SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 16, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3903 The People of the State of New York, Respondent, Ind. 5157/08

-against-

Reginald Siler, also known as Siler Reginald, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel) for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J., at plea and sentence), rendered on or about April 30, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3904 In re Michael Bifolco, Index 102445/08
Petitioner-Appellant,

-against-

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

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Robert David Goodstein & Associates, New Rochelle (Robert David Goodstein of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 15, 2009, which denied petitioner's application to annul respondent Police Commissioner's determination terminating petitioner's employment as a probationary police officer, and directed entry of a judgment dismissing the proceeding, unanimously affirmed, without costs.

The record establishes that petitioner was on restricted duty from December 29, 2006 through June 18, 2007 and, therefore, his six-month disciplinary probationary term did not begin until June 19, 2007 and did not end until December 19, 2007 (*see Matter of Garcia v Bratton*, 90 NY2d 991, 992-993 [1997]). Because the incidents leading to petitioner's dismissal occurred on August 3, 2007, well within the probationary period, respondents could

terminate petitioner without a hearing (*see Matter of York v McGuire*, 63 NY2d 760 [1984]; *Matter of Witherspoon v Horn*, 19 AD3d 250, 251 [2005]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3905 Marie Harrington, etc., Index 102427/07
Plaintiff-Appellant,

-against-

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

_____

William E. Betz, Great Neck, for appellant.

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

_____

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered August 14, 2009, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

The motion court correctly held that plaintiff failed to raise a triable issue of fact regarding proximate cause and failed to establish prima facie entitlement to summary judgment in her favor on liability.

The evidence adduced on the motion established that plaintiff's decedent was receiving medical care and treatment in the months preceding his death, despite defendants' allegedly inaccurately informing decedent and medical providers that decedent's insurance coverage had been terminated. Furthermore, decedent died because of a lethal overdose of prescription drugs while he was receiving medical care. Thus, even assuming

defendants were negligent, any such negligence was not a substantial cause of the events producing the injury (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Furthermore, decedent's overdose on prescription medication was an intervening act that contributed to his injuries and was not a normal or foreseeable consequence of the situation created by defendants' negligence (*id.*).

Plaintiff's opposition to the motion consists of conclusory assertions in her affidavit that decedent would not have been exposed to the dangerous combination of prescription drugs that caused his death had he been receiving appropriate care, and her expert's speculation that the lack of availability of appropriate treatment led directly to his death. Plaintiff failed to supply any evidentiary foundation and the affidavits are insufficient to raise an issue of fact as to proximate cause (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The expert's statements that interferon-induced psychosis may affect patients suffering from depression, and that interferon and ribivarin have been known to cause former drug addicts, like decedent, to fall back into drug addiction or overdose, are insufficient to raise an issue of fact to suggest that decedent's actions were sufficiently foreseeable so as not to break the chain of causation. In any event, the motion court

properly declined to consider the expert's affirmation because plaintiff failed to timely disclose his identity (*see Wartski v C.W. Post Campus of Long Is. Univ.*, 63 AD3d 916, 917 [2009]).

Finally, plaintiff fails to establish her entitlement to summary judgment on liability. Plaintiff contends that defendants are liable because, by providing and administering the employee health plan, they voluntarily assumed a proprietary, non-governmental function. Plaintiff asserts that defendants created a special relationship with and assumed a duty to decedent, which they breached by falsely and negligently preventing him from obtaining appropriate post-stabilization medical care. Even were we to apply these two standards, plaintiff must still establish proximate cause between any breach of duty and decedent's injuries (*see e.g. Garcia v City of New York*, 205 AD2d 49, 53-54 [1994], *lv denied* 85 NY2d 810 [1995]; *Nu-Life Constr. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 106 [1994], *lv dismissed* 84 NY2d 850 [1994]). Plaintiff has made no such showing.

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

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3906 Artalyan, Inc., et al., Index 605038/01
Plaintiffs-Respondents,

-against-

Kitridge Realty Co., Inc., et al.,
Defendants-Appellants.

_____

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, Mineola (Elizabeth Gelfand Kastner of counsel), for appellants.

Meier, Franzino & Scher, LLP, New York (Tinamarie Franzoni of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 24, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to meet their initial burden of establishing prima facie that they properly installed and maintained an adequate safety system in the building and that the fire did not originate or spread as a result of their negligence. Their contention that they should have been granted summary judgment because plaintiffs could not establish as a matter of law that they were negligent misapprehends their burden on their own motion. The vague deposition testimony of defendant Kitridge Realty Co.'s principal and owner about whether there was a fire safety system in the building was insufficient to demonstrate that plaintiffs' cause has no merit (CPLR 3212[b]).

Thus, defendants' motion was correctly denied for defendants' failure to make out a prima facie entitlement to summary judgment. The motion court did not need to consider plaintiffs' papers in opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Were we to consider plaintiffs' expert's affirmation and report submitted in opposition, plaintiffs clearly raised an issue of fact as to whether defendants' failure to maintain adequate fire alarms and sprinklers in the building permitted the spread of the fire, causing damage so extensive that the building had to be demolished.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3907 Iris Wellington, Index 22827/05
Plaintiff-Appellant,

-against-

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

Michelle F. Bhalerao,
Defendant.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Christian M. McGannon of counsel), for appellant.

Steve S. Efron, New York (Renee L. Cyr of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered October 1, 2009, which, in an action for personal injuries sustained in a collision between a public bus in which plaintiff was a passenger and a minivan driven by defendant Bhalerao, granted the motion of defendants-respondents Transit Authority and bus driver to set aside, as against the weight of the evidence, the jury's apportionment of liability 70% against the Transit Authority and bus driver and 30% against Bhalerao, and directed a new trial on the issue of liability, unanimously affirmed, without costs.

The court correctly found that, based on the photographic evidence, the jury's apportionment of liability could not have been reached upon any fair interpretation of the evidence (*see*

Lolik v Big V Supermarkets, 86 NY2d 744, 746 [1995]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-207 [2004]). The photographs, which show that the bus's front bumper was pushed forward and that the minivan's driver's side paneling was pulled back, clearly indicate that at the time of contact, the minivan was moving forward while attempting to make a left turn in front of the bus, and that the bus was either stopped or moving very slowly. Thus, the photos establish that the bus driver could not have been 70% at fault for the accident.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3908 The People of the State of New York, Ind. 3248/08
Respondent,

-against-

Jimmy Villalobos,
Defendant-Appellant.

_____

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

Cryus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about November 18, 2008.

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 16, 2010

CLERK

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

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3909 In re Joaquin Enrique C., III,

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

Anna Julia F., etc.,
Respondent-Appellant,

The Children's Aid Society, et al.,
Petitioner-Respondents.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondents.

Tamara A. Steckler, The Legal Aid Society, New York (Amy C. Hausknecht of counsel), Attorney for the Child.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 20, 2009, which, upon a fact-finding determination that the appellant-mother permanently neglected her child, terminated her parental rights, and committed the care and custody of the child to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that the agency satisfied its threshold statutory obligation of making diligent efforts to encourage and strengthen the parental relationship by arranging regular visits, referring the mother to parenting

skills classes for special needs children, a CPR course and individual therapy, and monitoring her progress (Social Services Law § 384-b[7][a]; *see Matter of Toshea C.J.*, 62 AD3d 587 [2009]).

Clear and convincing evidence also established that appellant failed to plan for the child's future. The mother's assertion that the child's injuries may have occurred while in the care of another was inconsistent with the medical evidence, which showed that as a result of "shaken baby syndrome," the child's injuries, including subdural hematomas, retinal hemorrhages and broken ribs, were inflicted on more than one occasion. Given the unusually demanding requirements of caring for a medically fragile child such as the subject child and the mother's failure to gain insight into the cause of the injuries, the finding of neglect was supported by the record (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Irene C. [Reina M.]*, 68 AD3d 416 [2009]). In addition, the mother failed to plan for the child's future due to her lack of awareness of the severity of his injuries and her failure to take an active role in implementing his various therapies.

The child has been with the same foster mother since he was three months old, and she wishes to adopt him. The foster mother not only provides a nurturing environment, but also puts extraordinary efforts into attending to the child's extensive

medical and therapeutic needs, and as a result, he has made remarkable progress in her care. In contrast, the mother lacks insight into the severity of her child's injuries and the demanding schedule of therapies involved in his care, failed to perform even one therapy with him, removed a medically required eye patch and ignored the restrictions of his dietary needs. Consequently, although the mother was loving toward her child, she was poorly equipped to handle his medical needs. Thus, a preponderance of the evidence established that terminating her parental rights would be in the child's best interests (*see Matter of Mykle Andrew P.*, 55 AD3d 305 [2008]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3911 Joan McInerney, Index 2243/08
Petitioner-Respondent,

-against-

Michael J. McInerney,
Respondent-Appellant.

_____

Michael J. McInerney, appellant pro se.

Veronica H. Mandel, Scarsdale, for respondent.

_____

Order, Surrogate's Court, Bronx County (Lee L. Holzman, S.), entered on or about July 17, 2009, which granted petitioner's motion for summary judgment dismissing respondent's objections and admitting the will to probate, directed the issuance of letters testamentary to petitioner and denied respondent's motion for summary judgment, unanimously affirmed, without costs.

The determination whether to dismiss objections and admit a will to probate is within the discretion of Surrogate's Court, and its determination will not be disturbed absent a showing of an abuse of such discretion (*see Matter of Colverd*, 52 AD3d 971, 972 [2008]). Here, petitioner demonstrated a prima facie showing of due execution of the will, as it contained a valid attestation clause and was executed under an attorney's supervision (*see Matter of Halpern*, 76 AD3d 429, 431-432 [2010]). The burden then shifted to respondent to produce evidentiary proof in admissible form to rebut the presumption and raise an issue of fact (*id.* at

432). Respondent failed to do so, as he countered only with a bare assertion that decedent suffered from cognitive impairment, which was not supported by medical evidence or competent testimony (*see Matter of Castiglione*, 40 AD3d 1227 [2007], *lv denied* 9 NY3d 806 [2007]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3912 Maria Gonzalez, et al., Index 22218/06
Plaintiffs-Appellants,

-against-

Praise the Lord Dental, et al.,
Defendants-Respondents,

Dr. Sandra Aguilar,
Defendant.

_____

Della Mura & Ciacci, LLP, Bronx (Walter F. Ciacci of counsel), for appellants.

Lewis Johs Avallone Aviles, LLP, New York (Michael G. Kruzynski of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered February 17, 2010, which denied plaintiffs' motion to vacate an order granting defendants' motion to dismiss the complaint for failure to comply with discovery orders, unanimously affirmed, without costs.

The court properly denied the motion because plaintiffs' excuse of "law office failure" was not credible. The discovery responses that counsel claims would have demonstrated partial compliance with the discovery orders post-dated the return date of the motion (*see Tandy Computer Leasing v Video X Home Lib.*, 124 AD2d 530, 531 [1986]; *Campbell-Jarvis v Alves*, 68 AD3d 701 [2009]). In view of the lack of a reasonable excuse, it is unnecessary to address whether plaintiffs demonstrated a

meritorious cause of action (*see Bryant v New York City Hous. Auth.*, 69 AD3d 488 [2010]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ

3913 The People of the State of New York, Ind. 4343/98
Respondent,

-against-

Raymond Arujo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Margaret Clancy, J.), rendered December 2, 2009, resentencing defendant to a term of 2 years, with 2 years' postrelease supervision, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46, and we perceive no basis for reducing defendant's term of postrelease supervision to 1 year. The resentencing court's stated intention to impose the minimum sentence clearly referred only to the prison term, and there is

no evidence that the court was mistaken as to the minimum PRS term available.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3914 Ludmilla Zinger, Index 110189/09
Petitioner-Appellant,

-against-

Richard Kaye, et al.,
Respondents-Respondents.

_____

Ludmilla Zinger, appellant pro se.

Ellenoff Grossman & Schole LLP, New York (Richard P. Kaye of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marilyn Schaefer, J.), entered December 4, 2009, which, inter alia, in this dispute over legal fees, granted respondents' motion to confirm an amended arbitration award in favor of respondent law firm the amount of $10,014.14, plus interest and costs, unanimously affirmed, without costs.

Appellant's argument on appeal amounts to an assertion that the arbitrators erred in their interpretation of the facts. This assertion, even if accepted as true, is not a sufficient basis upon which to set aside an arbitration award (*Matter of Merrill Lynch, Pierce, Fenner & Smith Inc. v Graef*, 34 AD3d 220, 221 [2006]). Furthermore, appellant has failed to establish any other grounds upon which the arbitration award may be set aside, such as that the award was the product of fraud, misconduct, or partiality by any of the arbitrators; that the arbitrators

exceeded their authority; that the arbitration was procedurally defective; or that the award was irrational or violated any strong public policy (*see Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]; CPLR 7511[b]).

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

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3915 The People of the State of New York, Ind. 1094/07
Respondent,

-against-

William Mitchell,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at plea and sentence), rendered on or about February 9, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3916 In re Gary Walsh, Index 112811/08
Petitioner,

-against-

Raymond Kelly, etc, et al.,
Respondents.

_____

Cronin & Byczek, LLP, Lake Success (Dominick Revellino of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondents.

_____

Determination of respondent New York City Civil Service Commission, dated May 23, 2008, which, after a hearing, affirmed the determination of respondent New York City Department of Citywide Administrative Services to disqualify and terminate petitioner as a New York City police officer on the ground that he omitted and falsified pertinent facts about his background in his application for employment, 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 [Shirley Werner Kornreich, J.], entered March 9, 2009), dismissed, without costs.

The hearing before the Civil Service Commission was not mandated by law and, therefore, the proceeding was improperly transferred to this Court (*Matter of Mingo v Pirnie*, 78 AD2d 984, 984-85 [1980], *affd* 55 NY2d 1019 [1982]). Nevertheless, we

decide the matter on the merits (*Matter of 125 Bar Corp. v State Liq. Auth. of State of N.Y.*, 24 NY2d 174, 180 [1969]; *Matter of DeMonico v Kelly*, 49 AD3d 265 [2008]).

The determination is rationally supported by testimony and documents adduced at the hearing showing that petitioner concealed that he had been a suspect in a criminal homicide while in the army and had associated with members of a gang that had committed a homicide. Furthermore, the Suffolk County Police Department had disqualified him from serving as a police officer (*see Mingo*, 78 AD2d at 985; *Matter of Urciuoli v Department of Citywide Admin. Servs.*, 75 AD3d 427, 428 [2010]). No basis exists to disturb the Commission's credibility findings (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). We have considered petitioner's other arguments and find them to be unavailing.

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3917N Fieldson Lodge Care Center, Index 306393/08
Plaintiff-Respondent,

-against-

Cecily Andrews,
Defendant,

Ian Andrews,
Defendant-Appellant.

_____

Law Office of Sergio Villaverde, PLLC, New York (Brian L. Charles of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Israel Spodek of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 21, 2009, which denied defendant Ian Andrews's motion to vacate the default judgment entered against him and for leave to serve an answer, unanimously affirmed, without costs.

Defendant failed to demonstrate both a reasonable excuse for his default and a meritorious defense to the action (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [2010], *lv dismissed* 15 NY3d 863 [2010]). He offered no evidence to substantiate his proffered excuse for his default, that he believed his mother's counsel had answered the complaint on his behalf (*see e.g. Gal-Ed v 153rd St. Assoc.*, LLC, 73 AD3d 438 [2010]). He offered no evidence to refute the reasonable inference from the documentary evidence and his own admissions that the transfer of his mother's home to him, without

consideration, immediately before his mother moved into plaintiff residential health care facility was fraudulent (*see e.g.*, *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [2006]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Richter, Abdus-Salaam, JJ.

3918N Christina Torres, Index 18878/07
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Ronemus & Vilensky, LLP, New York (Michael B. Ronemus of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 26, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

Plaintiff alleges that, while riding a bus in the Bronx operated by defendant, she slipped and fell on an oily substance on the floor. The court erred in granting defendant's motion for summary judgment because defendant failed to satisfy its burden of making a prima facie showing of entitlement to summary judgment upon the basis that it lacked actual or constructive notice of the alleged hazard (*see Castillo v New York City Tr. Auth.*, 69 AD3d 487 [2010]; *Moser v BP/CG Ctr. I*, LLC, 56 AD3d 323 [2008]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]. Defendant failed to demonstrate that the driver that it produced

for an EBT was the driver of the bus in question. Even if the witness produced actually was the driver, he provided no details regarding when the bus was last checked for defects on the day of the accident(*see Moser*, 53 AD3d at 323), and his testimony as to general procedures for bus inspection was insufficient for summary judgment purposes (*see Baptiste*, 45 AD3d at 259). Finally, plaintiff's testimony directly controverts that of the defendant's witness, creating issues of fact that preclude summary judgment.

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

ENTERED: DECEMBER 16, 2010

CLERK

Tom, J.P., Andrias, Sweeny, Abdus-Salaam, Manzanet-Daniels, JJ.

1923 Barbara Coleman, etc., Index 108435/08
Petitioner-Appellant,

-against-

Richard F. Daines, M.D., etc., et al.,
Respondents-Respondents.

_____

Bellin & Associates LLC, White Plains (Aytan Y. Bellin of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for state respondent.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for municipal respondent.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered March 26, 2009, denying the petition and dismissing this hybrid article 78 and 42 USC § 1983 proceeding seeking class certification, declaratory and injunctive relief, nominal damages and attorneys' fees and costs, reversed, on the law and the facts, without costs, and the matter remitted to Supreme Court for further proceedings consistent with the decision herein.

On November 21, 2007 and January 23, 2008, petitioner Barbara Coleman, born July 18, 1942 and suffering from, among other things, dementia, diabetes, anxiety, agitation and joint pain, submitted an application requesting Medicaid home care services in the form of sleep-in personal care attendants, 24 hours a day, seven days a week (24/7), retroactive to December 1, 2007. Petitioner was not given notice of the availability of

temporary Medicaid in the form of personal care attendant services that she claims she was entitled to pursuant to Social Service Law § 133 and article 17 § 1 of the New York Constitution.[1]

Pending the determination of her application, petitioner moved in temporarily with her sister and attorney-in-fact, Mazilee Coleman, so that she could be "cared for in some way." Because Mazilee also cared for their mother, who suffers from severe dementia, she was allegedly overburdened and unable to adequately provide the extensive, around-the-clock care and assistance petitioner needed in the activities of daily living, including, but not limited to, ambulating, feeding, dressing,

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[1]Article 17, § 1 [Public relief and care] provides: "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." Social Services Law § 133 [Temporary preinvestigation grant] provided, as of the time of petitioner's application: "[i]f it shall appear that a person is in immediate need, temporary assistance or care shall be granted pending completion of an investigation." We note that § 133 was amended (L 2010, ch 455, § 1), effective Aug 30, 2010, to provide: "Upon application for public assistance or care under this chapter, the local social services district shall notify the applicant in writing of the availability of a monetary grant adequate to meet emergency needs assistance or care and shall, at such time, determine whether such person is in immediate need. If it shall appear that a person is in immediate need, emergency needs assistance or care shall be granted pending completion of an investigation. The written notification required by this section shall inform such person of a right to an expedited hearing when emergency needs assistance or care is denied. A public assistance applicant who has been denied emergency needs assistance or care must be given reason for such denial in a written determination which sets forth the basis for such denial."

bathing and grooming. Consequently, on May 22, 2008, petitioner, who had yet to receive a determination on her Medicaid application, submitted a request pursuant to Social Services Law § 133 and article 17, § 1 of the New York Constitution for temporary Medicaid in the form of personal care attendant services, requesting that a determination be made within 48 hours.

On May 29, 2008, petitioner received a letter from the New York City Human Resources Administration (HRA), stating that she was eligible for Medicaid, retroactive to March 1, 2008. The letter did not specify the number of hours of personal care attendant services that petitioner was entitled to.

On June 17, 2008, petitioner, by Mazilee Coleman, commenced this proceeding, on behalf of herself and three classes of persons similarly situated,[2] asserting claims pursuant to 42 USC

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[2]Petitioner defined Class A as "[a]ll individuals who have been within three years prior to the filing date of the [verified petition], are now or may in the future be residents of New York State who have applied, are applying, or will be applying for Medicaid, who were not, are not or will not be given notice that they are entitled to apply for temporary Medicaid services in the form of personal care attendant services, as described in 18 NYCRR 505.14, pending the investigation and ultimate determination of their qualification for Medicaid funded personal care attendant services." Class B was defined as "[a]ll individuals who have been within three years prior to the filing date of the [verified petition], are now or may in the future be residents New York State, in 'immediate need' within the meaning of Social Services Law § 133, of Medicaid funded personal care attendant services, as described in 18 NYCRR 505.14, who were not, are not or will not be given notice that they are entitled to apply for temporary Medicaid services in the form of personal

§ 1983 and CPLR article 78 against respondents Richard F. Daines, M.D., Commissioner of the New York State Department of Health (DOH), and Robert Doar, Commissioner of HRA, in both their official and individual capacities.

In the first and second causes of action respectively, petitioner alleged that by failing to render and implement a determination as to how many hours of Medicaid funded personal care attendant services she and Class C members were entitled to in a timely manner, Commissioner Doar violated: (i) 42 USC § 1983 in that he violated 42 USC § 1396a(a)(8) and 42 CFR 435.911(a); and (ii) 18 NYCRR 360-2.4(a), which may be addressed through CPLR 7803(3) and an implied right of action.

In the third, fourth and fifth causes of action respectively, petitioner alleged that by failing to give notice pursuant to Social Services Law § 133 and article 17, section 1 of the New York Constitution of the availability of temporary Medicaid in the form of personal care attendant services to

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care attendant services pending the investigation and ultimate determination of their qualification for Medicaid funded personal care attendant services, and who were not provided with such temporary Medicaid services." Class C was defined as "[a]ll individuals who have been within three years prior to the filing date of the [verified petition], are now or may in the future be residents of New York City, who have submitted or will submit Medicaid applications to HRA requesting Medicaid personal care attendant services pursuant to 18 NYCRR 505.14, where the determination of the number of hours of personal care attendant services to which they are entitled has not been made and implemented in a timely manner by HRA as required by 42 USC § 1396a(a)(8), 42 CFR 435.911(a) and 18 NYCRR 360.2.4(a)."

petitioner and Class A members, respondents violated: (i) 42 USC § 1983 in that they violated the Due Process Clause of the 14th Amendment to the United States Constitution, (ii) the Due Process clause of the New York Constitution; and (iii) 18 NYCRR 351.1 (b), 350.7 (a) and (c), and 42 CFR 435.905, which may be addressed through CPLR 7803(3) and an implied right of action.

In the sixth cause of action, petitioner alleged that by failing to render a decision on her request for temporary medical assistance and by failing to provide services, respondents violated Social Service Law § 133 and article 17, section 1 of the New York Constitution, which may be addressed through CPLR 7803(3). In the seventh cause of action, petitioner alleged that by failing to render that decision within 48 hours and to provide the services the day after the decision, respondents violated the same provisions, which may be addressed through CPLR 7803(3) and an implied right of action.

Based on these causes of action, petitioner requested class action certification; injunctive relief requiring respondents to make a timely determination as to the number of hours of Medicaid funded personal care services to which applicants are entitled and to provide class members with notice of the availability of temporary Medicaid; a declaration of illegality regarding the policy not to provide notice; and nominal damages for petitioner and class members for the violation of their due process rights.

The State respondent answered the petition, admitting that it is the policy and practice of respondents not to provide or pay for temporary Medicaid in the form of personal care attendants or apprise applicants of the availability of same under Social Services Law § 133. The City respondent filed a cross motion to dismiss.

On June 18, 2008, the Supreme Court directed respondents to determine, by June 30, 2008, the extent of petitioner's entitlement to Medicaid funded personal care services and to have a plan for implementing services. On June 26, 2008, HRA authorized personal care services for petitioner 24/7. HRA did not determine her request for retroactivity to December 1, 2007. On June 30, 2008, personal services for petitioner began.

In the judgment on appeal, the court denied the petition and dismissed the proceeding on the threshold grounds of mootness and failure to exhaust administrative remedies. The court held that petitioner's claims were moot because she began receiving temporary care services on June 30, 2008 and the "likely to recur" exception to the mootness doctrine was inapplicable because petitioner's circumstances differed from that of other putative class members since she was receiving personal care from her sister. While noting that petitioner had requested Medicaid funded personal care attendant services retroactive to December 1, 2007, and that respondents had awarded her only Medicaid

assistance from June 30, 2008 onward, the court found that the matter was still moot because petitioner had not requested compensatory damages. Given the dismissal of her primary claim, the court found that petitioner's request for nominal damages was of no avail since those damages were now the primary relief sought and therefore must be litigated in the Court of Claims.

Supreme Court also found that even if the "likely to recur" exception applied, the petition would have to be dismissed because petitioner failed to exhaust her administrative remedies when she did not request a fair hearing. The court found that no exception to the exhaustion rule applied because (i) petitioner did not allege that the agency acted beyond its grant of power; (ii) petitioner's constitutional claim requires the resolution of factual issues; (iii) there is no indication that resort to a fair hearing would be futile because there are factual issues relating to the manner in which petitioner's application was processed; and (iv) petitioner did not face irreparable harm since she was being cared for by her sister. The court rejected petitioner's argument that administrative remedies did not have to be exhausted for her section 1983 claim, finding that because the claim would be entirely dependent on the fair hearing findings, the failure to exhaust administrative remedies also rendered those claims inappropriate for judicial review.

Based on this determination, Supreme Court did not reach the

merits of any of petitioner's causes of action.

We now reverse, reinstate the petition and remit for further proceedings.

"As a general principle, courts are precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances'" (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). An exception to the mootness doctrine exists where there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v Clyne*, 50 NY2d at 714-715; *see Matter of Jones v Berman*, 37 NY2d 42 [1975]).

In *Maul*, a suit was brought against City and State agencies for failure to provide services and placement to developmentally disabled minors in foster care. The City agency argued that the claims were moot because it had now provided the necessary services. The Court of Appeals disagreed, stating that the plaintiff fell with the exception to the mootness doctrine for "issues [that] are substantial or novel, likely to recur and capable of evading review" (*Maul* at 507). In *Jones*, the Court of Appeals similarly held that the issue of the provision of

emergency public assistance was not moot even though the petitioner was receiving public assistance at the time of the appeal because "the questions presented [were] of importance and interest and because of the likeliness that they will recur" (*Jones* at 57). Here too, as in *Maul* and *Jones,* all of the elements of the "likely to recur" exception to the mootness doctrine are present and the proceeding should not have been dismissed on that basis (s*ee Matter of Rodriguez v Wing*, 94 NY2d 192, 196 [1999]; *Konstantinov v Daines*, 2009 NY Slip Op 30973[U], [Sup Ct, NY County 2009]).

First, the petition challenges respondents' policy (i) not to notify Medicaid applicants of the availability of temporary Medicaid in the form of personal care attendants, (ii) not to provide or pay for temporary Medicaid benefits in the form of personal care attendants, and (iii) not to render a decision on requests for temporary medical assistance in the form of personal care attendants within 48 hours of such request and to provide the temporary Medicaid assistance the next day. Since this policy applies to other similarly situated Medicaid applicants and recipients, it is "likely to recur."

That petitioner's sister endeavored to provide some level of temporary care for petitioner does not alter this analysis. Petitioner's sister was also caring for their mother and allegedly could not provide petitioner with adequate care. Thus,

it cannot be said that her provision of services, in and of itself, obviated the need for temporary Medicaid benefits in the form of personal care attendants and distinguished petitioner from other class members. Indeed, the challenged policy would apply whether the applicant or recipient has or does not have someone to care for him or her in the interim and it is not uncommon or unusual for family, friends or neighbors of a disabled family member to attempt, despite the strain it places upon them, to provide temporary care until appropriate care becomes available.

Second, the issues are substantial and of public importance. Respondents' policy regarding notice and the availability of temporary services may negatively impact on the health and welfare of a substantial number of Medicaid applicants in need of personal care attendants, even if those attendants are not providing medical services.

Third, the issues are capable of evading review since applicants may receive the determination on their ultimate eligibility for Medicaid in the form of personal care attendants under Social Service Law § 133 before the issue of temporary eligibility comes before a court.

Accordingly, the proceeding should not have been dismissed as moot. Nor should the proceeding have been dismissed on the ground that petitioner failed to exhaust administrative remedies.

"[O]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). "The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (*id.* at 57 [internal citations omitted]). Exhaustion is also not required where only an issue of law is involved (*see Apex Air Frgt. v O'Cleireacain*, 210 AD2d 7 [1994], *lv denied* 86 NY2d 712 [1995]), or where the issue involved "is purely the construction of the relevant statutory and regulatory framework" (*Matter of Herberg v Perales*, 180 AD2d 166, 169 [1992]; *see also McKechnie v Ortiz*, 132 AD2d 472, 473 [1987], *affd* 72 NY2d 969 [1988]).

Here, petitioner argues that she was entitled, pursuant to rights granted by the Federal and State Constitutions and Social Services Law § 133, to notice of a right to temporary Medicaid benefits and to the benefits themselves. In opposition, the State respondent argues that the relief petitioner seeks is "contrary to federal and State Medicaid law, regulations and policy, a basic tenet of which is that covered medical care and

services are furnished only to Medicaid recipients who have been determined eligible for such benefits"; that Social Services Law § 133 does not broadly invest all Medicaid applicants with a right to Medicaid funded personal care prior to any investigation of their eligibility for such benefits; that no authority exists for temporary Medicaid, which would jeopardize federal monies and intensify the State's fiscal woes; and that the relief is unnecessary because the State accommodates a person's immediate need for medical care through the Department of Health's personal care regulation (18 NYCRR 505.14 [b] [5] [iv]). In moving to dismiss, the City respondents argue, among other things, that Commissioner Doar is required to follow Commissioner Daines's interpretation of the state scheme for medical assistance.

Thus, because this dispute turns on the construction of the relevant constitutional, statutory and regulatory framework, rather than a substantive factual dispute between the parties relating to the extent of personal care that petitioner requires or is entitled to, the matter falls with the exceptions to the exhaustion of administrative remedies doctrine (see *Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140-141 [1995] [exhaustion not required where further administrative steps would be futile in light of a firm statement of agency policy]*; G. Heileman Brewing Co. v New York State Liq. Auth.*, 237 AD2d 203, 203 [1997] ["the

motion court correctly invoked settled law that, where no factual issue is raised, a declaratory judgment action may be maintained to challenge the validity or application of a particular statute without exhausting administrative remedies" (internal quotation marks and citation omitted)]; *Matter of Amsterdam Nursing Home Corp. v Commissioner of N.Y. State Dept. of Health*, 192 AD2d 945, 947 [1993], *lv denied* 82 NY2d 654 [1993] [an administrative proceeding would be futile when the challenge is to the methodology the agency uses rather than the way in which the methodology was applied in a particular case]; *Matter of Herberg v Perales*, 180 AD2d at 169; *Konstantinov v Daines*, 2009 NY Slip Op 30973[U] ["the issues of whether respondents are required to provide petitioner with pre-investigative personal care services, and whether the ALJ is required to determine the personal care services at the fair hearing, are issues of law that involve the construction of the statutory and regulatory framework of the Medicaid program for the determination of applications in connection with personal care attendant services and therefore exhaustion of administrative remedies is not mandated"]).

Resort to a fair hearing would also be futile inasmuch as the hearing officer would be required to follow the established agency policy that petitioner seeks to challenge, which did not provide for notice of the right to temporary Medicaid benefits in the form of personal care attendant services or for the right to

those benefits themselves under Social Services Law § 133, as it existed as of the date the petition was filed.

Accordingly, the judgment is reversed and the matter remitted to Supreme Court to address the arguments raised in the petition and cross motion to dismiss that had not been reached due to the dismissal on the threshold grounds of mootness and failure to exhaust administrative remedies.

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

TOM, J.P. (dissenting)

This article 78 proceeding asserts that respondents acted in contravention of Social Services Law § 133 as well as federal and state law governing the grant of personal care attendant services, resulting in violation of petitioner's civil rights under 42 USC § 1983. It seeks class action status on behalf of applicants who were not provided with temporary personal care attendant services because (A) the applicant had no notice of their availability or (B) temporary services were not made available despite the applicant's immediate need or (C) no determination was made as to the number of hours such services would be provided.

In late January 2008, petitioner's attorney filed an amended Medicaid application on her behalf, including a cover letter explaining that her original application had incorrectly reflected that she owned, rather than rented, her residence. In late May, the attorney sent another letter demanding that petitioner "be immediately awarded temporary medical assistance in the form of personal care attendants, 24 hours, 7 days a week" while her application was being processed. A week later, by notice dated May 29, 2008, petitioner was informed that her application had been accepted and that she had been approved for "Community Coverage With Community-Based Long-Term Care." However, the notice did not indicate the number of hours that

personal care attendant services would be provided. While the notice indicated that review of the determination was available by way of a fair hearing, petitioner did not seek administrative review but filed this verified petition on June 16, 2008. On the following day, she obtained an order to show cause directing respondents to issue an expedited determination, which culminated in their authorization of 24-hour-a-day, seven-day-a-week home attendant services on June 26.

Respondents' authorization of around-the-clock home attendant services rendered moot petitioner's claims for declaratory and injunctive relief (*Pastore v Sabol*, 230 AD2d 835 [1996]), and the inclusion of a claim for nominal damages does not preserve the petition's viability. Respondents are not liable for money damages under 42 USC § 1983. Moreover, they cannot be sued in their personal capacities unless they were personally involved in wrongdoing (*K&A Radiologic Tech. Servs., Inc. v Commissioner of Dept. of Health of State of N.Y.*, 189 F3d 273, 278 [2d Cir 1999]).

Additionally, the failure to request a fair hearing renders the petition defective. Generally, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Though subject to qualification where an agency's

determination is challenged on a significant constitutional ground (*id.*), the absence of an administrative record in this matter precludes assessment of whether the constitutional claim is substantial (*see Banfi Prods. Corp. v O'Cleireacain*, 182 AD2d 465, 467-468 [1992]). "A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established" (*Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]). Here, petitioner failed to exhaust her administrative remedies before resorting to court intervention, and never even requested a fair hearing under 18 NYCRR 358-3.1. Even though petitioner claimed that respondents violated her constitutional rights, the petition presented factual questions requiring administrative review. It is uncontroverted that other exceptions to the exhaustion rule are inapplicable (*see Watergate II Apts.*, 46 NY2d at 57).

Petitioner's claim is predicated on Social Services Law § 133, which establishes "the availability of a monetary grant adequate to meet emergency needs assistance or care" when it is determined that an applicant "is in immediate need." The Medicaid application form recognizes the potential for emergency assistance and duly elicits the pertinent information. While petitioner's application reflects her request for "Medical

Assistance" for a "Serious Medical Problem" and indicates that she "[n]eeds home care," there is no entry in that portion of the application devoted to emergency cash assistance, which specifically asks, "Is there an immediate need?" Finally, petitioner's application lists a significant asset in the form of a tax-sheltered retirement account.

The requirement that administrative remedies be exhausted "furthers the salutory [*sic*] goals of relieving the courts of the burden of deciding questions entrusted to an agency . . . and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment'" (*Watergate II Apts.* at 57, quoting *Matter of Fisher [Levine]*, 36 NY2d 146, 150 [1975]). In view of the agency's timely award of home attendant services upon receipt of counsel's request for temporary assistance in May 2008, factual questions appropriate to determination in a fair hearing are raised with respect to whether petitioner's application sought a monetary grant and, if so, whether it indicated a need for the immediate assistance contemplated by Social Services Law § 133.

Petitioner's claims under 42 USC § 1983 were properly dismissed. Such claims must be subject to determination as a "'purely legal' question" and ripen only when an official authorized to make the determination takes action that inflicts

injury (*see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986], *cert denied* 479 US 985 [1986]). In the absence of an administrative record, no injury is demonstrated as a result of delay in awarding home attendant services or the failure to specify the hours such services would be provided. In order to state a claim under 42 USC § 1983, a petitioner must allege conduct, by a person acting under color of law, that deprives "the injured party of a right, privilege, or immunity guaranteed by the Constitution or the laws of the United States" (*DiPalma v Phelan*, 81 NY2d 754, 756 [1992]). No such federal right is even argued here. Petitioner alleges only that her right to temporary Medicaid benefits, and to notice thereof, was violated under state law. Even to the extent petitioner asserts a federal constitutional right to notice, such an assertion is based solely on her allegations of wrongdoing under Social Services Law § 133, and the failure to request a fair hearing likewise precludes review of that claim.

City of New York v Maul (14 NY3d 499 [2010]), relied upon by the majority, does not require a different result. That case involved the failure to supply services mandated by statute to developmentally disabled children already under the care of New York City's Administration for Children's Services (ACS) who were denied permanency planning and placement (*id.* at 504). Here, the petition concerns only an omission in an award notice (failing to

specify the number of hours of attendant care services to be provided) and an alleged failure to afford notice that such services are available on an interim basis while a Medicaid application is pending (despite a question on the application form specifically addressing the issue). Thus, unlike *Maul*, the instant matter does not concern the deprivation of statutorily mandated services to persons *already* entitled to receive them but, rather, the *initial* determination of petitioner's entitlement to statutory benefits, a question entrusted to the administrative agency in the first instance (*Watergate II Apts.*, 46 NY2d at 57).

Accordingly, the judgment should be affirmed.

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

ENTERED: DECEMBER 16, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2547 Wanda Rivera, et al., Index 26799/04
Plaintiffs-Appellants-Respondents,

-against-

Debra Greenstein, M.D., et al.,
Defendants-Respondents-Appellants,

John Wells, M.D.,
Defendant.

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Preston Wilkins Martin & Rodriguez, PLLC, New York (Elsa Rodriguez Preston of counsel), for appellants-respondents.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County, (Howard R. Silver, J.), entered May 14, 2009, that, after a jury verdict in plaintiffs' favor, denied the motion of defendants Greenstein and Pediatric Associates for a judgment notwithstanding the verdict and granted the alternative relief of setting aside the verdict, but only to the extent of directing a new trial as to damages unless plaintiffs stipulate to a reduction of the jury's $3,000,000 pain and suffering award to $150,000, unanimously reversed, on the law, without costs, the motion to set aside the verdict granted and the complaint dismissed as against defendants Greenstein and Pediatric Associates. The Clerk is directed to enter judgment accordingly.

This is a medical malpractice action. Plaintiffs claim defendants' alleged failure to diagnose and treat the infant

decedent for myocarditis[3] resulted in his death. After the jury rendered a verdict in favor of plaintiffs, the trial court directed a new trial as to damages unless plaintiffs stipulated to reduce the jury's $3,000,000 pain and suffering award to $150,000. Plaintiffs appealed the trial court's determination as to the pain and suffering award. Defendants Dr. Debra Greenstein and Pediatric Associates cross appeal the trial court's denial of their motion for a judgment notwithstanding the verdict. Because there was insufficient proof to support the verdict, we reverse and grant defendants' motion for judgment notwithstanding the verdict.

On December 22, 2003, plaintiffs took their four-year-old son who was sick with flu-like symptoms including cough and congestion, to see defendant Debra Greenstein, M.D. at her office at Pediatric Associates of New York.[4] Dr. Greenstein examined plaintiffs' son, diagnosed pneumonia and prescribed an antibiotic. At that time, Dr. Greenstein did not take any x-rays or order any blood work. Four days later, plaintiffs' son was still unwell, was lethargic and was not eating.

On December 27, 2003, Mrs. Rivera brought her son back to

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[3]Myocarditis means "inflammation of the muscular walls of the heart" (Stedman's Medical Dictionary, 25th ed.)

[4]Dr. Greenstein first saw plaintiffs' son when the infant was 2 ½ years old, noted that the child had neurological issues, and referred him to Dr. Wells, a pediatric neurologist who began working with him.

Dr. Greenstein's office, at which time the doctor had him admitted to New York University Medical Center (NYU) with a diagnosis of a viral infection that had led to dehydration and pneumonia. At the time of admission, a single position x-ray revealed pneumonia and blood tests revealed elevated CPK levels, as well as elevated liver enzyme levels (LDH), and transaminase.

On December 28, 2003, plaintiffs' son's CPK levels were tested at greater than 4800 (normal is under 200), and on December 30th, the CPK levels were at 24,000. On December 31, 2003, Dr. Greenstein discharged plaintiffs' son from the hospital with a diagnosis of inflammatory myositis[5]. At that time, Dr. Greenstein saw no signs that this condition was causing any damage to the heart. For instance, the heart rate and rhythm were normal. There was no enlarged heart on the chest x-ray. Nor did he have any sign of congestive heart failure.[6]

Accordingly, Dr. Greenstein did not order a baseline EKG. Nor did she order a baseline CPK upon admission or follow-up or test the elevated CPK blood level with a CK-MB test. In addition, Dr. Greenstein did not order a serum troponin blood test. As there was no clinical reason to involve a cardiologist, she did not have a cardiologist perform an evaluation.

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[5]Inflammatory myositis is inflammation of a muscle (Stedman's Medical Dictionary 25th ed.)

[6]Congestive heart failure occurs when the heart cannot pump enough blood to meet the body's needs (MayoClinic.com)

On January 5, 2004, plaintiffs returned to Dr. Greenstein's office. Their son was still very weak and had an extremely elevated CPK level of 32,710, as well as other abnormal lab results. Dr. Greenstein's impression was that the viral illness that had led to his pneumonia had also led to inflammatory myositis. Again, as there was no sign of injury to the heart, Dr. Greenstein did not order a CK-MB blood test, an EKG, a serum troponin test or arrange a consultation with a cardiologist.

On January 12, 2004, plaintiffs again returned, and Dr. Greenstein sent more bloodwork to Quest Diagnostics for a test of CPK and liver enzyme levels, both of which remained elevated. On its own initiative, Quest conducted a CK-MB test, that revealed a level of 239.9 compared to a normal reference range of 0.0 to 3.2. Quest made these results available on 1/13/2004. With respect to the CK-MB test, Quest notes, "These results are neither diagnostic nor non-diagnostic of myocardial injury. Collect another specimen if clinically indicated." Although the overall CPK remained elevated at 15,862 and the CK-MB was elevated at 239.9, the ratio of CK-MB to total CPK was only 1.51%, a ratio within normal limits. Defendants' expert claims this ratio confirms that the elevated CPKs were not from damaged heart muscle but, instead, were from skeletal tissue damage. Moreover, there are no clinical or laboratory findings in the record of a kind one would expect to see if myocarditis were an

issue, including decreased oxygen, fluid on the lungs, fluid retention, inflammation of the heart and an enlarged liver.

Suspecting a neurodegenerative disorder, rather than a cardiac problem, Dr. Greenstein referred plaintiffs to Dr. Wells, who examined their son on January 15, 2004. Dr. Wells ordered a brain MRI, but the results were normal. During this MRI, the child was under sedation and an anesthesiologist constantly monitored his cardiac status. No cardiac abnormalities were noted.

On January 24, 2004, plaintiff mother called Dr. Greenstein to report that her son had suffered a seizure. Dr. Greenstein advised her to bring him to NYU for an EEG. On January 26, 2004, plaintiffs' son had another seizure, and on the next day he had an EEG at NYU.

On January 28, 2004, plaintiffs' son suffered another seizure and stopped breathing. His father resuscitated him. An ambulance took plaintiffs' son to Bellevue Hospital where he died. Bellevue Hospital and the Medical Examiner's Office each performed autopsies. According to the autopsy from Bellevue, the cause of death was "acute myocarditis and tracheobronchitis." However, the autopsy showed that on gross inspection both the heart and the liver appeared normal. The Bellevue autopsy found microscopic evidence of focal myocyte necrosis on 2 out of 34 slides. The autopsy from the medical examiner, dated January 30,

2004, noted "no myocyte necrosis was identified" and that "the foci of myocyte damage were not present in the OCME sections."

The court charged the jury to answer whether Dr. Debra Greenstein departed from good and accepted medical practice by: (1) failing to order a CK-MB test, (2) failing to order an EKG, (3) failing to order serum troponin testing (4) failing to refer her patient for a cardiac evaluation and (5) failing to hospitalize her patient or bring him to her office on January 24, 2004. The jury answered "yes" in each instance. The jury also answered yes in each instance to the follow up question "was such departure a substantial factor in causing [plaintiffs' son's] death?" The jury awarded $3 million in damages.

The court denied that portion of defendants' motion seeking judgment notwithstanding the verdict and that portion seeking to set aside the verdict as against the weight of the evidence. However, because it found the verdict excessive, the court ordered a new trial on damages unless plaintiffs agreed to a reduced amount of $150,000.

Defendants argue that, given that there were no other reports or findings to support the diagnosis of myocarditis, it was likely a "subclinical finding." Plaintiffs maintain that because Dr. Greenstein knew that her patient suffered from a virus and because both autopsy reports list the cause of death as viral myocarditis, the jury could rationally infer that if Dr.

Greenstein had ordered heart-related tests a month earlier, she would have discovered the cardiac involvement and plaintiffs' son would have received the medical care he needed to survive the illness.

To succeed in a medical malpractice action, it is necessary for the plaintiff to show a departure from the accepted standard of medical practice, and that this departure was a proximate cause of the patients injuries (*see Alvarado v Miles*, 32 AD3d 255 [2006], *affd* 9 NY3d 902 [2007]; *English v Fischman*, 266 AD2d 6 [1999], *lv denied* 94 NY2d 760 [2000]). Competent medical proof as to causation is usually essential *(see Stanski v Ezersky*, 228 AD2d 311 [1996], *lv denied* 89 NY2d 805 [1996]). An expert offering only conclusory assertions and mere speculation that a doctor could have discovered the condition and successfully treated the patient does not support liability (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [2006]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [2006]).

The court should have set aside the verdict in its entirety because plaintiffs did not present evidence from which the jury could infer liability. First, plaintiffs failed to present evidence from which a jury could find that Dr. Greenstein departed from accepted standards of medical practice. Plaintiffs point to the blood tests that showed elevated liver enzymes with normal liver findings and elevated CPK, as well as the CK-MB test

of 239.9 on January 12, 2004, and that their son was irritable, unresponsive and had to be carried. Plaintiffs claim that these symptoms indicated cardiac involvement. However, as plaintiffs admit, these tests and symptoms could also indicate problems with other areas of the body, such as inflammatory myositis. All tests indicated that the child's heart was normal. The clinical and laboratory findings one would expect to see in myocarditis, such as fluid in the lungs, were not present when Dr. Greenstein performed her examination. Plaintiffs point to the Bellevue autopsy that listed the cause of death as myocarditis. However, this autopsy found only microscopic evidence of myocarditis. Putting aside that the Medical Examiner's Office found no evidence of myocarditis, the microscopic evidence that Bellevue found certainly could not have been discovered while plaintiffs' son was alive. The autopsy gives the benefit of hindsight that defendant, of course, did not have.

Nor do plaintiffs ever postulate what medical care their son should have received for his presumed heart condition that would have made a difference. Plaintiffs' expert, Dr. Heitler, suggests that the child could have been treated for congestive heart failure, but the record reflects unequivocally that he had no symptoms of congestive heart failure. Nor was there evidence of arrhythmia or other cardiac condition amenable to treatment. Dr. Heitler also hypothesizes that "they also could have--put him

at rest which is the--and support him at that time, but also they could have prevented further involvements, such as clots being formed in the ventricle and causing strokes or infarcts." This is also speculative and insufficient because it fails to specify any actual treatment. Moreover, the record does not support the existence of a blood clot.

Because plaintiffs failed to render an opinion as to what Dr. Greenstein could have done to save their son had she discovered myocarditis, the record is inadequate to establish proximate cause. A judgment notwithstanding the verdict therefore should have been granted.

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

ENTERED: DECEMBER 16, 2010

CLERK

Tom, J.P., Friedman, Nardelli, Acosta, Abdus-Salaam, JJ.

2894 Hilario Martinez, Index 20496/02
Plaintiff-Appellant-Respondent, 83609/03

-against-

Hunts Point Cooperative Market, Inc.,
Defendant-Respondent,

Lisa Motor Lines, et al.,
Defendants-Respondents-Appellants.

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Hunts Point Cooperative Market, Inc.,
Third Party Plaintiff-Respondent,

-against-

Nebraskaland, Inc., etc., et al.,
Third-Party Defendants-Respondents.

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Eileen T. Rohan, Bronxville, for appellant-respondent.

Strongin Rothman & Abrams, LLP, New York (Bary S. Rothman of counsel), for respondents-appellants.

Cohen, Kuhn & Associates, New York (Steven Balson-Cohen of counsel), for Hunts Point Cooperative Market, Inc., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Jacqueline Hattar of counsel), for Nebraskaland, Inc. and Cornhusker Farms, Inc., respondents.

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about May 5, 2009, which, insofar as appealed from as limited by the briefs, granted defendant-respondent's (Hunts Point) motion for summary judgment dismissing the complaint and all cross claims as against it, and denied defendants-appellants' (collectively LML) motion for summary

judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Plaintiff, a warehouse worker employed by third-party defendant Nebraskaland, a meat supplier, asserts that he was injured on Nebraskaland's premises when a steel wheel and hook, together with six frozen goat carcasses hanging from the hook, dislodged from the overhead rail, and hit him on the shoulder. Plaintiff sued Hunts Point, the out-of-possession landlord of the premises, and LML, a freight transporter hired by Nebraskaland's seller, whose workers, known as "lumpers," transferred the carcasses from the delivery truck to the hook and rail. The basis of the claim against Hunts Point is the allegation that the overhead rail system was defective in that the rail was bent, which allegedly created a tendency for the hook to dislodge. The basis for the claim against LML is the allegation that its workers loaded too many carcasses onto the hook.

Assuming in plaintiff's favor that Hunts Point was contractually obligated under Nebraskaland's lease to repair defects in the overhead rail system, the action must nevertheless be dismissed as against Hunts Point because, as the motion court found, plaintiff failed to adduce evidence sufficient to rebut Hunts Point's prima facie showing that it did not have actual or constructive notice of the allegedly dangerous condition of the

rail (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 642-643 [1996]). The prima facie showing was made out by the deposition testimony of Hunts Point's general manager, who had personal knowledge of nonroutine repair requests, and of Nebraskaland's vice president of operations, each of whom testified that he never observed damage to the overhead rail system and never received any complaints about it up to the date of the accident (*cf. Vaughan v 1720 Unico, Inc*, 30 AD3d 315 [2006]).[7] While this evidence may not affirmatively prove that no Hunts Point employee was ever told of the rail's condition prior to the accident, our jurisprudence does not "require a defendant [moving for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof" (*Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 385 [1998]; *see also Wellington v Manmall, LLC*, 70 AD3d 401 [2010] ["a defendant is not required to prove lack of notice where the plaintiff has not pointed to any evidence of notice"]).

Plaintiff failed to raise an issue of fact in response to Hunts Point's prima facie showing that it did not have actual or constructive notice of the alleged dangerous condition of the rail. Plaintiff argues that actual notice was demonstrated by

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[7]Indeed, when asked at his deposition whether "on the date of the accident . . . the rack system [was] in good operational and mechanical condition," the Nebraskaland vice president answered in the affirmative.

sworn statements of a coworker to the effect that, two months before the accident, the coworker overheard his supervisor complaining about the rail system on a phone call and that, after the call ended, the supervisor told the coworker that he had been speaking to an unidentified Hunts Point employee. Those statements are hearsay, however, insofar as they relate the supervisor's identification of the other party to the conversation, and therefore cannot be the sole basis for denying summary judgment (*see DiGiantomasso v City of New York*, 55 AD3d 502, 503 [2008]). We note that the record does not contain any deposition testimony or affidavit by the supervisor. Neither is an issue as to Hunts Point's constructive notice of the alleged dangerous condition of the rail system raised by the number of repair calls Hunts Point made to the premises demised to Nebraskaland over the preceding year or by the frequent visits made to the premises by the aforementioned Hunts Point general manager. None of the repair calls or visits concerned the rail, the alleged dislodging problem was intermittent, and the existence of the problem would not have been obvious to the Hunts Point general manager (who disclaimed expertise in dealing with rail systems) from a chance observation of the bent rail overhead (*see Delosangeles v Asian Ams. for Equality, Inc.*, 40 AD3d 550, 552 [2007] [visibility of air conditioner that ultimately fell from window did not "suggest() that a dangerous condition was

visible, let alone visible and apparent" so as to give rise to constructive notice]; *Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 ,500 [2007] [to give rise to constructive notice, "(m)ere notice of a general or unrelated problem is not enough; the particular defect that caused the damage must have been apparent"]).

Plaintiff's testimony that LML lumpers "always" loaded six carcasses onto the meat hooks raises an issue of fact as to whether the lumpers created the allegedly dangerous condition by overloading the hooks (*see Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439, 439-440 [2010]). LML's assertion that six carcasses would not have created a dangerous condition is unsupported by expert affidavits and is otherwise conclusory. Absent argument from LML, we decline to consider the issue of whether LML made a delivery of carcasses to Nebraskaland on the date of plaintiff's accident.

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

ENTERED: DECEMBER 16, 2010

CLERK

Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3165-
3166N Admiral Insurance Company, et al., Index 114048/06
Plaintiffs-Appellants,

-against-

Marriott International, Inc., et al.,
Defendants-Respondents,

Eagle One Roofing Contractors, Inc., et al.,
Defendants.

_____

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for appellants.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered April 2, 2009, which granted defendant Eagle One's motion to vacate a default judgment, reversed, on the law, without costs, the motion denied and the default reinstated. Order, same court and Justice, entered August 19, 2009, which, inter alia, granted the Marriott defendants' motion for summary judgment dismissing the complaint as against them, modified, on the law, to vacate the dismissal and to declare that the Marriott defendants are not obligated to defend and indemnify plaintiff Townhouse Management Co. in connection with the underlying personal injury action, and otherwise affirmed, without costs.

Eagle's motion to vacate the default judgment should have been denied because the only excuse it proffered for its default was a perfunctory and unsubstantiated claim of law office

failure, which does not constitute a reasonable excuse (*see Okun v Tanners*, 11 NY3d 762 [2008]; *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, 906 [2009]). Accordingly, consideration of the merits of Eagle's defense is unnecessary (*see Time Warner City Cable v Tri State Auto*, 5 AD3d 153, 153 [2004], *appeal dismissed* 3 NY3d 656 [2004]). Eagle's contention, raised for the first time on appeal, that the motion to enter judgment on default was untimely because it was made more than one year after the default is not entitled to consideration (*see Cohn v Goldman*, 76 NY 284, 287 [1879]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988] [a party is prohibited from arguing on appeal a theory not advanced before the court of original instance]) and, in any event, is devoid of merit. Eagle erroneously measures the default from the date of service of the summons and complaint rather than from the date on which its answer was due (*see PM-OK Assoc. v Britz*, 256 AD2d 151, 152 [1998]).

Subject to one qualification, Supreme Court correctly concluded that Marriott's obligations to indemnify and procure insurance coverage were contingent on the lease commencement date and substantial completion of the construction work on the building it was to occupy pursuant to its Master Lease Agreement (MLA). That construction of the MLA is supported by its plain language, and a contrary interpretation would not be commercially reasonable (*see Matter of Lipper Holdings v Trident Holdings*, 1

AD3d 170, 171 [2003]), insofar as it would require the party without any control over the construction work to indemnify the party exercising plenary authority over that work. To be sure, the last sentence of section 2.6 of the MLA provides that Marriott's duty to indemnify under section 12.1 is triggered by "[a]ny entry onto the Property prior to the Lease Commencement Date by [Marriott], its employees, inspectors, contractors or agents." But this exception proves the rule as the last sentence of section 2.6 would be surplusage if plaintiffs were correct that Marriott assumed the indemnification obligations as soon as the MLA became binding (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Plaintiffs' fallback argument -- that issues of fact exist as to the effectiveness of the lease -- is without merit. As Supreme Court found, plaintiffs raise no issue of material fact that substantial completion had not occurred at the time of the underlying accident.

Contrary to the concurrence's apparent view, plaintiffs do not argue that Marriott's obligation to indemnify under the MLA arises in the first instance under the last sentence of section 2.6. Notably, moreover, plaintiffs allege in their complaint that they are entitled to be indemnified under the MLA because of the provisions of section 12.1. To the extent that plaintiffs

are contending nonetheless that Marriott is required to indemnify them because of the last sentence of section 2.6, we reject it for the simple reason that any such argument is raised for the first time in plaintiffs' reply brief. Pursuant to the last sentence of section 12.1, Marriott is not obligated to indemnify (regardless of whether the duty to indemnify assertedly arises in the first instance under section 12.1 or the last sentence of section 2.6) with respect to a claim arising out of negligent acts (and certain omissions) of the landlord or its agents, employees or contractors. Thus, such an argument does not raise a pure issue of law that can be raised on appeal for the first time (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [2009]).

The concurrence's position with respect to that argument is premised on a cross motion made by Marriott and the failure of plaintiffs to contest a factual assertion made by Marriott in the cross motion. The cross motion, however, was made by *plaintiffs*, not Marriott. Moreover, Marriott does not argue in its brief that plaintiffs should be deemed to have conceded that the accident resulted from the landlord's negligence (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play"]).

We modify to make the declaration that the motion court intended but neglected to make (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]).

All concur except Tom, J.P. and Román, J. who concur in a separate memorandum by Tom, J.P. as follows:

TOM, J.P. (concurring)

In this action arising out of a lease between nonparty 554-556 Third Avenue, LLC (landlord) and defendant Executay Corp., plaintiffs seek a declaration that defendants are obligated to defend and indemnify plaintiff Townhouse Management Co., as landlord's managing agent, in connection with an underlying personal injury action. The underlying action has been settled by Townhouse and the settlement sum paid by plaintiff Admiral Insurance Co., which appears as subrogee. The parties dispute whether the lease and its indemnification provision were in effect on the date of the injury.

Executay Corp., described in the complaint together with defendant Marriott Executay as a "division or brand" of defendant Marriott International, Inc. (collectively, Marriott), entered into the subject master lease agreement with landlord on August 8, 2000. The lease agreement contemplates that Executay (tenant) and landlord would cooperate in the design of an executive hotel to be constructed by landlord "at its sole cost and expense" and leased thereafter by tenant for a 15-year term beginning on the "Lease Commencement Date." The agreement contains mutual covenants providing indemnity to each party and its agents against liability arising out of the other party's activities on the premises. Section 2.10 of the agreement provides that the lease will commence on the date any apartment

is occupied for residential purposes or upon substantial completion of the premises, which under section 2.11 requires "certificates from the Architect, the Engineer, the General Contractor and the Interior Designer . . . and a certificate of occupancy authorizing occupancy and use of the Building and the Apartments for the purposes contemplated herein." Section 2.6 provides that "[a]ny entry onto the Property prior to the Lease Commencement Date by the Tenant, its employees, inspectors, contractors or agents shall be subject to the indemnification provisions set forth in Section 12.1. That section, upon which this action is predicated, requires tenant to indemnify "Landlord, Landlord's Mortgagee and Landlord's managing agent" against, inter alia, "injury . . . sustained within the Building or the Apartments," but excludes claims arising out of the negligent acts "of Landlord or its agents, employees or contractors." Finally, the lease agreement provides that each party will maintain commercial general liability insurance throughout the lease term naming the other party and its agents as additional insureds.

On October 29, 2003, Faith S. Luck, Marriott's employee, was performing an inspection of the building. According to her deposition testimony, she was in the process of inspecting an apartment on the 25th floor of the 26-story building when she slipped on water that had accumulated on the floor, sustaining

injury to her elbow.

On its motion to dismiss plaintiffs' instant action, Marriott argued that (1) the lease was not in effect on October 29, 2003, the date Marriott's inspector was injured, and (2) even if the lease were presumed to be in effect, the injury was the result of the negligence of landlord, its employees, agents or contractors and thus outside the ambit of the indemnification provision. In opposition, plaintiffs argued only that the lease was "in full force and effect" at the time of the accident, obliging defendants to provide indemnification. Alternatively, they argued that questions of fact concerning whether the work in the building had been substantially completed at the time Ms. Luck sustained injury preclude summary judgment.

Supreme Court held that the lease was not in effect on the date of the accident and that "plaintiffs cannot benefit from the indemnification provision contained therein." The court noted that plaintiffs alleged neither that any apartments had been occupied on the accident date nor that the a certificate of occupancy had been issued for the building. The court further noted that plaintiffs did not address the question of their negligence in connection with the accident, and in view of its holding, the court did not reach the issue.

Plaintiffs contend that Supreme Court erred in ruling against them, restating the arguments made on the motion — that

the lease was in effect or, alternatively, that factual issues are presented with respect to its effectiveness. For the first time on appeal, they argue that while there may be some question whether the lease was in effect on the date of the accident, the indemnity provided in section 12.1 is neither limited by the lease commencement date nor confined to the lease term. Plaintiffs do not address Marriott's contention that the accident was the result of landlord's negligence and, thus, not within the scope of section 12.1.

At the outset, it should be noted that a complaint seeking a declaratory judgment is not properly dismissed even where the plaintiff has not established entitlement to the declaration sought (*Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]). Where, as here, a disposition is reached on the merits, the court should issue a declaration (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *see also Daley v M/S Capital NY LLC*, 44 AD3d 313, 315 [2007]).

Supreme Court correctly decided that the lease was not in effect on the date of the accident. An indemnity provision is strictly construed, and a contract is deemed to indemnify a party against liability for its own negligence only where such an intent is clearly indicated by "'the language and purpose of the entire agreement and the surrounding facts and circumstances'"

(*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]). To recover against Marriott under the indemnification provision of the lease, plaintiffs (landlord's agents and assigns) are required to establish not only that the provision was effective, but also that the surrounding facts and circumstances clearly support its enforcement against Marriott (*id.*).

The conditions specified for commencement of the lease, particularly the occupancy of apartments for residential use or the issuance of the requisite certificates, had not been fulfilled at the time the underlying action accrued. Indeed, a consultant for the construction contractor gave deposition testimony that the building was only 80% to 90% enclosed on the date Ms. Luck slipped on water that had accumulated in a 25th-floor apartment, a floor the consultant testified was still under construction at the time. Because plaintiffs' only argument for recovery under the indemnification provision before Supreme Court was that "the lease agreement and its indemnification provision were in full force and effect" at the time of the accident, the court was correct to deny plaintiffs' motion for summary judgment.

Plaintiffs challenge the propriety of the grant of summary judgment to Marriott, advancing the novel argument that even

though the lease might not have been in effect, the indemnity provided under the parties' master lease agreement included, under section 2.6, inspections by tenant or its agents "prior to the Lease Commencement Date." Raising this contention for the first time on appeal presents plaintiffs with a problem of proof. As the proponent of the indemnification provision, plaintiffs have the burden to establish that any condition precedent to Marriott's obligation to indemnify has been fulfilled (*see Great N. Ins. Co.*, 7 NY3d at 417). "The party who sues on a promise has the burden of proving that conditions precedent attached to the duty to perform that promise were complied with, otherwise there would be no breach of that promise" (Calamari & Perillo, Contracts § 11.7, at 363 [6th ed]; *see Lindenbaum v Royco Prop. Corp.*, 165 AD2d 254, 258 [1991]; *Strader v Collins*, 280 App Div 582, 586 [1952]). Among the conditions plaintiffs must establish to support enforcement of the indemnification provision against Marriott is that the accident does not fall within the exception for injury resulting from the negligence "of Landlord or its agents, employees or contractors." On its cross motion, Marriott contended that Ms. Luck sustained injury because landlord's contractor permitted an unsafe condition — the accumulation of standing water — to exist on the 25th floor and, as noted, plaintiffs have permitted this allegation to go uncontroverted.

Where, as here, there is a cross motion and no party

contests a factual assertion, "there is, in effect, a concession that no question of fact exists" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975] ["Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted"]; *see also G.B. Kent & Sons v Helena Rubinstein, Inc.*, 47 NY2d 561, 565 [1979] [parties submitting cross motions for summary judgment invite judicial resolution on the basis of their submissions on the motion]). Thus, even overlooking the rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" (*Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988], citing *Huston v County of Chenango*, 253 App Div 56, 60-61 [1937], *affd* 278 NY 646 [1938]; *see e.g. Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]), by failing to contest Marriott's factual assertion, plaintiffs have conceded that the accident resulted from landlord's negligence. Thus, the injury is excepted from tenant's obligation to indemnify landlord by the express terms of the lease agreement, and plaintiffs cannot prevail on their indemnity claim, even under their novel theory (*see Arteaga v*

231/249 W. 39 St. Corp., 45 AD3d 320, 321 [2007] [indemnification claim dismissed on the basis of uncontroverted assertions]).

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

ENTERED: DECEMBER 16, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3240 In re Lawrence C.,
Petitioner-Respondent,

-against-

Anthea P.,
Respondent-Appellant.

_____

Elayne Kesselman, New York, for appellant.

Lawrence C., respondent pro se.

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Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about July 7, 2009, which, insofar as appealed from, as limited by the briefs, granted the petition to the extent of directing that the subject children reside primarily with petitioner father upon attaining the age of four and awarded final decision-making authority to the father concerning the children's education, extracurricular activities and medical care, unanimously reversed, on the facts, without costs, the direction to change the division of custodial time between the parties upon the children's attaining the age of four and the award of final decision-making authority vacated, the petition denied insofar as it seeks an award of greater custodial time to the father than he currently enjoys, and the matter remanded for further proceedings regarding other relief sought by the petition.

The parties met through a Web site advertisement placed by

respondent mother seeking a man with whom to conceive a child. Thereafter, the parties agreed to try to conceive through artificial insemination, contemplating that petitioner father would be an active parent to any resulting child. Since the subject twin children were born in June 2007, the parties have shared custody, but the mother has been the primary custodian. Currently, in every two-week period, the children spend 10 nights with the mother and four nights with the father.

As a result of disagreements between the parties that began to arise even before the children were born, the father commenced this proceeding seeking primary custody in October 2007. The order appealed from (rendered by a referee pursuant to the parties' stipulation) directs, inter alia, that, "upon attaining the age of 4 years and enrollment in school," the children shall reside primarily with the father. Specifically, the order directs that the children, after the change in the division of custody, are to be in the mother's custody three out of every four weekends (Friday 5:00 p.m. to Sunday 5:00 p.m.) and from 5:00 p.m. to 7:30 p.m. two Wednesdays per month (those preceding and following the first Saturday of each month), and in the father's custody the remainder of the time. On the mother's appeal, we reverse and vacate the direction to alter custodial arrangements when the children attain the age of four.

The touchstone of a child custody determination is "the best

interest of the child, and what will best promote its welfare and happiness" (Domestic Relations Law § 70). Although each case must be decided on its particular facts, the courts, out of concern for maintaining stability in a child's life, have long held that "[c]hanges in conditions which affect the relative desirability of custodians . . . are not to be accorded significance unless the advantages of changing custody outweigh the essential principle of continued and stable custody of children" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 550 [1976]; *see also Alan G. v Joan G.*, 104 AD2d 147, 153 [1984]; *Matter of Larkin v White*, 64 AD3d 707, 709 [2009]; *Matter of Moorehead v Moorehead*, 197 AD2d 517, 519 [1993], *appeal dismissed* 82 NY2d 917 [1994]; *Meirowitz v Meirowitz*, 96 AD2d 1030 [1983], *appeal dismissed* 60 NY2d 1015 [1983]). Hence, "[p]riority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement" (*Matter of Nehra v Uhlar*, 43 NY2d 242, 251 [1977]). In short, the parent seeking a change in custody arrangements bears the burden of proof that the change is in the child's best interests (*see People ex rel. Wasserberger v Wasserberger*, 42 AD2d 93, 96 [1973], *affd* 34 NY2d 660 [1974] [petition to change custody denied because petitioner "has shown nothing to warrant a change"]; *Matter of Lumbert v Lumbert*, 229 AD2d 683, 684 [1996] [where "consideration of an

array of factors produced no clear preference, . . . resort to stability and maintenance of the status quo as the pivotal factor(s)" was justified]).

Bearing in mind that, in matters of child custody, the authority of the Appellate Division is as broad as that of the trial court (*Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]) and that the Referee's finding that both parties are fit parents is unchallenged, we find no support in the record for the conclusion that the relative advantage of giving the father primary custody is so great as to justify moving four-year-old children from the primary custody of their mother, who has been their primary caregiver since their birth. None of the grounds on which the Referee ordered the future change in custody are so compelling as to warrant the attendant disruption of the children's lives. First, the Referee found that the father was "more likely to promote meaningful contact and a relationship between the other parent and the children." However, the Referee acknowledged that the mother's conduct never reached the level of deliberately frustrating, denying or interfering with the father's parental rights so as to raise doubts about her fitness to act as a custodial parent (*see Victor L. v Darlene L.*, 251 AD2d 178, 179 [1998], *lv denied* 92 NY2d 816 [1998]). It appears to us that, while each parent would do well to adopt a more cooperative attitude toward the other, the past deficiencies in

the mother's conduct are not so great as to warrant displacing her as the primary custodial parent. Nor is a change in custody warranted by the Referee's speculation (based solely on lay testimony) that the children, by reason of their nontraditional family background, would more easily fit in with other children in the father's West Village neighborhood than in the mother's predominantly Greek-American neighborhood in Queens. Further, we find that the record does not support the Referee's view that the father is more likely to place the children's needs before his own. In sum, because "the advantages of the change [do not] greatly outweigh the advantages of continuity and stability" (*Matter of Fountain v Fountain*, 83 AD2d 694, 694 [1981], *affd* 55 NY2d 838 [1982]), the Referee improvidently ordered the future change in custody.

We remand the matter to Family Court for consideration of any other relief sought by the petition (including alteration of final decision-making authority) in light of our determination that custody arrangements will remain unchanged until a material change of circumstance is demonstrated. In this regard, we vacate Family Court's award to the father of final decision-making authority in certain spheres, which award appears to have

been predicated on the now-vacated grant of primary custody to him.

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

ENTERED: DECEMBER 16, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3652 Lot 1555 Corp., et al., 101973/09
Plaintiffs-Respondents,

-against-

Fron Nahzi, etc.,
Defendant-Appellant.

_____

Roy A. McKenzie, New York, for appellant.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered November 24, 2009, which, to the extent appealed as limited by the briefs, denied defendant's motion to dismiss the action on the basis of res judicata, unanimously affirmed, with costs.

"[W]here there is a valid final judgment the doctrine of res judicata, or claim preclusion, bars future litigation between those parties on the same causes of action" (*Matter of Hodes v Axelrod*, 70 NY2d 364 [1987]). This doctrine is based on the principle that a "judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307 [1929]). Even assuming

that plaintiff Biberaj had been a party defendant in the prior action (*Nahzi v Lieblich*, 69 AD3d 427 [2010], *lv denied* 15 NY3d 703 [2010]), res judicata would not apply because the defendants in the prior action were not required to assert as a counterclaim the claim they bring in this action. The judgment in the prior action established that defendant, the plaintiff in that action, was entitled to a percentage of the sale price of real property owned by defendant Lot 1555 Corp. In this action, plaintiffs claim that they loaned defendant a substantial sum to purchase a cooperative apartment. The judgment they seek would not destroy or impair rights or interests established by the first judgment.

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

ENTERED: DECEMBER 16, 2010

CLERK

Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3183 Jo-Fra Properties, Inc., Index 114288/08
Plaintiff-Appellant-Respondent,

-against-

Leland Bobbe, et al.,
Defendants-Respondents-Appellants.

_____

Aury Bennett Stollow, P.C., New York (Aury B. Stollow of counsel), for appellant-respondent.

Robert Petrucci, New York, for respondents-appellants.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 7, 2009, modified, on the law, to deny plaintiff's motion for summary judgment on its cause of action for attorney's fees in connection with its fourth through tenth causes of action, and otherwise affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
David Friedman
Eugene Nardelli
Rolando T. Acosta, JJ.

3183
Index 114288/08

_____x

Jo-Fra Properties, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Leland Bobbe, et al.,
Defendants-Respondents-Appellants.
_____x

Cross appeals from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 7, 2009, which, to the extent appealed from, denied plaintiff's motion for summary judgment on its causes of action for use and occupancy and to dismiss defendants' affirmative defense of noncompliance with the Loft Law and their counterclaim for rent overcharges, granted defendants' cross motion for summary judgment dismissing the use and occupancy causes of action, granted plaintiff's motion to dismiss defendants' counterclaim for attorney's fees in connection with the use and occupancy causes of action, and granted plaintiff's motion for summary judgment on its cause of action for attorney's fees in connection with its fourth through tenth causes of action.

Aury Bennett Stollow, P.C., New York (Aury B. Stollow of counsel), for appellant-respondent.

Robert Petrucci, New York, for respondents-appellants.

Saxe, J.

In this appeal, plaintiff-landlord Jo-Fra Properties challenges the application of the provision of the Loft Law (Multiple Dwelling Law article 7-C) that precludes the owner of a building covered by the Loft Law from collecting rent if it fails to bring the building into compliance with the requirements of the law (*see* Multiple Dwelling Law § 302[1][b]). Primarily, plaintiff asserts that it is unjust and inequitable to prevent it from collecting use and occupancy because its inability to legalize the residential lofts in its buildings was not its fault.

The buildings at issue are located on West 28th Street in Manhattan. Plaintiff purchased the buildings at 47 through 55 West 28th Street in 1977; the current principals of Jo-Fra inherited their interests in 2002. Defendants are the residents of 51, 53 and 55 West 28th Street. The buildings' lofts became occupied with residential tenants beginning in the 1970s; more residential tenants were accepted through the 1990s. All these tenants' leases specified that their premises were not for residential use.

As early as 1978, the Department of Buildings issued violations for the illegal residential use of some of the buildings' commercial lofts. Jo-Fra thereafter sent those

tenants form letters directing them to end the violation or vacate the premises, but it took no follow-up steps. The Loft Law was enacted in 1982; in 1984, Jo-Fra registered one of the five buildings, 47 W. 28th Street, with the Loft Board in the course of unsuccessfully attempting to contest the Loft Law's applicability to the building.

Jo-Fra took no steps to comply with the Loft Law with regard to those buildings before August 2004, when the tenants filed an application for coverage under Multiple Dwelling Law article 7-C, which application Jo-Fra opposed. After substantial litigation (*see Matter of Jo-Fra Props., Inc.*, 27 AD3d 298 [2006], *lv denied* 8 NY3d 801 [2007]), the parties stipulated that the tenants' application would be withdrawn without prejudice and that Jo-Fra would register the buildings as interim multiple dwellings. Jo-Fra filed the registration on Oct. 1, 2007. Although the Loft Board did not initially accept the registration, purporting instead to grant the tenants' 2004 application, after a court order issued in the context of a CPLR article 78 proceeding directed it to do so, the Loft Board finally accepted Jo-Fra's registration by an order dated February 19, 2009.

Meanwhile, in the course of 2008, following its Oct. 1, 2007 filing, Jo-Fra took a number of steps to begin bringing the buildings into compliance with the Multiple Dwelling Law. In

August 2008 it filed architectural plans and alteration applications for all three buildings at issue here, and it filed narrative statements for number 55 on September 29, 2008 and for number 53 in January 2009. As of the date of its motion for use and occupancy, it had not yet filed a narrative statement for number 51; its architect's affidavit dated February 17, 2009 stated that the narrative statement for number 51 would not be filed until after the Loft Board conference for building 53 was completed. No permits to perform the legalization work were obtained.

In July 2008, the tenants filed overcharge complaints with the Loft Board for the years 2004-2008. Also in 2008, a dispute began between Jo-Fra and the tenants regarding the tenants' use of public areas of the buildings, such as the hallways and staircases, to store personal property. Violations were issued by the Fire Department in the summer of 2008, and Jo-Fra notified the tenants to cease the use of the public areas. In August 2008, Jo-Fra served 10-day notices of termination based on failure to cure "violation of substantial obligation of tenancy" and purporting to terminate "license[*s*], if any," for the use of the public areas of the buildings.

Jo-Fra commenced this action in October 2008, seeking arrears in use and occupancy, ejectment of the tenants, and

counsel fees. The tenants' answer seeks a money judgment for the amount of the overcharge and reciprocal counsel fees under Real Property Law § 234.

Both sides moved for summary judgment. The motion court granted the tenants' cross motion for summary judgment to the extent of dismissing Jo-Fra's use and occupancy claims, but granted Jo-Fra summary judgment on its cause of action for attorney's fees in connection with its remaining claims. Each side appeals from the portion of the order adverse to its position.

Initially, there is no dispute here that the Loft Law applies to these buildings. The purpose of the Loft Law was to legalize de facto multiple dwellings that were not up to code (*see Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 66 NY2d 298, 302-03 [1985]). The law was intended "to confer rent stabilized status on legalized interim multiple dwellings" (*91 Fifth Ave. Corp. v NYC Loft Bd.*, 249 AD2d 248, 249 [1998]), *appeal dismissed* 92 NY2d 918 [1998]). Incremental conversion was provided for so as to allow a "transition" of former commercial spaces into the rent regulation system (*see Blackgold Realty Corp. v Milne*, 119 Misc 2d 920, 921 [Civ Ct, NY County 1983], *affd* 126 Misc 2d 721 [App Term, 1st Dept 1984], *affd* 119 AD2d 512 [1st Dept 1986], *affd* 69 NY2d 719 [1987]).

With the enactment of the Loft Law in 1982 (L 1982 ch 349), owners of interim multiple dwellings were first given a timetable in which to "take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building" (Multiple Dwelling Law § 284[1][i]). If they complied with that legalization timetable, they were entitled to collect rent even if they had not yet obtained a certificate of occupancy (§ 285); otherwise, the lack of a proper certificate of occupancy would preclude a right to collect rent for those properties (§ 302[1][b]; *see Cromwell v Le Sannom Bldg. Corp.*, 171 AD2d 458 [1991]; *County Dollar Corp. v Douglas*, 161 AD2d 370 [1990]). The compliance timetables were extended when the Loft Law was renewed in 1992, 1996, and 1999 (Multiple Dwelling Law §§ 284[1][ii], [iii], [iv]).

The importance of compliance with those timetables while they are in place is illustrated by *Lipkis v Gilmour* (221 AD2d 229 [1995], *affg* 160 Misc 2d 50 [1994]). There, during the period after one statutory legalization timetable had expired and before a new legalization timetable had yet been enacted, an owner who had failed to comply with the prior legalization timetable was held to be precluded from suing for rent, up until the point that a new timetable was put in place by the Legislature.

While Jo-Fra has, albeit very belatedly, taken a number of the steps required by the Multiple Dwelling Law to legalize the buildings, it does not, and cannot, contend that it has taken *all* such steps, or that it has taken those steps within any statutory time frame. Indeed, Jo-Fra points out that it is, of course, impossible for it to meet the expired September 1999 deadline for filing an alteration application. Rather, it suggests that equity requires forgiving its non-compliance and allowing it to collect use and occupancy. It argues that Supreme Court's dismissal of its claim relies on an overly literal interpretation of the Multiple Dwelling Law and that the statute's literal application produces an absurd, unjust result. It also argues that the statute, being remedial, should be interpreted equitably to favor owners.

As to Jo-Fra's argument that compliance is impossible because the tenants did not seek coverage until 2004, it is founded on an incorrect assumption. The Loft Law did not give owners the option of waiting until tenants requested coverage. The incremental legalization of a loft building by an owner is mandatory, not permissive; Multiple Dwelling Law § 284(1) directs that an owner "shall" take all of the described steps within the specified time periods (*see Matter of Vlachos v New York City Loft Bd.*, 118 AD2d 378, 381-382 [1986]). The burden is on the

owner, and on no one else (*id.* at 381).

Jo-Fra's affirmative obligation to register the buildings as interim multiple dwellings is not avoidable by a claimed lack of knowledge of the tenants' residential tenancy. In any event, its receipt of violations citing illegal residential use prior to the enactment of the Loft Law further establishes its awareness, as does its registration of one of its five buildings, number 47, in the course of unsuccessfully attempting to contest the statute's coverage. Moreover, Jo-Fra itself operated a wholesale flower business at numbers 49 and 51 until the 1990s, putting it in a position to be aware of the tenants' residential presence there. Yet, aside from registering number 47, it took none of the steps contemplated by Multiple Dwelling Law § 284 until its belated registration of the remaining buildings as interim multiple dwellings in 2007. Jo-Fra's failure to take the steps necessary to obtain a certificate of occupancy for the residential portions of the buildings precludes it from obtaining the use and occupancy award it seeks.

Nowhere in the record does a principal of Jo-Fra, or even its counsel, explain why Jo-Fra opted not to take any steps toward coverage until 2007, although it had loft tenants since the 1970s and had accepted more through the 1990s. This decision, not the actions of the tenants or the Loft Board, put

Jo-Fra in its current bind.

The case law relied on by Jo-Fra is unpersuasive or inapposite. While in *Zane v Kellner* (240 AD2d 208 [1997]), a case post-dating the Loft Law, this Court cited equitable considerations in directing the tenant to prospectively pay use and occupancy into court, notably, the motion court had denied the tenants' motion to dismiss the claim on the ground that it could not determine as a matter of law whether the Loft Law applied to the building.

To the extent that Jo-Fra argues that Multiple Dwelling Law § 284 is invalid for want of fairness, the assertion is unpreserved; in any event, it is without merit. Subdivision (i) of § 284(1) allows the Loft Board to extend compliance deadlines on good cause shown, and subdivision (vi) makes other provisions for variances and similar applications. Jo-Fra asserted in Supreme Court that the Loft Board had announced that it would not accept § 284(1)(vi) applications, but there is no showing that CPLR article 78 relief was sought, or even that the bar to such registrations was more than short-term. It therefore cannot even be said that Jo-Fra's predicament is permanent. Jo-Fra has abandoned its constitutional argument and made no other argument against the statute's validity before Supreme Court.

While the Loft Law, for the first years of its enactment and

renewal, sought to facilitate owners' voluntary conversions of loft buildings to residences, the Legislature's decision in 2001 not to further extend the deadlines for alteration applications and permits reflected a determination that the owners' interests no longer warranted that protection. If Jo-Fra had acknowledged the buildings' status and satisfied its owner obligations under the Loft Law, instead of spending years raising procedural defenses, it could have been in compliance long ago. While it had a right to pursue its defenses, it has no one to blame but itself for the position it is now in.

As to attorneys' fees, Jo-Fra was not entitled as a matter of law to the award of attorney's fees that the motion court awarded based on its grant of summary judgment to Jo-Fra on its fourth through tenth causes of action. The grant of summary judgment to Jo-Fra on those causes of action was not grounded in a default by the tenants of a lease provision, but rather was based on the reasoning that the tenants had use of those spaces under a license revocable at will, and that once the landlord exercised its right of revocation the tenants' continued use of those spaces constituted a trespass. Because there has been no factual finding that the tenants' use of the common areas constituted a violation of the provisions of their leases, Jo-Fra has not yet established that it is entitled to judgment on its

cause of action for attorney's fees in connection with its fourth through tenth causes of action. Nor can the tenants' reciprocal claims under Real Property Law § 234 succeed in the absence of a default under the lease (*see Dupuis v 424 E. 77th Owners Corp.*, 32 AD3d 720, 722 [2006]).

Finally, the Loft Board has heard and determined the rent overcharge issue; therefore, this Court will not in the present context reach Jo-Fra's argument that defendants' overcharge claims are partly time-barred.

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 7, 2009, which, to the extent appealed from, denied plaintiff's motion for summary judgment on its causes of action for use and occupancy and to dismiss defendants' affirmative defense of noncompliance with the Loft Law and their counterclaim for rent overcharges, granted defendants' cross motion for summary judgment dismissing the use and occupancy causes of action, granted plaintiff's motion to dismiss defendants' counterclaim for attorney's fees in connection with the use and occupancy causes of action, and granted plaintiff's motion for summary judgment on its cause of action for attorney's fees in connection with its fourth through

tenth causes of action, should be modified, on the law, to deny plaintiff's motion for summary judgment on its cause of action for attorney's fees in connection with its fourth through tenth causes of action, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 16, 2010

CLERK