SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 28, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3409 Troy VG.,
Petitioner-Appellant,

-against-

Tysha M. McG.,
Respondent-Respondent.

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Karen D. Steinberg, New York, for appellant.

Paul F. Sweeney, Bronx, for respondent.

Craig S. Marshall, Bronx, attorney for the child.

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Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about July 8, 2009, which denied the petition insofar as it sought to vacate the acknowledgment of paternity of the child, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a new hearing before a different judge.

Petitioner testified, and it appears to be undisputed, that when the child was approximately three years old, the child would cry during visits with petitioner and say that petitioner was not his father. According to petitioner, his relationship with the

child appeared to be "going backward" and the child indicated he did not want to be with petitioner. Under all the relevant circumstances, Family Court erred in determining that the question of equitable estoppel could be resolved without a psychiatric evaluation of the parties and the child *(Matter of Eugene F.G. v Darla D.*, 261 AD2d 958, 959 [1999]). Moreover, Family Court should not have precluded cross-examination of respondent mother with respect to the child's living situation at the time of the hearing, particularly as the question of whether another person was acting as a father clearly is relevant to the ultimate issue of the best interests of the child (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3414 Kel-Tech Construction, Inc., Index 112707/07
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Massoud & Pashkoff, LLP, New York (Lisa Pashkoff of counsel), for appellant.

Sonya M. Kaloyanides, New York (Rosanne R. Pisem of counsel), for respondent.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 8, 2009, which granted defendant New York City Housing Authority's (NYCHA) motion to dismiss the complaint, unanimously affirmed, without costs.

Under the subject contract, as a condition precedent to suit, plaintiff was required to file a written notice of claim for extra costs or damages within 20 days after said claim arose and to comply with any demands for additional information. Plaintiff argues that NYCHA, by its affirmations and representations, induced it into believing that it did not need to file a notice of claim. Even assuming that plaintiff's estoppel argument has merit, the failure to comply with NYCHA's request for additional information in a letter dated May 21, 2007 is itself sufficient to require dismissal of the complaint.

Plaintiff does not and cannot contend that it was induced into believing it need not comply with the request and, as noted above, compliance with requests for additional information is a precondition to suit.

Plaintiff's remaining arguments are unavailing.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3570-
3570A Koren Rogers Associates Inc., Index 603258/08
Plaintiff-Appellant,

-against-

Standard Microsystems Corporation,
Defendant-Respondent.

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Amos Weinberg, Great Neck, for appellant.

Mark I. Koffsky, Hauppauge, for respondent.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered September 16, 2009, dismissing the complaint, affirmed, with costs. Appeal from order, same court and Justice, entered August 20, 2009, which denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In May 2006, defendant entered into a contract with plaintiff which provided that plaintiff would conduct a search to fill the position of "Director, Corporate Accounting" at defendant's corporation. The fee and billing structure was based on the estimated starting compensation for the Director position, which was $150,000 plus a target bonus of $30,000. The contract also included a term clause stating that the search was expected

to be completed within four months of the date of the contract and that in the event it was not, defendant could elect to terminate the contract with three business days' written notice. Defendant interviewed three candidates referred by plaintiff and hired Robert Papa to fill the Director, Corporate Accounting position. Defendant then paid plaintiff the agreed-upon rate of 30% of Papa's starting compensation. Twenty-two months later, in June 2008, defendant hired Christina Catalina, a candidate whose resume plaintiff had sent defendant for the Director position opening. Ms. Catalina was hired for an entirely different position of "Senior Director, Corporate Accounting and Assistant Controller," and plaintiff did not refer her for this position. The parties do not dispute that Papa was still working as the Director, Corporate Accounting, when Catalina was hired for the Senior Director position. Plaintiff now seeks to recover a placement fee for the employment of Catalina.

"[O]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself" (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [2001] [internal quotation marks and

citation omitted] [where the contract was unambiguous and made no mention of additional job titles, plaintiff was only entitled to compensation for its search for a single position]). The contract here is clear and unambiguous, and the intention of the parties can be gathered from the instrument itself. The contract provided for a placement for the specific position of Director, Corporate Accounting, and did not provide that plaintiff would refer candidates for additional positions, or that defendant would be responsible for paying a fee for any referrals for different positions. Plaintiff performed under the contract by providing defendant with viable candidates, one of whom was hired for the specified position, and defendant, in turn, paid plaintiff the agreed upon fee. At that point the contract ended.

Indeed, the Senior Director position was not in existence in 2006 when Catalina was originally interviewed. It was not until January 2008 that defendant found the need to create the new position. Catalina and defendant had sporadically corresponded throughout 2007 and 2008, which, according to defendant, is common among professionals in the accounting field. Furthermore, defendant did not engage plaintiff's services to fill the newly created position. Plaintiff confuses the issue by arguing that Catalina's hiring for the job of Senior Director, Corporate Accounting, Assistant Controller, was covered by the contract.

This job title does not appear anywhere in the contract that was sent to defendant.

Although both plaintiff and the dissent point to *Macro Group v Swiss Re Life Co. AM.* (178 Misc 2d 869 [Civ Ct, NY County 1998]) as instructive, the case is distinguishable. In *Macro*, two candidates were referred to the defendant/employer and both candidates were offered positions. Notably, the defendant offered to pay the plaintiff an additional fee in the event the second candidate accepted the offer. Thus, the parties had an agreement for the referral and hiring of the second candidate. Such is not the case here. Defendant never discussed the need to fill the newly created position of Senior Director with plaintiff. In fact, defendant stated that it relied on its own internal resources in conducting the interview process and ultimate hiring.

The dissent also relies upon *Arrow Empl. Agency v Rice Buick-Pontiac-GMC Truck* (185 Misc 2d 811 [App Term 2d Dept 2000]), and *Barrister Referrals v Windels, Marx, Davies & Ives* (169 AD2d 622 [1991]), both of which involve different factual scenarios than the one presented here. In *Arrow*, which is not binding on us, the defendant failed to compensate the plaintiff at all under the employment referral contract. In *Barrister*, the defendant failed to compensate the plaintiff, and in fact,

terminated the contract prior to making any hires. Moreover, the contract in *Barrister* provided that the plaintiff would receive a finder's commission for bringing a candidate to the defendant's attention. However, here the contract signed by the parties provided for payment if plaintiff found a candidate for one specific position, within a specific time frame.

Plaintiff's argument that defendant is required to pay a fee for any hire made as a result of plaintiff's sending a resume to defendant could establish an open-ended obligation. Plaintiff could have included provisions in the contract prohibiting defendant from hiring candidates for other positions or requiring defendant to compensate plaintiff for such hiring, but it did not do so, and thus, is not entitled to anything more than it already was paid.

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

SAXE, J. (dissenting)

This appeal requires us to consider whether an employer may be legally obligated to pay a second fee to a placement firm although the parties' contract specifically covers only one position to be filled, where, after one of the placement firm's proposed candidates is hired to fill the opening, the employer later hires, for a second position, another of the candidates originally submitted by the placement firm. In this case, defendant-employer ultimately hired *two* of the candidates provided by the placement firm. Yet, the employer disputes the placement firm's claim for an additional fee, relying on the lapse of 22 months before the second hire, the more-senior nature of the second position, and the employer's claim that the follow-up contact was made by the candidate rather than by the employer's consultation of its file of previous candidates. The majority of this Court now holds that *as a matter of law*, the employer may not be held responsible for the placement firm's fee for the second candidate. I respectfully dissent, concluding that issues of fact are presented that preclude summary determination here.

Plaintiff Koren Rogers Associates is an employer-paid executive search firm. By a letter agreement signed May 5, 2006, defendant-employer Standard Microsystems Corporation (SMC) retained Koren to find candidates to fill a "Director, Corporate Accounting" position at SMC. SMC agreed to pay Koren "30% of the successful candidate's first year's cash compensation." Although it contains a provision that if Koren could not complete its search within four months, SMC could terminate the agreement on three days' written notice, and receive reimbursement for its out-of-pocket expenses, the contract contained no provision for its automatic termination upon the successful hiring of a candidate and payment of the agency's fee. Nor does it discuss the possibility that the employer might subsequently offer employment to the other candidates submitted by the agency.

Koren referred three candidates for the open position, including Robert Papa, who was already an independent consultant at SMC, and Christina Catalina. After interviews, SMC offered the position to Papa, who accepted the position. SMC's employment record lists Papa's job title as "Senior Manager, Reporting and Consolidation" rather than as "Director, Corporate Accounting," but there was no dispute that Papa was hired for the position contemplated by the contract, and SMC paid the balance due under the contract in September 2006.

In June 2008, SMC hired Christina Catalina as "Senior Director, Corporate Accounting and Assistant Controller" with a starting salary of $200,000. Koren demanded a placement fee pursuant to the parties' agreement, but SMC took the position that the agreement did not cover SMC's subsequent hiring of Catalina for a position not covered by the parties' contract. This action followed.

The motion court granted defendant's cross motion for summary judgment dismissing the complaint, and the majority now affirms, reasoning that the hiring of the second candidate for a different position 22 months later was, as a matter of law, beyond the scope of the agreement.

In my view, factual issues preclude resolution of this dispute as a matter of law. For example, SMC claims that the second position was a newly created job not within its contemplation in 2006, and that its consideration of Catalina for the position in 2008 occurred because she independently maintained contact with the company, rather than because it retained the 2006 candidates' information for possible future hiring. However, while those assertions, if proved, will entitle SMC to dismissal of the action, they are not incontrovertible truths; they must be found to be true, after plaintiff has been given the opportunity to challenge them, before they entitle

defendant to judgment in its favor.

Moreover, the fact that the terms of the contract were fulfilled by SMC's hiring of Papa and its payment to Koren of the fee due under the contract does not end all possible claims, where SMC thereafter hired a second of the placement firm's proposed candidates. A similar situation was presented in *Macro Group, Inc. v Swiss Life Re Co. Am.* (178 Misc 2d 869 [Civ Ct NY County 1998]). There, the plaintiff employment agency referred two applicants to the employer for the position of Assistant Comptroller; the employer hired one of the applicants as Assistant Comptroller. The second candidate was also offered a position, as Financial Manager and Assistant Vice-President, which she initially turned down, but after she contacted the employer directly some months later (on unrelated business), the contact eventually led to her acceptance of the previously offered position, 10 months after she first refused it. The court granted the placement firm a judgment for its fee, rejecting the employer's defenses that (1) it had not asked the placement firm for candidates for the Financial Manager position; (2) the candidate had been referred for a different position, and not been hired for that position; and (3) her eventual hiring was

unrelated to the original referral, having come about solely through subsequent contact initiated by the applicant herself (*id.* at 871-872).

Regarding the argument that the candidate herself made the subsequent contact, the court in *Macro* observed that "but for plaintiff's referral of the applicant the defendant would not have come into contact with the applicant" (*id.* at 872). The same reasoning invalidates SMC's argument that Koren's claim must be dismissed because it was Catalina who later reached out to SMC after she was initially rejected as a job candidate proposed by Koren. As Appellate Term explained in *Arrow Empl. Agency v Rice Buick-Pontiac-GMC Truck* (185 Misc 2d 811, 812 [App Term 2d Dept 2000]), "even if [the candidate] was hired after she contacted defendant, this occurred subsequent to the initial interview with defendant which took place as a result of the original referral by plaintiff, and cannot constitute an attenuating circumstances absolving defendant of its liability." The same basic scenario was presented in *Smith's Fifth Ave. Agency, Inc. v Airwick Indus., Inc.* (1989 WL 54105, 1989 US Dist LEXIS 5511 [SD NY 1989]), where the court rejected the employer's defense that no fee was payable because the eventual hiring only occurred after it intially rejected the candidate and terminated the agreement with the placement agency, and it was the candidate who made

renewed contact with the employer to inform it of her availability for a downgraded version of the original position.

Nor is it appropriate to dismiss Koren's claim as a matter of law on the ground that the contract automatically expired upon SMC's hiring of Papa, so that the placement firm would never be entitled to a fee for a subsequent hire from the same pool of applicants. Even an explicit termination of such a contract does not cut off the placement firm's right to a fee if the ultimate hiring can be traced back to its initial referral of the employee (*see Barrister Referrals v Windels, Marx, Davies & Ives*, 169 AD2d 622 [1991]). In *Barrister Referrals*, this Court referred for trial the claim by the plaintiff search firm seeking payment of its finder's fee notwithstanding the intervening termination of its contract with the defendant law firm. Although the candidate initially brought to the law firm's attention by the search firm joined the law firm over two years after the their earlier negotiations were cut off, *after* the parties' agreement was terminated, this Court explained that it was "for the jury to determine whether a connection can be traced between plaintiff's initial introduction of [the subject attorney] to [the law firm] and the termination of the entire transaction some two years later" (*id.* at 623).

I would also reject defendant's assertion that the job title of the position for which Catalina was hired establishes as a matter of law that it was separate and distinct and therefore not covered by the letter of retention. An employer's decision to hire a placement agency's candidate at a lower salary and for a different position than that for which he or she was referred does not defeat the agency's right to recover under an enforceable fee arrangement (*see Arrow Empl. Agency*, 185 Misc 2d at 812; *Robert Half Personnel Agencies v Certified Mgt. Corp.*, 102 Misc 2d 317 [App Term, 1st Dept 1979]). The rule should be no different for a candidate hired at a higher salary, especially when the difference between the position described by the placement agreement and the position for which the second candidate was hired, besides the higher salary, is the addition of the word "Senior" to the job title. To the extent this Court's decision in *Maysek & Moran v Warburg & Co.* (284 AD2d 203 [2001]) seems to indicate that a placement agency is only entitled to its fee when the job for which its candidate was hired exactly matches the level of the job recited in the retainer agreement, it cites no supporting authority, is contrary to the body of case law and legal principles otherwise applicable to the situation, and yet lacks any discussion or acknowledgment of those cases or principles, and I would not follow it.

Koren was retained to find candidates for the position of "Director, Corporate Accounting." The position SMC hired Papa to fill was "Senior Manager, Reporting and Consolidation," while the subsequent position filled was "Senior Director, Corporate Accounting and Assistant Controller." These facts simply do not permit any conclusion as to whether the position for which Catalina was hired was close enough to that contemplated by the parties' agreement as to require SMC to cover Koren's fee for that placement. Nor does SMC's assertion that Papa's position paid $150,000 while Catalina's job paid $200,000.

I do not suggest that an employer's obligation to the placement firm would continue in perpetuity. But, in the absence of contractual provisions clarifying the parties' respective rights and obligations in relation to those proposed candidates who were not initially hired, the employer who hires a second of the proposed candidates should not be permitted to avoid any liability to pay a fee to the placement firm for that second candidate by relying on the theory that the contract expired upon the completed hiring of one candidate for the single position discussed in the placement contract. Rather, a variety of facts should be considered, including the lapse of time, the nature of the subsequent position, and whether the employer used candidate information it received previously from the placement firm. The

facts presented in the present case necessitate fact-finding as to some of these factors, precluding summary judgment.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3617-
3618-
3619 EchoStar Satellite L.L.C., Index 600282/08
Plaintiff-Appellant,

-against-

ESPN, Inc., et al.,
Defendants-Respondents.

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Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel) for appellant.

Weil, Gotshal & Manges LLP, New York (David L. Yohai of counsel), for respondents.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 12, 2010, dismissing the complaint, and bringing up for review an order, same court and J.H.O., entered March 23, 2010, which, inter alia, denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to vacate the grant of summary judgment to defendants, and to direct that the motion be denied, and otherwise affirmed, without costs. Appeal from the March 23, 2010 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and J.H.O., entered April 21, 2009, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment on the liability portion

of their counterclaim for interest owed as a result of plaintiff's untimely payments under the agreements, unanimously affirmed, without costs.

This dispute centers around a series of three substantially similar licensing agreements, effective September 2005, between plaintiff EchoStar Satellite, LLC, on the one hand, and certain subsidiaries of the Walt Disney Company (Disney[1]), on the other. EchoStar, which operates a direct broadcast satellite system under the trade name "DISH Network," broadcasts television programming that it licenses from content providers such as Disney. One of the contracts authorized EchoStar to transmit the Disney Channel, Toon Disney and SOAPnet, programming created by defendants ABC Cable Networks Group, Inc. and SOAPnet, LLC. Another contract licensed to EchoStar the right to broadcast ABC Family, a network owned by defendant International Family Entertainment, Inc. A third agreement governed EchoStar's right to transmit ESPN and ESPN2 in both standard and high definition, as well as ESPNEWS, ESPNU, ESPN Classic and ESPN Deportes, all of which are operated by defendants ESPN, Inc. and ESPN Classic, Inc.

[1] Although Disney is not named as a defendant, the individual defendants are referred to collectively herein as "Disney."

EchoStar claims that Disney breached the agreements by refusing to provide to EchoStar the high definition version of programming carried by the networks named in the agreements. However, inasmuch as the ESPN agreement expressly provided that EchoStar would be furnished the high definition versions of programming offered on ESPN and ESPN2, there is evidence that during the parties' negotiations Disney's attempts to exclude future high definition programs were rejected by EchoStar, and there is further evidence that other television providers may receive high definition programming from Disney at no additional cost, we are unable to conclude, as a matter of law, that the contracts were unambiguous as to the parties' intentions with regard to future high definition programming.

Likewise, EchoStar's contention that the contracts unambiguously provide that it bargained for and obtained the right to distribute all of the high definition "feeds" of the licensed networks is also unpersuasive, if for no other reason than that the word "feed" is not defined in the contract, and in the context presented, is not readily susceptible to one meaning. Further, while Schedule A of the ESPN agreement does not contain a separate rate card for high definition programming, paragraph 6(f) of the same agreement does contain a "Technical Provisionary Surcharge" for at least the initial year of the agreement, and

thus we leave to the factfinder the import of the paragraph in relation to EchoStar's contention that it was entitled to future high definition programming at no additional cost.

Further, there is ambiguity in the "Most-Favored Nations" clause of the ESPN agreement, which provides that Disney will not give competing distributors a lower "Net Effective Rate" than EchoStar's based on rates reduced by, inter alia, "in-kind consideration." A factfinder could reasonably conclude that the high definition networks that Disney provided to EchoStar's competitors for no additional charge constituted "in-kind consideration" within the meaning of the clause.

As is relevant to Disney's counterclaims, each of the agreements requires EchoStar to pay licensing and other fees within 30 days after a defined reporting period, in addition to a 15-day grace period. The agreements uniformly provide that "[a]ny amounts not paid by EchoStar within forty-five (45) days following the end of the Reporting Period for which such amounts are due shall accrue interest at the rate of one and one-half percent (1 ½%) per month or at the highest lawful rate, whichever shall be the lesser, compounded monthly from the date such amounts were due until they are paid." Each agreement also contains a clause stating that the agreements "cannot be changed or terminated orally and no waiver by either EchoStar or

[defendants] of any breach of any provision hereof shall be or be deemed to be a waiver of any preceding or subsequent breach of the same or any other provision" of the agreements.

EchoStar readily admits that it never made its fee payments within the 45-day maximum time allowable by the agreements. Rather, it made payments, on average, within 75 days of their due date. Disney accepted these payments, none of which included accrued interest, without protesting their lateness. Indeed, as EchoStar points out, Disney employees praised EchoStar employees when they sped up payments in response to the formers' requests. Disney never mentioned EchoStar's interest obligation until sometime after October 31, 2005, in response to a claim by EchoStar that Disney had breached the "most favorable nation" provision in the ESPN agreement. In a letter to a senior EchoStar executive refuting that claim, Disney's Vice President for National Accounts observed that EchoStar had been significantly delinquent in its monthly payments, and stated that if EchoStar continued to pay beyond the 45-day deadline, Disney "will begin imposing interest as outlined in . . . the Agreement."

In January and February 2006, ESPN's senior director of accounting sent letters to EchoStar's controller formally demanding payment of outstanding interest for the October and

November 2005 payments, which had accrued pursuant to the ESPN agreement. Despite the letters, EchoStar continued to make payments late and without remitting interest on the late payments, and Disney continued to negotiate EchoStar's checks without protest. On four separate occasions, once in 2007, and three times in early 2008, EchoStar submitted payment to a Disney lockbox designated for payment, with an accompanying letter stating that the checks enclosed were "as full and final payment of all outstanding amounts owed by" EchoStar to Disney.

In January 2008, EchoStar commenced this action, alleging in its complaint that Disney breached each of the three agreements by demanding payment from EchoStar for the right to broadcast each of the licensed networks in high definition. In its answer, Disney asserted a counterclaim for any and all interest which had accrued over the life of each agreement as a result of EchoStar's failure to make timely payments thereunder. In its reply to the counterclaim, EchoStar asserted, inter alia, the affirmative defenses of accord and satisfaction, estoppel, and waiver, as well as a defense that the parties modified the interest provisions of the agreements through a course of conduct.

Disney moved for summary judgment on its counterclaim, contending that it engaged in no conduct which manifested a knowing intention to relinquish its right to collect interest

from EchoStar. Supreme Court granted the motion (it simultaneously denied EchoStar's motion for summary judgment dismissing the counterclaim). The court first found that the four letters stating that the enclosed checks represented "full and final payment of all outstanding amounts owed" did not constitute an accord and satisfaction because they did not expressly condition payment on Disney's relinquishment of any right to collect other amounts owed. The court separately identified, but did not individually analyze, each of the three other main defenses relied on by EchoStar, that is, waiver, estoppel and modification by contract. Rather, it combined them into a discussion of waiver. Relying on the doctrine that "a waiver is not to be lightly presumed," the court found that EchoStar had not "attributed any conduct of the defendants that caused EchoStar to believe that [Disney] would not seek the interest payments to which [it was] contractually entitled."

As the motion court correctly observed, it is axiomatic that waiver "is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). Such intention "'must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act'" (*Navillus Tile v Turner Constr. Co.*, 2 AD3d 209, 211 [2003], quoting *Orange Steel Erectors v Newburgh*

Steel Prods., Inc., 225 AD2d 1010, 1012 [1996]). Here, EchoStar tethers its waiver argument to the fact that Disney never made concerted efforts to collect interest despite its unquestionable right to do so in light of the former's repeated late payments of licensing fees. However, Disney's failure to press for interest amounts to mere silence or inaction, which are insufficient to establish an intent to waive a known right (*see Courtney-Clarke v Rizzoli Intl. Pubs.*, 251 AD2d 13 [1998]). EchoStar points to no affirmative action on Disney's part from which one can infer that Disney surrendered its contractual right to demand interest. To the contrary, Disney reaffirmed to EchoStar its entitlement to interest in a letter written to a top EchoStar executive less than one year after the agreements became effective. Also, there was no requirement in the agreements that EchoStar calculate and include interest in its periodic remittances. The agreements merely provide that interest on late payments shall accrue at a stated rate. Thus, Disney's acceptance of checks without interest included is of no moment. Moreover, the agreements do not provide any timeframe within which Disney was required to press a claim for accrued interest.

Merely because Disney accepted late payments does not mean it waived the right to collect interest. That was a right reserved to it in agreements negotiated between both parties,

each of which had equal bargaining power, presumably so that, in the event EchoStar did pay late, it would not gain a windfall by enjoying whatever return on investment could otherwise have been realized by Disney. EchoStar, a sophisticated party if ever there was one, could not have been surprised by Disney's counterclaim for interest. To the contrary, it would have been naive for it to have expected that Disney would not seek compensation through interest for the loss of use of the funds.

It is this distinction between Disney's *choice* to allow late payments and its *right* to collect interest that renders inapposite the cases cited by EchoStar. For example, in *Snide v Larrow* (93 AD2d 959 [1983], *affd* 62 NY2d 633 [1984]), the plaintiffs, seeking to foreclose on the home they sold to the defendants, were found to have waived their right to declare the defendants in default based on late payment where they were found to have accepted late payments over an extended period of time. There is no discussion in that case of whether the plaintiff was entitled to collect interest. Similarly, in *Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC* (30 AD3d 1 [2006], *affd* 8 NY3d 59 [2006]), the issue was whether the defendant breached its lease by failing to make timely rent payments, a default which would have triggered the obligations of an individual guarantor. This Court only considered whether the

landlord waived its right to demand timely payment by repeatedly accepting late payment. Again, here, it is irrelevant whether Disney waived its right to demand timely payment. Rather, the question is whether it relinquished its right to demand interest, which none of EchoStar's cited cases answers.

We also reject EchoStar's contention that Disney modified the agreements by failing to enforce the interest provisions upon the receipt of each late payment. Even if Disney's conduct could have altered the contracts despite the clauses stating that the agreements "cannot be changed or terminated orally," Disney's conduct of accepting late fee payments is, again, not indicative of an intention to relinquish the right to collect interest accruing as a consequence of the late payments.

Nor does EchoStar have a credible defense of equitable estoppel. A party will be estopped from invoking a contractual right where estoppel would

> "in the interest of fairness . . . prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106 [2006] [internal quotation marks and citations omitted]).

As discussed above, EchoStar was not justified in relying on its

perception that Disney had decided not to enforce the interest provisions, because nothing about Disney's conduct permitted such an inference. Further, there was nothing misleading about Disney's failure to demand interest each time EchoStar submitted a late payment. In addition, EchoStar's claim that it would have submitted payments earlier had it known of Disney's intention to seek interest falls short, since it also contends that the process of calculating the monthly payments (which it agreed to do) was time consuming and difficult to complete in the time allotted by the agreements. EchoStar's contention that it suffered an injustice because of Disney's conduct in condoning late payment is equally unavailing, considering that the alleged injustice was its having to honor an obligation negotiated into the agreements at arms length.

Finally, there was no accord and satisfaction. As EchoStar acknowledges, the amount in obligation must be *in dispute* before an accord and satisfaction may extinguish a debt. Here, that was not the case. While Disney made some efforts to remind EchoStar of its obligation to pay interest, there is no evidence that EchoStar ever communicated to Disney its belief that under the circumstances it did not owe interest. Thus, Disney could not have known when it accepted the fee payments that EchoStar was conditioning such acceptance on a relinquishment of any future

interest claim. In the cases cited by EchoStar, *Sarbin v Southwest Media Corp.* (179 AD2d 567 [1992]), *Hondares v TSS-Seedman's Stores* (151 AD2d 411 [1989]) and *Hirsch v Berger Import & Mfg. Corp.* (67 AD2d 30 [1979]), there was a bona fide, ongoing disagreement between the parties, each of which was aware of the other's position. In this case, EchoStar's Senior Vice President testified that, after Disney demanded interest in January and February 2006, "[w]e never saw another word on this [interest issue] again."

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

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3623 Marsha Zimbler, etc., et al., Index 150016/06
Plaintiffs-Respondents,

-against-

Resnick 72nd St Associates, etc.,
Defendant,

The Board of Managers of the
Oxford on Seventy Second, et al.,
Defendants-Appellants.

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for The Board of Managers of the Oxford on Seventy Second and Brown Harris Stevens Residential Management, LLC, appellants.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for The Fitness Company, appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 12, 2010, insofar as it denied the motions of defendants The Board of Managers of the Oxford on Seventy Second and Brown Harris Stevens Residential Management, LLC and defendant The Fitness Company for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The infant plaintiff was injured when a sliding glass door leading from an outdoor playground to the fitness club lounge fell on her as she attempted to open it. Plaintiff, who had used

a different door to get from the lounge to the playground, testified at her deposition that when she tried to slide open the door that was not on the track, the top part started to fall on her. The building superintendent testified at his deposition that he arrived at the scene within minutes of the accident and was told by the infant plaintiff's nanny that the door was out of its track. In a second conversation, after the infant plaintiff was taken out by emergency medical personnel, the nanny told the superintendent that the door was outside its frame and had been in that position from the time she and the infant plaintiff entered the premises, maybe an hour or two before the accident.

In opposition to defendants' prima facie showing of entitlement to summary judgment, plaintiffs produced sufficient evidence to raise a material issue of fact as to whether the door's off-track position was discernable for a long enough time to provide defendants with constructive notice of the dangerous condition (*see e.g. Rose v Da Ecib USA*, 259 AD2d 258, 260 [1999]). Although the nanny's statements were not admissible under the excited utterance exception to the hearsay rule since there was no showing that they were made under the stress of excitement caused by the accident (*see Lieb v County of Westchester*, 176 AD2d 704 [1991]; *Pector v County of Suffolk*, 259 AD2d 605 [1999]; *compare Gagliardi v American Suzuki Motor Corp.*,

303 AD2d 718 [2003], *lv denied* 100 NY2d 515 [2003]), they were not the only evidence offered in opposition to defendants' motions from which constructive notice may be inferred, and thus may be considered along with the admissible evidence (*see DiGiantomasso v City of New York*, 55 AD3d 502 [2008]; *Matter of New York City Asbestos Litig.*, 7 AD3d 285, 286 [2004]; *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1999]).

Although it was not addressed by the motion court, we note that the doctrine of res ipsa loquitur is not applicable to the facts here, where the door, located in a heavily trafficked area and intended to be used by the public, was not within the exclusive control of defendants (*see Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3951 The People of the State of New York, Ind. 2632/04
Respondent,

-against-

Bernard Hinson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered January 22, 2008, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the delay of certain witnesses in coming forward with incriminating information.

The court properly exercised its discretion in admitting evidence of an uncharged crime, consisting of testimony that immediately after defendant shot the victim, he pointed the

pistol at the victim's brother and squeezed the trigger, resulting in an apparent misfire. This testimony completed the victim's brother's narrative of the events, and the uncharged crime was inextricably interwoven with the charged murder (*see People v Gines*, 36 NY2d 932 [1975]). Among other things, this evidence was particularly relevant because of its relationship to other evidence that circumstantially connected defendant to a jammed pistol with a round lodged in its chamber. The probative value of this evidence far outweighed any prejudice.

Defendant's claim that the court erred in granting the prosecutor's challenges for cause to two prospective jurors is foreclosed because the prosecutor did not exhaust her peremptory challenges (*see* CPL 270.20[2]), and defendant's argument to the contrary is without merit. In any event, the court's rulings on the challenges were proper exercises of discretion.

The court properly exercised its discretion when it denied defendant's mistrial motion, made after a witness referred to a photographic identification. This evidence was not harmful to

defendant, who had already introduced similar evidence, and in any event the court's curative actions were sufficient to prevent any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Richter, Manzanet-Daniels, JJ.

3952 Peggy Prato, Index 302841/09
Plaintiff-Respondent,

-against-

Sarah Arzt, D.O., et al.,
Defendants,

Sterling Alexander, M.D.,
Defendant-Appellant.

_____

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

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered August 21, 2009, which denied defendant Alexander's motion to change venue, unanimously affirmed, without costs.

Defendant seeks to avoid the result of failing to move for a change of venue within 15 days after serving his demand (CPLR 511[b]), and failing to offer a reason for the delay, by asserting that plaintiff engaged in duplicitous conduct. However, nowhere in his motion did defendant allege that plaintiff made "misleading statements as to [her] actual residence" (*Pittman v Maher*, 202 AD2d 172, 174 [1994] [internal quotation marks and citation omitted]). The record circumstances do not establish any impropriety by plaintiff. Thus, the untimeliness of defendant's motion is fatal to the motion (*see*

id. at 175; *Rosenthal v Bologna*, 211 AD2d 436, 437 [1995]).

Defendant's argument that the court improperly declined to reject plaintiff's opposition to his motion as untimely pursuant to CPLR 2214(b) is misguided. The issue was addressed and resolved by the motion court, which granted defendant's request for an opportunity to file a reply. More importantly, defendant has not shown that he suffered any prejudice as a result of the court's acceptance of plaintiff's late opposition papers (*see Dinnocenzo v Jordache Enters.*, 213 AD2d 219 [1995]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3953 In re Joseph R.,

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

_____

Michael S. Bromberg, Sag Harbor, for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 22, 2009, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed the act of unlawful possession of a weapon by a person under 16, and also committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the fourth degree, and placed him on probation for 12 months, unanimously affirmed, without costs.

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

a bag from a friend, appellant actually knew there was a firearm in the bag (*see generally People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]), and that he took possession of it for the purpose of hiding it. Appellant's claim of temporary innocent possession is without merit (*see People v Sheehan*, 41 AD3d 335 [2007], *lv denied* 9 NY3d 993 [2007]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3954 Jesse Vazquez, etc., Index 6893/07
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin P.C., New York (Miriam Skolnik of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 12, 2009, which denied defendant's motion to compel disclosure and granted plaintiff's cross motion for a protective order, unanimously affirmed, without costs.

The motion court properly declined to compel the disclosure of plaintiff's siblings' medical and academic records since defendant "fail[ed] to offer any expert evidence establishing a particularized need for inquiry into such matters not placed at issue by the complaint" (*Mendez v Equities By Marcy*, 24 AD3d 138, 138 [2005]). Nothing more than speculation supports defendant's assertion that the mental condition of the siblings has any bearing on plaintiff's condition, particularly since plaintiff's claim is that the exposure to lead exacerbated his pervasive developmental disorder (PDD), not that it actually caused the

PDD. Defendant submitted an affidavit by an expert who stated that the requested records would assist him in addressing plaintiff's condition, but never addressed the affidavit by plaintiff's expert, who rebutted defendant's expert's affidavit in detail and stated that plaintiff's medical and academic records from before his alleged exposure to lead were "more than adequate" for the purpose of drawing diagnostic and prognostic conclusions concerning plaintiff's condition after the alleged lead paint exposure.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3956 The People of the State of New York, Ind. 4749/07
Respondent,

-against-

Raheem Campbell,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 5, 2009, convicting defendant, after a jury trial, of attempted gang assault in the first degree and assault in the second degree, and sentencing him to concurrent terms of 4 years and 3 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the conviction for second-degree assault to third-degree assault and reducing the sentence on that conviction only to time served, and otherwise affirmed.

The verdict convicting defendant of attempted gang assault in the first degree was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence

showed that defendant and three other men repeatedly punched and kicked the victim as he lay on the ground.

However, the evidence did not establish defendant's guilt of second-degree assault based on the use of a dangerous instrument, charged under an acting-in-concert theory. There was no claim that defendant personally used a knife, and there was no evidence even to suggest that defendant was aware that one of the other attackers used a knife. The use of the knife was not open and obvious.

We reach defendant's unpreserved sufficiency claim in the interest of justice, and reduce the conviction to third-degree assault. In view of that determination, we find it unnecessary to reach defendant's other claim relating to the second-degree assault conviction.

Defendant failed to preserve his arguments regarding the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis

for reversal, since the court's charge was sufficient to prevent the challenged remarks from causing any prejudice. We have considered and rejected defendant's related claim of ineffective assistance of counsel.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3957 The People of the State of New York, Ind. 4650/09
Respondent,

-against-

Bobby Weekfall,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey 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 (Thomas Farber, J.), rendered on or about February 9, 2010,

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 28, 2010

CLERK

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

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3961 The People of the State of New York, Ind. 7874/98
Respondent,

-against-

Odell Clifton,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about January 28, 2010,

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 28, 2010

CLERK

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

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3963 Dominic Florio, et al., Index 105178/07
Plaintiffs-Respondents,

-against-

Arnold Kosimar,
Defendant-Appellant,

Norman A. Petti, et al.,
Defendants.

_____

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for appellant.

Meagher & Meagher, P.C., White Plains (Jeremy D. Barberi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan B. Carey, J.), entered on or about December 22, 2009, which, insofar as appealed from, as limited by the briefs, denied defendant Arnold Kosimar's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

In this medical and dental malpractice action, the motion court properly denied defendant's motion for summary judgment. To sustain a cause of action for medical malpractice, a plaintiff must prove a deviation or departure from accepted practice and that such departure was a proximate cause of plaintiff's injury (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). Here, the conflicting expert affidavits raise issues of fact as to

whether defendant departed from accepted practice by, inter alia, failing to perform other testing before ruling out an infection. Although defendant claimed that his duty of care to plaintiff was limited to determining whether plaintiff's swelling might compromise his airway, issues remain as to whether the duty expanded past the immediacy of the consultation (*see Cregan v Sachs*, 65 AD3d 101, 109-110 [2009]). The conflicting affidavits likewise raise a triable issue as to whether the departures were a proximate cause of plaintiff's infection. His experts opined that the infection had been present since the placement of the implants, that plaintiff's swelling in the vicinity of a recent operative site was a symptom of the infection, and that an earlier diagnosis of the infection would have minimized the risk of systemic infection (*see Alvarado v Miles*, 32 AD3d 255 [2006], *affd* 9 NY3d 902 [2007]).

We reject defendant's argument that plaintiff's experts are unqualified and that their opinions are speculative *(see Farkas v Saary*, 191 AD2d 178 [1993]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3964-
3964A The People of the State of New York, Ind. 690/05
Respondent,

-against-

Rudy Fleming,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 11, 2006, convicting defendant, after a jury trial, of murder in the first degree, two counts of robbery in the first degree (two counts), attempted robbery in the first degree (four counts), attempted robbery in the second degree, and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of life without parole, and, order, same court and Justice, entered on or about May 27, 2009, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied defendant's CPL 440.10 motion, without conducting a hearing or appointing a defense psychiatric expert. Citing evidence that after he began serving his sentence

he was diagnosed as psychotic and treated accordingly, defendant argues that further inquiry is necessary regarding whether he was incompetent to stand trial. Before trial, and after the testimony of two psychiatrists at a thorough hearing, the court made a competency determination that defendant does not challenge. There was extensive evidence that defendant, even if psychiatrically ill, was deliberately exaggerating his illness and feigning the type of symptoms that might suggest an inability to understand the proceedings and assist in his defense. In addition, after the verdict, the court granted defense counsel's request for another psychiatric examination, and that examination again concluded that defendant was competent and was malingering and reporting grossly exaggerated and improbable symptoms. Furthermore, a psychiatric expert was appointed to assist the defense before and during trial and in connection with sentencing, but did not submit a report or testify for defendant. Accordingly, the court properly concluded that defendant's submissions on the motion were insufficient to raise an issue as to whether defendant was incompetent at the time of trial (*see People v Gelikkaya,* 84 NY2d 456, 459-460 [1994]). Nor did defendant demonstrate any need for assignment of a psychiatric expert to assist in presenting the motion (*see People v Dearstyne*, 305 AD2d 850, 852-853 [2003], *lv denied* 100 NY2d 593

[2003]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the employment-based reason provided by the prosecutor for the challenge to one potential juror was nondiscriminatory (*see People v Funches*, 4 AD3d 206, 207 [2004], *lv denied* 4 NY3d 798 [2005]; *People v Wint*, 237 AD2d 195, 197-198 [1997], *lv denied* 89 NY2d 1103 [1997]). The record also supports the court's acceptance of the prosecutor's explanation that he challenged two other panelists based on nondiscriminatory concerns that family members' experiences with police officers may have engendered negative or distrustful attitudes toward law enforcement (*see People v Fowler*, 45 AD3d 1372, 1373 [2007], *lv denied* 9 NY3d 1033 [2008]) and that the demeanor of one of these panelists was inappropriate (*see Thaler v Haynes*, 559 US__, __, 130 S Ct 1171, 1174-1175 [2010]). The court's determination that the prosecutor's reasons for challenging those three jurors were nonpretextual is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). We do not find any disparate treatment by the prosecutor of similarly situated panelists.

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

NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. There was ample evidence of defendant's homicidal intent, including, among other things, his statement after the crime to a testifying accomplice.

We perceive no basis for reducing the sentence as excessive. Defendant's remaining challenges to his sentence are without merit.

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3965 Renee Eliasberg, Index 112080/07
Plaintiff-Respondent,

-against-

Memorial Sloan-Kettering Cancer Center, et al.,
Defendants,

MacKenzie Group, Inc.,
Defendant-Appellant.

_____

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

Hach & Rose LLP, New York (Philip S. Abate of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 23, 2010, which, to the extent appealed from, denied defendant MacKenzie Group, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendant MacKenzie Group, Inc.

Defendant established that it did not have a service contract with the building manager, defendant Milford Management Corp.; that Milford was responsible for control and inspection of the sliding doors that caused plaintiff's injuries; that defendant performed work on the sliding doors on an as needed

basis as determined by Milford; that it did not displace Milford's duty to maintain the doors in a safe condition; and that the record contains no evidence that it created an unreasonable risk of harm or increased a risk of harm on those occasions when it made repairs to the doors (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). In its last service call before the accident, defendant repaired the doors' track, not the sensors, which apparently caused the doors to close before plaintiff had passed between them. Although defendant had installed those sensors, there is no evidence that there were any problems with them. Neither plaintiff, who had visited the building many times before the accident, nor Milford, whose employees inspected the doors by walking through them, was aware of any malfunctions of the sensors between the date of the installation and the date of plaintiff's accident.

Plaintiff's expert failed to provide an evidentiary foundation for his conclusion that defendant failed to properly and timely repair, maintain and inspect the sliding doors (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). In essence, the expert's opinion that defendant created a dangerous condition by improperly setting the sensors when it installed them was based on the fact that the accident happened.

Nor did plaintiff raise an issue of fact as to the

applicability of the doctrine of res ipsa loquitur to this case, since the record demonstrates conclusively that the doors and sensors were not within defendant's exclusive control (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3966N WHG CS, LLC, et al., Index 650788/10
Plaintiffs-Appellants,

-against-

LSREF Summer REO Trust 2009, et al.,
Defendants-Respondents.

_____

Haynes and Boone, LLP, New York (Louis M. Solomon of counsel), for appellants.

Allen & Overy LLP, New York (Jacob S. Pultman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered August 2, 2010, which denied plaintiffs' motion for a preliminary injunction and vacated a temporary restraining order, unanimously affirmed, with costs.

In this commercial financing dispute between different classes of lender, plaintiff WHG CS, LLC (WHG), a junior lender, seeks to compel defendant LSREF Summer REO Trust 2009, the debt servicer and a senior lender, to extend the maturity date of a $125,500,000 loan (the Mortgage Loan) that was set to expire on July 9, 2010, to avoid the declaration of a default and foreclosure of the properties that secure the loan. Plaintiff WHG SUB CS, LLC (WHG Mezz) seeks recognition of its right to extend the maturity date of the Mortgage Loan under a related mezzanine loan by stepping into the shoes of the Mortgage Loan

borrower, to avoid foreclosure of the Mortgage Loan.

Plaintiffs failed to establish that they are likely to succeed on the merits, that they will suffer irreparable injury if an injunction is not granted, and that the balance of equities is in their favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). They claim that WHG is entitled to unilaterally direct the servicer of the loan to waive a condition precedent to extending the maturity date. However, while the Participation and Servicing Agreement requires the servicer to obtain the written consent of the "Controlling Holder" (WHG) to 29 enumerated actions, including "waiver of any of the extension conditions set forth in the Mortgage Loan Agreement," it does not require consent to denial of a waiver.

Plaintiffs claim that WHG Mezz is entitled to foreclose on the Mezz Loan, step into the borrower's shoes, and extend the maturity date of the Mortgage Loan. They are correct that the court's finding that WHG Mezz could no longer foreclose on the Mezz Loan to cure the breach of the maturity date because the date had passed failed to recognize that the TRO had expressly tolled the running of the time for WHG Mezz to exercise its right to extend the maturity date. However, the Intercreditor Agreement, which provides WHG Mezz with the opportunity to cure a default in the Mortgage Loan, is ambiguous as to whether the

particular default at issue here, i.e., a default of the maturity date, may be cured by an extension of the maturity date, which must have passed for a default to have occurred, or must be cured by payment of the outstanding principal balance of the loan. Thus, it cannot be determined whether plaintiffs are likely to succeed on this claim.

Plaintiffs failed to establish irreparable injury, since they can be compensated by money damages (*see GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586 [2009]).

Finally, plaintiffs failed to establish that the balance of the equities is in their favor (*see Credit Index v RiskWise Intl.*, 282 AD2d 246 [2001]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1944 In re Terrace Court, LLC, Index 100449/08
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.
- - - - - -
Robert Katel, et al.,
Intervenors-Respondents.

_____

Wenig Saltiel LLP, Brooklyn (Meryl L. Wenig of counsel), for appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for DHCR, respondent.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for intervenors-respondents.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered August 7, 2008, denying the petition to annul respondent's determination, dated November 15, 2007, which denied a major capital improvement (MCI) rent increase for five apartments in petitioner's building, and dismissing the proceeding brought pursuant to CPLR article 78, affirmed, without costs.

In May 2004, petitioner applied to the Division of Housing and Community Renewal (DHCR) for an MCI increase after performing work on the outside of the building that included pointing,

waterproofing and masonry. Petitioner sought a monthly increase of $42.58 per room based on a claimed project cost of $1,207,853. Shortly after petitioner filed the application, three tenants objected to it, claiming that water continued to infiltrate into their apartments. The Tenants' Association also opposed the application. It submitted to DHCR the affidavits of several tenants who claimed that they continued to experience leaks in their apartments in the areas where petitioner had performed pointing work. The Association's submission focused on apartments 6F, 7F, 8F, 9F, 5B and 8A.

The Association also proffered the affidavit of an architect who had inspected the work on the Association's behalf. The architect opined that petitioner's contractor had actually done less work than petitioner claimed it had done in the rent increase application. In a supplemental affidavit, the architect averred that the leaks inside the apartments to which he was given access were consistent with water infiltrating from the outside of the building, as opposed to from the building's plumbing. The Association submitted additional statements from the architect in which he noted that water continued to infiltrate the building as late as February 2005. Finally, the Association submitted a violation report from the Department of Buildings, dated December 2004, which cited petitioner for

allowing interior water damage in apartments 6F, 7F, 8F, and 9F, and for incomplete pointing of the building's facade.

Petitioner attempted to rebut the Association's submissions by stating that it had addressed any leaks inside the complaining tenants' apartments. However, it adhered to its position that its contractor had performed the pointing work properly. Petitioner offered its own architect's reports, which disputed the tenants' architect's findings. Petitioner also pointed out that the Buildings Department violation had been dismissed, and stated the problem was because one of the "F"-line tenants had caused a leak.

In September 2005, DHCR sent an inspector to the building. A representative of petitioner accompanied the inspector as he examined the conditions of apartments 6F, 7F, 8F, 5B and 8A (access to apartment 9F was not available). According to his report, in each of the apartments the inspector observed walls in some state of disrepair, including staining, discoloration, blistering or cracking, or some combination of those conditions. Only in apartments 8A and 8F did the inspector detect actual wetness with his moisture meter. DHCR did not share its inspector's report with petitioner.

On December 19, 2005, DHCR issued an order granting petitioner's application to the extent of increasing the monthly

rent by $40.20 per room. However, the order permanently exempted apartments 8A, 5B, 6F, 7F and 8F from the increase, based on the complaints of those tenants that leaks persisted in the apartments, as confirmed by the DHCR inspector's report. Petitioner filed a petition for administrative review (PAR) which challenged DHCR's conclusion that a moisture problem persisted in the subject apartments after the pointing work was completed. Petitioner also contended in the PAR that DHCR exceeded its authority by permanently exempting apartments 8A, 5B, 6F, 7F and 8F from the rent increase, rather than giving petitioner an opportunity to cure whatever defects persisted.

DHCR denied the PAR, finding that "the state of the apartments at the time of the inspection warranted the exemption ordered by the Rent Administrator." DHCR further found that the permanent exemption was appropriate, considering that the conditions found in the apartments "existed in the apartments when work was completed just prior to the owner's filing of the application for an MCI rent increase for pointing, masonry, etc. . . ."

Petitioner commenced this article 78 proceeding. It asserted in its petition that DHCR's permanent exemption of the five apartments exceeded the agency's regulatory authority and was arbitrary and capricious. It also argued that its due

process rights were violated by DHCR's failure to serve it with a copy of the inspector's report. After granting a motion by the tenants of the five apartments to intervene, Supreme Court denied the petition and dismissed the proceeding. The court held that, because the inspector's report merely confirmed the tenants' allegations that water continued to infiltrate the building after the completion of the work, no due process violation occurred as a result of DHCR's failure to provide petitioner with a copy of it. The court further held that DHCR did not abuse its discretion in ruling that an exemption was appropriate for the five apartments. That conclusion was based on the existence of the inspection report, as well as the other submissions of the parties. In addition, the court held that granting a permanent exemption was proper and did not constitute an unwarranted penalty, since petitioner was not precluded from seeking rent increases for other MCI work performed on the subject apartments.

Supreme Court did not abuse its discretion. The record before it and the agency contained much more than just the DHCR inspection report to which petitioner objects. Well before the inspection was conducted, the tenants submitted complaints indicating the pointing work was not performed properly, as well as multiple reports from an expert who stated that the damage in the tenants' apartments was directly related to inadequate

waterproofing of the building facade. Thus, even without the inspection report, the record contained sufficient evidence warranting the disallowance of a rent increase for the five apartments (*see Matter of Cenpark Realty Co. v New York State Div. of Hous. & Community Renewal*, 257 AD2d 543 [1999]).

In any event, the inspection report was properly considered, despite the fact that it was based on an inspection performed 16 months after the work was completed (*see Matter of Whitehouse Estates v New York State Div. of Hous. & Community Renewal*, 5 AD3d 190, 190 [2004] [holding that DHCR determination was "rationally supported" by an inspection performed six years after work was performed]). Moreover, the inspection report merely confirmed the allegations previously made. Accordingly, no due process violation resulted from DHCR's failure to provide a copy of the report to petitioner prior to making its initial determination (*see Matter of Empress Manor Apts. v New York State Div. of Hous. & Community Renewal*, 147 AD2d 642 [1989]).

Further, DHCR did not abuse its discretion in permanently exempting the five apartments. Indeed, the agency is entitled to the same deference on that issue as it is on the issue of whether it properly ruled that some of the subject work was defective in the first place. Petitioner argues that the agency only had two options, to deny the rent increase completely, or to grant it

completely, after giving petitioner an opportunity to cure the problem that was permitting water to infiltrate the five apartments. However, petitioner fails to cite any relevant case law for that proposition. The recent case of *Matter of Langham Mansions, LLC v New York State Div. of Hous. & Community Renewal* (76 AD3d 855 [2010]), on which the dissent primarily relies to support its argument that petitioner here was entitled to an opportunity to cure, is inapposite. There, the majority held that DHCR acted irrationally by ignoring its own policy of "suspend[ing] a [MCI] rent increase for individual apartments until repairs of defects are completed (rather than revoking the increase)" *id.* at 858 [internal quotation marks and citations omitted]). However, that policy is irrelevant here, where DHCR did not revoke a rent increase already in place but rather declined to grant an increase in the first instance. The distinction is more than a "nuance," as it is characterized by the dissent. In the PAR discussed in *Langham Mansions*, and in *Langham Mansions* itself, the agency revoked a rent increase that had been granted years earlier. While the record contains no evidence of why DHCR adopted the policy against revocation, one can surmise that the policy was implemented to avoid the prejudice which would be visited on a landlord which relied in good faith, and for a lengthy period of time, on a rent increase,

only to later lose it. Such a concern would not exist in this case, where petitioner never enjoyed a rent increase. Accordingly, there was no reason for DHCR to consider the policy that applied in *Langham Mansions*.

In any event, the dissent's emphasis on the policy recognized by this Court in *Langham Mansions* bespeaks its fundamental misunderstanding of our position here. *Langham Mansions* does not compel us to reverse the decision in this case, because *Langham Mansions* cannot possibly be read to stand for the proposition that a landlord should be given an opportunity to cure defects regardless of the circumstances. In *Langham Mansions* itself, this Court specifically noted that any necessary repairs would be "minor," and that the inspection report noting defects in the new windows "fails to conclude that any of the windows inspected were installed defectively or in an unworkman-like manner" (76 AD3d at 859). Here, in contrast, and contrary to the dissent's reading of the record, there is no evidence that only minor work would be called for if the landlord were granted an opportunity to cure the defects. Indeed, there is no reason to believe that DHCR did not have enough evidence to conclude that significant re-pointing was necessary, especially because, as the dissent points out, the issue was "hotly contested." Moreover, unlike that in *Langham Mansions*, the inspection report

upon which DHCR relied in this case characterized at least one of the apartments as containing a water-damaged wall that was repaired "in an unworkmanlike manner." In any event, it is not this Court's role to revisit the facts that were before DHCR. To do so would be an improper encroachment on the agency's role in adjudicating MCI applications and would exceed the well accepted standard of review of administrative determinations (*see Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]).

The statutory and regulatory authority on which petitioner relies, Rent Stabilization Code (9 NYCRR) § 2522.4, and DHCR's Policy Statement 90-8, which interprets the Code section, are inapplicable. Section 2522.4(a)(13) states:

> "The DHCR shall not grant an owner's application for a rental adjustment pursuant to this subdivision, in whole or in part, if it is determined by the DHCR prior to the granting of approval to collect such adjustment that the owner is not maintaining all required services, or that there are current immediately hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services. However, as determined by the DHCR, such application may be granted upon condition that such services will be restored within a reasonable time, and certain tenant-caused violations may be excepted."

By its plain language, that section applies only to the situation where the owner is unquestionably entitled to a full MCI rent increase, but for the fact that the owner continues,

after the improvements are made, to allow an unrelated condition to persist which constitutes a deprivation of services or for which a violation remains open. Under those circumstances, the owner must be granted an opportunity to cure the unrelated condition before the otherwise fully-earned rent increase can be granted. Here, as the dissent acknowledges, there is no violation or deprivation of services that is unrelated to the work for which the rent increase is sought. Rather, the problem condition is related to the very work for which petitioner seeks a rent increase. Accordingly, 2522.4(a)(13) does not apply. Moreover, we decline to extend the reach of the section to cover the situation here, as that would usurp the power of DHCR, which is charged by the Legislature to promulgate the Code.

There is no evidence that DHCR has a specific policy never to deny a rent increase outright in the first instance, nor does petitioner present any evidence of such a policy. Petitioner does not even make this argument on this appeal, nor does it appear to have made it below. Indeed, the April 8, 2003 administrative order mentioned by the dissent appears to be one of two administrative orders in the record in which DHCR fashioned the remedy espoused by petitioner here. Two decisions do not reflect a "policy," but rather specific exercises of discretion by DHCR in particular cases that on their own do not

mandate similar action by the agency in this case. Further, the dissent does not allow for the possibility that whereas in those cases DHCR may have had ample reason to believe that the landlord would make (or had made) the necessary repairs in a diligent fashion, the agency in this case, based on the record before it, did not believe that petitioner intended in good faith to address the situation, especially after it vociferously denied the existence of a problem and then engaged in unsuccessful efforts to fix it.

Without any support for its position, the dissent states that the "proper relief" would be to grant a rent increase for the entire building on a conditional basis and that DHCR's determination to permanently exempt the five apartments was "irrational." However, again, it is not the role of the Judiciary to create new policies or craft new remedies in a particular area, especially where the Legislature has already delegated that task to an administrative agency. Moreover, where the agency acts rationally, it is entitled to great deference, even if a court would have come to a difference conclusion (*see Matter of Tolliver v Kelly*, 41 AD3d 156, 158 [2007], *lv denied* 9 NY3d 809 [2007]). Indeed, a court's opinion that a particular outcome is not fair or is not in the interests of justice is not sufficient to overcome the deference to be afforded an agency

acting rationally within its area of expertise (*see Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [2000]).

Here, contrary to the dissent's position, it was eminently reasonable for DHCR not to permit a rent increase for that portion of the work that was defective and so did not constitute "'an improvement to the building or to the building stock'" (*Matter of Garden Bay Manor Assoc. v New York State Div. of Hous. & Community Renewal*, 150 AD2d 378, 378 [1989], quoting Rasch, New York Landlord and Tenant, Rent Control and Rent Stabilization, Operational Bulletin No. 84-4, at 547, 549). The landlord has failed to carry its burden of establishing that DHCR acted irrationally when, after considering all of the facts before it, including the facts that most of the work was performed properly, but a distinct portion was not, it refused to give petitioner a "do-over" for that portion of the work which was defective. Accordingly, the agency's determination is entitled to our deference.

Contrary to the dissent's assertion nowhere do we express the view that "where this Court has found DHCR to have acted properly in denying a rent increase for work which it deemed defective, it has not required DHCR to afford petitioner an opportunity to go back and address the problems that led to the

denial." Our determination in this case is based on our view that there is no evidence that, on this record, DHCR abused its discretion in permanently exempting the subject apartments. This is not in contravention of *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal* (305 AD2d 207, 208 [2003]), which was determined on its own facts and does not support the dissent's advocacy for a one-size-fits-all solution in cases of deficient MCI work.

Finally, the dissent sees the agency's determination as conferring a windfall on the exempted apartment owners and working a forfeiture on the landlord. That might have been the case if DHCR had no rational basis for ruling the way it did. But it had such a basis, and so it is simply not for this Court to pass judgment on the fairness of the result.

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

NARDELLI, J. (dissenting)

I respectfully dissent, since I do not believe there is any rational basis for the determination by the Division of Housing and Community Renewal (DHCR) to exempt, permanently, the five apartments from the MCI rent increase which was awarded to petitioner-landlord, and which is already being borne by the other tenants in the building. The agency's determination works a forfeiture on the landlord by requiring it to improve the apartments while depriving it in perpetuity of the right to subsequent compensation for the cost of that work once properly completed. Moreover, the agency's determination gratuitously bestows a windfall on the tenants of 5 of the 37 rent-stabilized apartments in the building by permitting them to escape any MCI increase based on an improvement to their units while forcing the other rent-stabilized tenants to pay their equitable share of the cost of such work. Since the improvement at issue is building-wide, there is no justification in having these five apartments remain exempt from the increase once repairs are satisfactorily made.

Petitioner's landmarked building, located at 202 Riverside Drive, contains 91 apartments, 37 of which are rent regulated. Seeking to upgrade items that were more than 60 years old and obsolete, petitioner sought and obtained the approval of the

Landmarks Preservation Commission and the Buildings Department to do pointing work and replace masonry, lintels and parapets at a cost of $1,207,853, as the majority essentially concedes. The record contains copies of the canceled checks tendered by petitioner that clearly evidence payment for the work. The New York City Landmarks Preservation Commission has issued a Notice of Compliance signifying that the work had been completed satisfactorily.

DHCR's basis for denying the MCI increase was that there was moisture in the five apartments after the work was completed, and that it may be inferred that the moisture resulted from the work. Even if, for the sake of argument, the claim is accurate, a contention that petitioner strenuously challenges, DHCR's solution is inconsistent with its own prior determinations in which it exempted apartments such as these from the MCI increase only until such time as the necessary repairs are made. DHCR itself provides the evidence for such an approach since in its answer in Supreme Court it submitted a decision dated April 8, 2003, involving a building located at 2500 Johnson Avenue in the Bronx (Docket # KE610015RT) in which DHCR exempted apartments with moisture problems after exterior pointing work had been done, only "until such time as the owner satisfactorily corrects the problems."

Section 2522.4(a)(13) of the Rent Stabilization Code (9 NYCRR) provides, in pertinent part, that when "the owner is not maintaining all required services . . . [the] application [for an MCI increase] may be granted upon condition that such services will be restored within a reasonable time." DHCR Policy Statement 90-8 further provides,

> "Where there is a DHCR order in effect determining a failure to maintain services in an individual apartment(s), and an MCI rent is approved, the MCI order will be issued for the entire building granting the rent increase. However, until a restoration order is issued for the individual apartment(s), the owner is barred from collecting the prospective increase."

In this case, there had not even been a prior finding that petitioner was not providing services. Indeed, it appears that the tenants complained only after the MCI application for a rent increase was filed. They had otherwise not made any complaints to the appropriate authority concerning petitioner's failure to provide services. There is no evidence in the record that the moisture, such as it was, resulted from petitioner's prior neglect of the building. Rather, it appears to have resulted from petitioner's efforts to upgrade the building. In any event, nothing in the record supports any inference that further remedial work required "major" renovations, since the moisture apparently was not significant to the tenants until the landlord

sought a rent increase.

Thus, logic dictates that the proper relief would be to suspend any increases for the apartments in question until petitioner had been given an opportunity to cure the defects, but, once the defects were cured, to permit prospective (only) increases. Permanently barring petitioner from obtaining an increase, when other tenants are paying the surcharge, is irrational. Indeed, as this Court stated as recently as September of this year in a case that presented a strikingly similar issue, "[S]imple common sense dictates suspending an increase rather than revoking it permanently" (*Matter of Langham Mansions, LLC v New York State Div. of Hous. & Community Renewal*, 76 AD3d 855 [2010]). Once petitioner has allayed DHCR's concerns about the condition in the individual apartments, there will be no justification for exempting the tenants residing in those apartments from paying for their fair share of the surcharge for the capital improvements, as the law provides.

In *Langham Mansions*, this Court, while holding that it was irrational to permanently deprive a landlord of an MCI rent increase simply because the initial work on certain units fell short, noted that to do so was also inconsistent with DHCR's own prior policy. The *Langham Mansions* landlord replaced windows in a 59-unit landmarked apartment building, and windows in four

units were found to be defective. This Court reversed the motion court's order denying the landlord's petition to vacate the DHCR determination to exempt permanently from the MCI increases the four units in which the defective windows were situated. This Court took approving note of the landlord's argument that the determination was arbitrary because DHCR "neither indicated a reason for its drastic penalty nor adhered to prior rulings in similar cases where only a few units were affected" (*id.* at 858).

In particular, the *Langham Mansions* court quoted from a DHCR ruling that enunciated its policy as follows:

> "'The Commissioner notes that it is [DHCR] Policy to *suspend* a [major capital improvement] rent increase for individual apartments *until repairs of defects are completed* (rather than revoking the increase as suggested by the tenant-petitioners)'" (*id.*, quoting *Matter of Little and Breslow,* DHCR Admin Review Docket No. NC430029RP [Aug. 2, 1999]).

Thus, insofar as pertinent to this appeal, *Langham Mansions* sets forth two propositions: 1) that DHCR's policy is to suspend rather than revoke MCI rent increases for individual apartments that need repairs, and 2) that it is arbitrary for DHCR to permanently deny MCI rent increases for individual apartments because there is a small number of defective conditions that need repair.

The majority recognizes that *Langham Mansions* stands in

clear conflict with its holding. In its effort to disregard *Langham Mansions*' holding it makes two points. One is that *Langham Mansions* somehow does not apply here because in *Langham Mansions* DHCR "*revoked* a rent increase that had been granted years earlier" while here "petitioner never enjoyed a rent increase" for the affected apartments." The second is that in *Langham Mansions* the necessary repairs were "minor" while here, "there is no evidence that only minor work would be called for if the landlord were granted an opportunity to cure the defects." Under logical scrutiny, the distinctions drawn by the majority dissolve into meaningless and self-contradictory rhetoric.

As to the majority's first point, it is obvious that *Langham Mansions* forces the majority to concede that DHCR did in fact have a policy against permanently revoking MCI increases for individual apartments in need of repair. Trying to wish away this obstacle to reaching its desired result, the majority offers the following speculation:

> "While the record contains no evidence of why DHCR adopted the policy against revocation, one can surmise that the policy was implemented to avoid the prejudice which would be visited on a landlord which relied in good faith, and for a lengthy period of time, on a rent increase, only to later lose it."

Here, however, this reason would not apply, as the majority would

have it, because the Rent Administrator did not grant petitioner the increase in the first instance.

The majority's reasoning on this point seems odd. The landlord in *Langham Mansions* initially received the increase because it had prevailed in front of the Rent Administrator. It was only upon the PAR that the rent increase was revoked, rather than suspended, leading to the article 78 proceeding which resulted in this Court's *Langham Mansions* decision. Thus, by the majority's lights, everything rides on how the Rent Administrator decides the matter. Applying the same reasoning to the judicial system, a litigant who prevails at Supreme Court keeps the spoils of that win regardless of any error in the Supreme Court decision subsequently found by the Appellate Division.

Another troubling aspect of the majority's analysis is that its theory is just that -- a theory conjured out of thin air by means of speculation and surmise. Nowhere, not in this case, not in the record or briefs for *Langham Mansions*, not in our decision in *Langham Mansions*, is the matter said to rest on the fact that the landlord had been receiving the increase. While the majority feels that the landlord's reliance on having received the rent increase barred revocation of the increase in *Langham Mansions*, it never explains why the landlord's expenditure of $1,207,853 in expectation of receiving the MCI increase in issue here counts

for nothing. The reasoning is simply inconsistent.

The inadequacy of the majority's attempt to distinguish *Langham Mansions* is highlighted by the resolution of a different MCI rent increase application concerning the same building. In opposition to an MCI application based on roof, pointing and waterproofing work, the tenants alleged that the new roof was subject to pervasive and widespread leaks. In *Matter of Langham Mansions Co.* (Docket No. P13 430064 OM [July 30, 2003]), the DHCR Rent Administrator barred the landlord from collecting the rent increase for the four apartments that had water stains and leak damages until all repairs were completed. In that MCI application - remarkably similar to the one at issue here - the landlord's right to repair and recover is obviously not made dependent upon the fact that landlord had been receiving the MCI rent increase; in fact, just the opposite.

The majority is correct, of course, in stating that DHCR is entitled to deference. However, the agency is "[i]ndeed . . . [not] entitled to the same deference on th[is] issue as it is on the issue of whether it properly ruled that some of the subject work was defective in the first place." True, there is no basis in the record to challenge its determination on the quality of the work, and that determination is certainly entitled to deference. Regarding the permanent revocation of the increase,

however, DHCR runs right up against its prior policy and decisions. "A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasoning for reaching a different result on essentially the same facts is arbitrary and capricious" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 517 [1985]). DHCR has not suggested any basis for departing from its prior policy.

As to the scope of the repairs in the matter before us, the record reflects that 202 Riverside Drive contains 333 rooms and that the increases have been suspended for only 22 rooms in a job that involved waterproofing and pointing work totaling 19,262 square feet. Whether there was in fact any moisture coming through to the apartments after work stopped was a hotly contested issue.[1] In any event, the majority concedes that of 91 apartments in the building, only in two (8A and 8F) "did the inspector detect actual wetness with his moisture meter." Hence,

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[1]The majority states: "[i]ndeed, there is no reason to believe that DHCR did not have enough evidence to conclude that significant re-pointing was necessary, especially because, as the dissent points out, the issue was 'hotly contested.'" However, DHCR itself never stated that the amount of work remaining to be done was "significant," and the majority does not directly address the question of whether the record would have supported such a finding if it had been made. Based on my review of the record, I would contend that the amount of work still needed to complete the job is not extensive. I would also note that the issue of outstanding necessary work was also "hotly contested" in *Langham Mansions*.

just as in *Langham Mansions*, "minor" would appear to be the appropriate adjective to describe the repair work -- work that petitioner was certainly ready to perform.

In upholding DHCR's denial-in-perpetuity of an MCI rent increase to five apartments, the majority conflates the approach to be followed when an MCI rent increase is to be disallowed building-wide and the approach to be followed when the increase is warranted, but there is a limited number of apartments that need repairs after the completion of the major capital improvement. This explains the majority's citation to *Matter of Cenpark Realty Co. v New York State Div. of Hous. & Community Renewal* (257 AD2d 543 [1999]) to support its conclusion that "the record contained sufficient evidence warranting the disallowance of a rent increase for the five apartments." *Cenpark Realty* stands for the principle that there is no MCI rent increase permitted if the work is not done on a building-wide basis and did not inure to the benefit of all tenants. The case casts no light on what should be done where, as here, the renovation qualifies as a major capital improvement but the quality of the work in certain units fell short. Similarly, *Matter of Whitehouse Estates v New York State Div. of Hous. & Community Renewal* (5 AD3d 190 [2004]) and *Matter of Garden Bay Manor Assoc. v New York State Div. of Hous. & Community Renewal* (150 AD2d 378

[1989]) are unavailing because there, too, the work did not qualify as a major capital improvement. To reiterate, in our case, no one contests that the work did so qualify. The majority's reliance on these cases bespeaks a failure to understand the distinction between work that does not constitute a building-wide improvement and work that does constitute a building-wide improvement but, as to certain units, has not yet been satisfactorily completed.

What emerges is that the majority has not one single case that supports DHCR's determination to disregard a policy of suspending rather than revoking the MCI rent increases for the five apartments. In lieu of such authority, it ultimately asserts that DHCR "did not believe that [petitioner] intended in good faith to address the situation." DHCR, however, makes no such claim. Moreover, the record belies the majority's assertion, since it is apparent that petitioner stands ready to remedy the conditions. At bottom, this is precisely the outcome petitioner seeks by this appeal. While, as the majority notes, "it is not the role of the Judiciary to create new policies or craft new remedies," it is the role of this Court to follow its precedents, i.e. *Langham Mansions*, and it is the role of DHCR to reach determinations that are rational and that either are consistent with its prior determinations or, if instituting a

change of course, are at least accompanied by a rational explanation of that change of course. "The policy reasons for consistent results . . . are . . . to maintain the appearance of justice" (*Charles A. Field Delivery Serv.*, 66 NY2d at 519). In view of our decision in *Langham Mansions*, I do not see how the dismissal of the subject petition maintains the appearance of justice.

The majority's writing actually tracks the dissent in *Langham Mansions* at this Court and the decision at Supreme Court. These writings rely on *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal* (305 AD2d 207 [2003]). The majority here, in following the Appellate Division dissent and Supreme Court decision in *Langham Mansions*, is of the view that, where this Court has found DHCR to have acted properly in denying a rent increase for work which it deemed defective, it has not required DHCR to afford a petitioner an opportunity to go back and address the problems that led to the denial. In this regard the majority concludes that "[t]he landlord has failed to carry its burden of establishing why here, where most of the work was performed properly, but a distinct portion was not, DHCR having considered all of the facts before it, acted irrationally by refusing to give petitioner a 'do-over' for that portion of the work which was defective." The problem for the majority is not

merely whether DHCR has acted rationally -- manifestly, it has not -- but that DHCR itself under facts such as these has permitted a "do over." While the majority dismisses *Weinreb* as having been "determined on its own facts," in that case a "do over" was exactly what was permitted to the landlord. While the landlord there sought an increase for all apartments, the record of that appeal reflects that the Rent Administrator determined that "the 22 apartments found to have defective windows are exempt from the increase for windows and sidewalk bridge *until such time [as] the owner makes the necessary repairs, and only then shall the increase be effective prospectively*" (emphasis added). Hence, the very case which has been cited to support the majority's position in fact supports the opposite result. Tellingly, the majority does not even attempt to distinguish *Weinreb* or to explain how it believes I have misconstrued its record. Instead, the majority simply disregards what DHCR did in *Weinreb*. I do not believe that such an ad hoc approach to deciding similar cases is consistent with a principled jurisprudence.[2]

Turning to the rationality issue, I note that the majority's

[2]It is troubling that DHCR itself relies on *Weinreb* on this appeal, notwithstanding that the case actually supports petitioner's position.

disparagement of allowing a conditional prospective increase under these circumstances as a "do over" does nothing to demonstrate the rationality of DHCR's perpetual disallowance of the increase. The majority disregards the fact that petitioner has expended more than $1.2 million on the improvements, with the well-justified expectation of receiving an MCI rent increase. At the conclusion of such an extensive renovation, it is certainly likely that some of the work would need further refinement. The contract for the work actually provides that the contractor will undertake post-completion corrections. Nothing in the record indicates that the vast majority of the work was performed unsatisfactorily, or that even these "punch list" items were not eventually corrected. Petitioner accepts that until any substandard work in the five subject apartments is corrected, it cannot receive an MCI rent increase for those units. Once those conditions are corrected, it is not rational to deny the increase. Moreover, once the conditions in issue are corrected, there simply will be no reason to exempt tenants in these apartments from the MCI increases. Again, the majority cites to no case which supports allowing some apartments to be permanently exempt from the MCI increase when such an increase has been

imposed on the other tenants in the building. Granting the petition is not, as the majority characterizes it, an issue solely of fairness, but, more importantly, an exercise of reason over caprice.

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

ENTERED: DECEMBER 28, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2671 The People of the State of New York, Ind. 5455/07
Respondent,

-against-

Sergio Rodriguez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 15, 2008, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, robbery in the first degree (two counts), and robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 40 years, modified, on the law, to the extent of directing that the sentences for the attempted murder and assault convictions be served concurrently, the matter remanded to the trial court for resentencing, and otherwise affirmed.

Defendant's challenges to the People's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also find that the challenged portions of the summation constituted permissible

comment (*see generally People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]) on the victim's demeanor when he entered the courtroom and saw defendant. The prosecutor specifically called on the jurors to rely on their own observations of the victim's demeanor. Defendant's related ineffective assistance of counsel claim is without merit.

As the People concede, the court should have imposed concurrent sentences for the attempted murder and assault convictions because there is no basis for finding that these crimes were committed through separate acts. "[S]entences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" (*People v Laureano*, 87 NY2d 640, 643 [1996]; *see* Penal Law § 70.25[2]). In this case, the facts do not support any conclusion other than that the crimes of assault and attempted murder were effected through the same acts.

Nevertheless, we remand the matter to the trial court so that it may restructure the sentences to arrive lawfully at the aggregate sentence which it clearly intended to impose upon defendant, who was the actual shooter, and thus deserving of greater punishment than his accomplices. One of the two robbery counts of which defendant was convicted charged him with forcible

stealing of property while displaying a firearm (Penal Law § 160.15[4]). It is self-evident that defendant's display of a gun during the robbery, on the one hand, and his actual shooting of the victim, on the other, arise from separate acts, and are thus not subject to the strictures of Penal Law § 0.25(2).

This Court has, on at least one prior occasion, vacated illegal consecutive sentences, but remanded the case for resentencing, so that sentences on other counts which were initially run concurrently, could be imposed consecutively so as to reflect the court's intended sentencing scheme (*see People v Montel*, 269 AD2d 293, 294 [2000]), *lv denied* 95 NY2d 800 [2000]. Defendant contends that *Montel* is inapplicable because the convictions resulted from a negotiated plea. This distinction is meaningless. As the Court of Appeals has observed, when illegal sentences are corrected, and a defendant resentenced in accordance with statutory prescriptions, a colorable argument only arises if his "sentence had been increased beyond his legitimate expectations of what the final sentence should be" (*People v Williams*, 87 NY2d 1014, 1015 [1996]). As long as defendant's aggregate sentence in this case is not increased beyond what the court originally intended to impose, he will face no jeopardy from having taken an appeal.

To the extent the Second Department's decision in *People v Romain* (288 AD2d 242 [2001], *lv denied* 98 NY2d 640 [2002]) suggests that a different result is warranted, we decline to follow its reasoning.

Nor are this Court's decisions in *People v Rosado* (28 AD3d 215 [2006]) and *People v Davis* (12 AD3d 237 [2004], *appeal withdrawn* 4 NY3d 762 [2005]) inconsistent with the result reached herein. In both of those cases the People sought resentencing to adjust the individual sentences themselves so that the aggregate sentence need not be reduced, which procedure would run afoul of CPL 430.10 ("when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced"). In this case, the People seek resentencing only to realign which sentences are to run consecutively, not to disturb any of the individual sentences.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

I agree with the majority's memorandum but write separately to emphasize certain points. At the outset of the gunpoint robbery committed by defendant and his two accomplices, defendant brandished a gun and demanded the victim's gold chain. Even though the victim was in the act of complying with that demand, defendant shot him in the leg. Defendant's gratuitous and brutal violence only escalated from that point. As the victim continued his efforts to take off the chain, defendant shot him in the torso. The victim fell against a fence and defendant shot him a third time, in the back. The second bullet created multiple holes in the victim's bowel; the third bullet lodged in his vertebrae and caused severe spinal cord injury. Miraculously, the victim survived. But although he eventually may be able to walk with the assistance of braces, he will be wheelchair bound for the rest of his life when outside the home.

Defendant was convicted by a jury of attempted murder in the second degree, assault in the first degree, robbery in the first degree (two counts) and robbery in the second degree. Victor Perez, his jointly tried accomplice, was the one who actually took the chain and other property from the victim; he was acquitted of the attempted murder and first-degree assault charges but convicted of two counts of first-degree robbery and

one count of second-degree robbery. (Prior to trial, the second accomplice pleaded guilty to second-degree robbery.) As defendant had been convicted of second-degree assault little more than a year before the commission of this crime, he was sentenced as a second violent felony offender. For the attempted murder and first-degree assault convictions he was sentenced to consecutive terms of 25 years and 15 years, respectively; he also was sentenced to two terms of 25 years for the first-degree robbery convictions and one term of 15 years for the second-degree robbery conviction, with these three terms running concurrently with each other and with the sentences for the attempted murder and first-degree assault convictions. Perez, also a second violent felony offender, was sentenced to concurrent terms of 25 and 15 years for, respectively, the first and second-degree robbery convictions. Thus, defendant's aggregate sentence was a richly deserved 40 years; his much less culpable accomplice, who was not armed with a weapon, did not himself commit any violent acts and was acquitted of the attempted murder and first-degree assault charges, received an aggregate sentence of 25 years.

In sentencing defendant, Supreme Court made a mistake. Penal Law § 70.25(2) requires concurrent sentences when two or more crimes are committed though a single act. As the People

appropriately concede, although consecutive sentences for attempted murder and assault crimes arising from repeatedly shooting the same victim may be authorized in a particular case, the record here does not disclose sufficient facts from which it could be concluded that one gunshot constituted the attempted murder and another the first-degree assault (*see People v Parks*, 95 NY2d 811 [2000]). Accordingly, the sentences for these crimes should have been made to run concurrently. However, the sentence for either the second-degree robbery conviction or for one of the first-degree robbery convictions, the one predicated on the display of what appears to be a pistol (Penal Law § 160.15 [4]), lawfully can run consecutively either to the first-degree assault or the attempted murder conviction. Thus, the aggregate sentence of 40 years that was imposed is one that is authorized by the Penal Law.

The question in this case then is what is permissible when the illegal sentence is corrected. Has the Legislature mandated that the only permissible corrective action is to direct that the sentences on these two components of the sentence (the sentences for attempted murder and first-degree assault) run concurrently? Even if Supreme Court determined that it intended to impose an aggregate sentence of 40 years and did not make a considered determination that no other consecutive sentences were

appropriate, is Supreme Court precluded from restructuring the sentence so as to impose the same aggregate sentence or even one that is less than the original sentence but entails consecutive sentences not previously imposed?

In my view, the only reasonable answer to that question is no. In the first place, no statute requires a yes answer. CPL 430.10 provides that, "[e]xcept as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment *and such sentence is in accordance with law*, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced" (emphasis added). A necessary condition to the application of this prohibition is that the sentence at issue be a lawful one. Components of the sentence are lawful, but the syntax of the statute makes clear that the entire sentence is considered to be the "sentence of imprisonment." Because Supreme Court imposed a sentence of imprisonment "and such sentence is [not] in accordance with law," I would conclude that the prohibition is inapplicable.

Moreover, determining when consecutive sentences are prohibited can be exceedingly difficult. An apt illustration is provided by *People v Rojas* (8 NY3d 493 [2007]), in which a divided Court of Appeals concluded that the sentences had to run concurrently, with Judge Graffeo, joined by Judges Read and

Piggott, concluding that consecutive sentences were authorized (*see People v McKnight*, __ NY3d __, 2010 NY Slip Op 09161 [2010]). As the Legislature surely was mindful both of the difficulties judges would sometimes face and of the enormous importance to the People of a just sentence, it makes no sense to think the Legislature intended that judges have only one chance of getting it right. The United States Supreme Court has made much the same point: "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" (*Bozza v United States*, 330 US 160, 166-167 [1947]). In multiple defendant cases like this one, furthermore, the conclusion that this one wrong move by Supreme Court immunizes defendant from having any of the underlying sentences run consecutively would be at odds with the fundamental precept of justice that like cases should be treated alike. It can mandate that unlike cases be treated as like cases; despite defendant's far greater culpability and moral blameworthiness, he would get the same sentence as Perez, 25 years.

Although I think it self-evident that Supreme Court did not intend such an extraordinarily unjust result, the more important point is that we should have a strong basis in the text of a statute to conclude that the Legislature intended judges to have only one chance of getting it right. The statutory text is to

the contrary (*see* Penal Law § 5.00 ["the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law"]). And as the People point out, CPL 470.20 also is relevant here. It states:

> "[u]pon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent."

This is plainly a grant of discretionary authority to intermediate appellate courts and nothing in the Penal Law requires that it be read stingily in this context. But to accept defendant's position means that whenever judges make sentencing errors like this one, nothing can be done to protect the rights of the People, regardless of how profound the injustice may be.

Although the Court of Appeals apparently has not addressed the issue, our decision in *People v Montel* (269 AD2d 293 [2000], *lv denied* 95 NY2d 800 [2000]) is on point, as is the Second Department's decision in *People v Romain* (288 AD2d 242 [2001], *lv denied* 98 NY2d 640 [2002]). These two decisions come to opposite conclusions and defendant urges that we should not follow our own precedent in *People v Montel* because the erroneously imposed consecutive sentences were imposed not after a trial but after

the defendant's guilty plea. The heart of defendant's argument, however, is that CPL 430.10 precludes any change to the sentence other than what is absolutely necessary to correct the specific error in a component or components of the sentence. If that argument is correct, it applies equally when consecutive sentences are erroneously imposed following a guilty plea or a trial. For the reasons stated above, I think the argument is incorrect and we should follow *People v Montel*.

Our decisions in *People v Davis* (12 AD3d 237 [2004]) and *People v Rosado* (28 AD3d 215 [2006]) are distinguishable as they address a different problem. If, for example, a defendant is sentenced to two consecutive terms of 5 years (so that the aggregate sentence is 10 years) but only concurrent sentences are lawful, *People v Davis* and *People v Rosado* preclude either or both of the concurrent sentences that are imposed on resentencing from exceeding the 5-year terms originally imposed. That is not to deny that there is tension between, on the one hand, *People v Montel* and, on the other, *People v Davis* and *People v Rosado*. But we need not grapple with that tension to decide this appeal. Suffice it to say that when a judge directs sentences to run consecutively, it may be reasonable to presume that the period of incarceration specified for each conviction (including those for any additional sentences which are made to run concurrently)

represents a considered determination by the judge, but less reasonable to presume that a direction that the sentence for one or more additional convictions shall run concurrently with the sentences running consecutively represents a considered determination. After all, in the latter situation that direction may be compelled by an antecedent conclusion that the consecutive sentences result in the appropriate aggregate sentence.

Finally, defendant offers an independent argument based on the Second Department's decision in *People v Losicco* (276 AD2d 565 [2000], *lv denied* 96 NY2d 802 [2001]) that the imposition of concurrent sentences only is required by Penal Law § 70.30(1)(a). As defendant forthrightly recognizes, the Third Department not only has rejected that argument but has read our decision in *People v Lopez* (15 AD3d 232 [2005], *lv denied* 4 NY3d 888 [2005]) to have rejected it as well (*Matter of Lopez v Goord*, 51 AD3d 1231 [2008], *lv denied* 11 NY3d 708 [2008]). In any event, I would not reach this argument as defendant raises it for the first time in his reply brief.

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

ENTERED: DECEMBER 28, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2672 John Kidd, Index 116964/08
Plaintiff-Respondent,

-against-

Gene Epstein, et al.,
Defendants-Appellants.

_____

Maurice A. Reichman, New York, for appellants.

Sherwood Allen Salvan, New York, for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 21, 2009, which, insofar as appealed from as limited by the briefs, in an action for libel, denied defendant Epstein's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, defendant Epstein's motion for summary judgment granted and, upon a search of the record, defendant Kobayashi is granted summary judgment. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint. Appeal from so much of the same order as denied the motion of defendant Kobayashi to dismiss the complaint pursuant to CPLR 3211, unanimously dismissed, without costs, as abandoned.

The subject e-mail published by defendants to the shareholders of the cooperative is not defamatory. Although the e-mail asserts that a letter plaintiff claimed to have obtained

from his plumber for use in a legal action against defendants for damages from a water leak was a "fake," it contained a recitation of the facts supporting that assertion. Accordingly, it is a non-actionable opinion. As the Court of Appeals has explained, "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth" (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977], *cert denied* 434 US 969 [1977], citing *Buckley v Littell*, 539 F2d 882, 893 [1976], *cert denied* 429 US 1062 [1977]; Restatement [Second] of Torts § 566]).

The relevant factors to be considered when distinguishing between assertions of fact and nonactionable expressions of opinion are: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993] [internal quotations and citations omitted]). Not only does the e-mail recite the factual basis for defendant Epstein's assertion

that the letter was a "fake," the surrounding circumstances make clear both that plaintiff and defendants have had a turbulent relationship and that the recipients of the e-mail were aware of the ongoing disputes between them. For these reasons, a reasonable reader, aware of the full context and social circumstances of the communication, would recognize the allegedly defamatory statements as expressions of opinion.

Defendant Kobayashi's appeal from that portion of the order which denied her motion is dismissed because she abandoned the arguments she raised below and instead joins in Epstein's arguments in support of his motion for summary judgment. As noted above, summary judgment is granted to Kobayashi upon a search of the record.

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

ENTERED: DECEMBER 28, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2678N Edeline Augustin, Index 66800/85
Plaintiff-Appellant,

-against-

Nerva Augustin,
Defendant-Respondent.

_____

Warren S. Hecht, Forest Hills, for appellant.

Law Offices of Paul S. Goldstein, Jamaica (Glenn S. Koopersmith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about April 13, 2009, which, to the extent appealed from, as limited by the briefs, denied plaintiff's motion to vacate a judgment of divorce entered by the Clerk of that court in 1985 and for an award of counsel and expert fees, modified, on the law and the facts, to remand the matter for an evidentiary hearing with respect to so much of plaintiff's motion as seeks an order vacating the 1985 judgment of divorce, and otherwise affirmed, without costs.

The IAS court denied plaintiff wife's motion to vacate the 1985 divorce judgment on the ground of fraud. A motion to vacate a judgment upon the ground of fraud pursuant to CPLR 5015(a)(3) must be made within a reasonable time (*see Weimer v Weimer*, 281 AD2d 989 [2001] [4 year delay unreasonable]; *Richardson v*

Richardson, 309 AD2d 795 [2003] [12 year delay unreasonable; *Sieger v Sieger*, 51 AD3d 1004, 1006 [2008], *lv denied* 14 NY2d 711 [2010] [7 year delay unreasonable]). The IAS court found that the wife was aware of the defendant husband's alleged misconduct by July 1990, and that she waited until 2008 to move to vacate the judgment. It determined that the wife's 18-year delay was unreasonable.

Although the wife never argued below that the 1985 judgment should be vacated for lack of jurisdiction pursuant to CPLR 5015(a)(4), contrary to the husband's contention, this Court may review the argument since it is a legal argument which appears upon the face of the record and could not have been avoided if brought to the husband's attention at the proper juncture (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). The wife's argument, however, lacks merit. Although a motion to vacate a judgment for lack of jurisdiction may be made "at any time" (*Caba v Rai*, 63 AD3d 578, 580 [2009]), such a motion should be denied if the movant acted as if the judgment were in effect before moving to vacate it (*Calderock Joint Ventures, L.P. v Mitiku*, 45 AD3d 452, 453 [2007]). Here, the IAS court determined that because the wife did not deny that she submitted the 1985 divorce judgment to the Queens County Family Court in 1992 to obtain support for herself

and her children, she waived any objection to the court's jurisdiction over her (*see id.*).

Given that the wife failed to submit a complete copy of her statement of net worth and her motion to vacate lacked merit, the IAS court providently exercised its discretion in denying the wife's motion for counsel fees (*see* Domestic Relations Law § 237(a); *see generally De Cabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]).

The IAS court also providently exercised its discretion in denying the wife's motion for expert fees, namely $1,000 for a handwriting expert's appearance at trial. Because the wife's motion to vacate the 1985 divorce judgment was denied, the handwriting expert's appearance was not necessary.

However, inasmuch as each party contends that the other surreptitiously procured the 1985 judgment by some form of deceit, and given the policy implications of a fraud being perpetrated on the court, we exercise our independent discretion and remand for an evidentiary hearing. If it is found that it was the wife who wrongfully obtained the divorce, her motion to vacate the judgment should be denied. If, however, it was the husband who was fraudulent, then Supreme Court can reach the issue of whether the wife's delay in seeking to vacate the judgment was reasonable, or whether she waived any challenges to

the validity of the judgment by relying on it in seeking maintenance and support in Family Court in 1992.

We do not find it necessary at this juncture to draw inferences from an incomplete and contradictory record, particularly in light of our remand for a hearing. Indeed, the need for an evidentiary hearing is manifest by the IAS's court characterization of the wife's lack of "credibility and bona fides" and the concurrence's assertion that "there is a substantial basis for believing that the *husband* fraudulently obtained the divorce" (emphasis added).

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

McGUIRE, J. (concurring)

I write separately because the majority's discussion of the only significant issue in this remarkable case is inadequate and flawed.

A judgment of divorce in an action ostensibly commenced by the wife was entered in Supreme Court, New York County, on July 1, 1985. Although no definitive conclusion can or should be reached on this record, there is a substantial basis for believing that the husband fraudulently obtained the divorce without the wife's knowledge pursuant to a scheme he devised and executed. Indeed, Supreme Court acknowledged that when it wrote of the "apparent improprieties engaged in by the [husband] to obtain the 1985 divorce judgment." Nonetheless, Supreme Court denied the wife's September 2008 motion seeking, inter alia, to vacate the 1985 judgment. Supreme Court held that the wife could not challenge the 1985 judgment because she concededly knew of it by mid-1990 at the latest and did not take affirmative steps to challenge it in the ensuing 18 years. According to Supreme Court, the "apparent improprieties" of the husband "do not excuse the [wife's] 18-year inaction." It is not clear whether Supreme Court's ruling was based on waiver or estoppel. In any event, Supreme Court effectively precluded the wife from seeking maintenance, equitable distribution of marital assets and all

other benefits a spouse otherwise is entitled to seek on the dissolution of a marriage.

Supreme Court should have held a hearing with respect to so much of the wife's motion as seeks an order vacating the 1985 divorce judgment. Both parties to this action have submitted sworn affidavits to the effect that each did not know anything about the 1985 action before the judgment was entered. Certainly one of them is lying about that (possibly, but implausibly, both are lying). In the procedural posture of this case, we should assume that the husband fraudulently obtained the judgment. As discussed below, only the mere inaction of the wife supports Supreme Court's ruling. The wife's inaction cannot justify a ruling by Supreme Court that effectively validates the fraudulent judgment, penalizes the wife, perhaps substantially, and not only disregards the apparent wrongdoing of the husband but permits him to profit, perhaps substantially, from that wrongdoing.

The parties were married in Haiti in January of 1973 and have three adult children from the marriage. In 1983 a decree of divorce was issued in Haiti in an action commenced by the husband. Although the parties dispute the validity of that decree, obtained on the wife's default, Supreme Court did not rule on the issue and we need not and should not address it.

In January of 1985, a divorce action was commenced in

Supreme County, New York County, purportedly by the wife, represented by Jean H. Charles, Esq. The complaint, ostensibly verified by the wife, alleges, inter alia, abandonment by the husband and that the parties had been living separate and apart for more than two years. An affidavit purportedly executed by the wife that same month also so asserts, and alleges as well that the husband had admitted service of the summons with notice, was not seeking equitable distribution and was waiving his right to answer and to service of any additional papers. Mr. Charles notarized both sworn statements. In an affidavit sworn to on January 12, 1985, the husband (or an imposter) admitted service of the summons with notice, stated he was not seeking equitable distribution and was waiving his right to answer and to service of any additional papers other than the judgment of divorce. By an "Affirmation of Regularity," dated April 29, 1985, Mr. Charles requested that the action be placed on the undefended calendar for trial. The judgment of divorce, entered on July 1, 1985 on motion of Mr. Charles, awarded custody of the children to the wife, with Family Court exercising concurrent jurisdiction over issues of child custody and child support. Neither the complaint, the affidavit ostensibly submitted by the wife nor the judgment of divorce makes any mention of a request by her for maintenance or child support.

Almost 23 years later, in April 2008, the wife commenced a divorce action in Supreme Court, Queens County. In her amended verified complaint, the wife swore that the husband had abandoned her in 2002 by leaving the marital residence and promising never to return. She swore as well that she had supported the husband through medical school and that shortly after he graduated from medical school the husband had left the marital home, periodically returning only to finally leave in 2002. In addition, she asserted that there was no judgment of divorce in favor of either party and against the other in any court of competent jurisdiction. The wife sought, inter alia, an "evaluation of [the husband's] medical license and practice," equitable distribution of marital assets and exclusive occupancy of the marital residence.

In his answer, the husband set forth the 1985 divorce judgment as an affirmative defense and counterclaimed for sanctions, alleging that the action was frivolous because of the 1985 judgment the wife allegedly obtained. Thereafter, in early September 2008, the husband moved to dismiss the complaint pursuant to CPLR 3211(a) on the basis of the 1985 judgment.

Later that month, the wife brought the motion that is at issue on this appeal in Supreme Court, New York County. She seeks an order: vacating the 1985 judgment, staying the Queens

action and granting her pendente lite counsel and expert fees. In an affidavit submitted in support of the motion (the main affidavit) the wife asserted that after their marriage in Haiti in 1973, she supported the husband while he was attending college and medical school there. According to the wife, she "originally came" to the United States in 1969 and, through her sponsorship, defendant came to the United States in 1977 and obtained permanent residence. The husband assertedly left the marital home several times during the course of the marriage. During 1981 and 1982, after having left the marital home in 1980, he visited the two children they had at the time. After one visit, they became intimate for a brief period, which resulted in the birth of their third child in January 1982. The wife also maintained that in 1997 the husband decided to return to the marital home and she "foolishly agreed to take him back." The couple lived with their children in an apartment in Queens, with the wife providing the sole support for the family (except for a brief period in which the husband worked) until late in 2002. Late that year, the husband left the marital home for the last time, after obtaining work at a hospital in Brooklyn. Also according to the wife, the husband "passed his medical boards" in 2004 and moved to North Carolina where he was employed as a physician.

With respect to the 1985 divorce, the wife swore that she had never filed for a divorce prior to the action she had commenced in Queens, that she had not retained and did not know an attorney by the name of Jean H. Charles and that the purported signature of hers on the "Affidavit of the Plaintiff" in the 1985 divorce action was a forgery. According to the affidavit of a handwriting expert who analyzed the signatures on the two affidavits purportedly submitted by the wife in the 1985 action, the person who signed those affidavits was not the same person who had produced known signatures of the wife. Her attorney affirmed that there was no current listing for an attorney named Jean H. Charles but that an attorney with that name had been suspended by the Second Department since 1995 (*see Matter of Charles*, 206 AD2d 139 [1994]).

Counsel also argued that "the fact that [the husband's] signature appears with the fraudulent papers utilized in obtaining the divorce is virtual proof that he was a party to the fraud." In addition, pointing to the absence of any provision in the 1985 judgment for equitable distribution, maintenance or child support, counsel contended that the husband was the only person who could benefit from the fraudulent divorce.

In opposition to the motion, the husband swore that he had obtained a divorce from the wife in Haiti in 1983, that as far as

he knew the Haitian divorce was valid and that he had given the wife a copy of the decree in late 1983. He denied having played any role, let alone a fraudulent one, in the 1985 divorce action. He swore not only that he did not appear in that action but that he "did not even know about it." With respect to the affidavit submitted to the court in the 1985 action purportedly sworn to by him, the husband denied the signature was his and asserted that he had never authorized anyone to sign his name to it. According to the husband, he recalled that "on or before 1992," the wife appeared in Family Court in Queens County and told the judge that she had obtained a divorce. He also swore that the wife then "handed a piece of paper to the court, the contents of which [he] was unaware." He claimed he recently had told his attorney of this recollection and, referring the court to his attorney's affirmation, contended that "[i]t now appears that the piece of paper was a copy of the [1985 judgment]." In his attorney's affirmation, counsel stated that while examining the contents of the Queens County Family Court file, the record room clerk with him at the time found a copy of the 1985 judgment. Apparently, that copy, a copy of which was attached to the affirmation, was not in the folder it should have been in; it was certified on July 3, 1985, two days after its issuance.

The plot soon thickened with a new twist. In a reply

affidavit (erroneously denominated a "sur-reply" affidavit), the wife stated that she "kn[e]w the [husband] committed fraud" in procuring the 1985 judgment because of a letter dated July 27, 1990 she had received from the Departmental Disciplinary Committee, First Department. The letter, a copy of which was attached to her affidavit, is addressed to the wife and reads as follows:

> "The Departmental Disciplinary Committee has completed its investigation of Jean H. Charles, Esq., in connection with your complaint.
>
> "The Committee found that, early in 1985, Nerva Augustin, your husband, consulted Mr. Charles with regard to obtaining an uncontested divorce. Based on information Mr. Charles received from your husband, he prepared the necessary papers and advised Mr. Augustin to return to his office with you to sign them. On or about January 15, 1985, Mr. Augustin appeared at Mr. Charles' office with a woman he represented to be his wife and documents were signed and thereafter filed in New York County. On July 1, 1985, a divorce judgment was signed by Honorable Benjamin F. Nolan. In February 1987, Mr. Charles was contacted by David H. Brown, Esq., your attorney, who advised Mr. Charles that you had just learned of the divorce but had never consented to or participated in this proceeding. Mr. Charles thereafter contacted your husband who acknowledged that the woman who had appeared with him in Mr. Charles' office in 1985 had not been you. Although Mr. Charles contacted Mr. Brown and indicated a willingness to take whatever legal steps were necessary to void the divorce, he has not yet taken such steps.

> "This is conduct contrary to the spirit of the Code of Professional Responsibility, and the Committee issued a Letter of Caution to Mr. Charles."

Although it is hard not to conclude that the wife made no mention of the DDC letter in her main affidavit because she hoped thereby to give the husband the rope with which to hang himself, she "apologize[d] to the Court for not providing the document with [her main] affidavit." As noted above, she asserted that "[a]fter receiving this letter . . . , [she] was under the impression that the divorce was invalid and [she] was still married to the [husband]." She made no specific reference to the husband's assertions concerning either the 1983 Haitian divorce decree or to the statements she allegedly made to the Family Court judge regarding a divorce she had obtained. However, she stated that she had "read the reply affidavit of [her husband], and den[ied] all of the allegations therein."

Unquestionably, unless it also is a forgery, the DDC letter provides considerable support for the wife's position that the husband fraudulently procured the 1985 judgment and perjuriously denied any knowledge of the judgment before it was issued in the affidavit he submitted on this motion. Nonetheless, as noted above, Supreme Court denied the wife's motion to vacate the 1985 judgment on the ground that she could not challenge it because

she had not taken any legal action to invalidate it for some 18 years after receiving the DDC letter. Supreme Court summarily rejected the wife's assertion that she had been under the impression after receiving the DDC letter that the divorce was invalid. Because of the statement in the letter that although Mr. Charles had "indicated a willingness to take whatever legal steps were necessary to void the divorce, he has not yet taken such steps," Supreme Court found this "self-serving claim" of the wife to be "not credible."

In the first place, Supreme Court should not have summarily rejected as "not credible" the wife's assertion that she was under the impression the divorce was invalid. Perhaps only a lawyer could think that the law would regard as valid a divorce judgment obtained through the fraudulent and criminal conduct of one spouse without the knowledge of the other. Lacking the advantages of training in the learned ways of the law, however, the wife reasonably could have had the common sense belief that the judgment was not worth the paper it was written on. The statement in the DDC letter that Supreme Court relied on certainly was not sufficient by itself to require the wife to believe the opposite. More importantly, as discussed below, what the wife believed about the legal status of the judgment after learning of its existence is irrelevant.

In her motion, the wife alleged that the 1985 judgment "present[ed] a case of 'extrinsic fraud,' i.e., a 'fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter'" (*Aguirre v Aguirre*, 245 AD2d 5, 7 [1997] [quoting *Shaw v Shaw*, 97 AD2d 403 [1983]; *see generally United States v Throckmorton*, 98 US 61 [1878]). Because it is right on point, I quote at length from the Second Department's discussion of extrinsic fraud, also referred to as fraud on the court, in another matrimonial action:

> "A judgment obtained without proper service of process is invalid, even when the defendant has actual notice of the lawsuit, because as a prophylactic measure such a rule is necessary to prevent 'sewer service' (see *Feinstein v Bergner*, 48 NY2d 234, 239-241). 'Sewer service' is, however, but one species of fraud that the Legislature and courts are concerned with vis-a-vis invalid default judgments. Extrinsic fraud, which includes the touting of someone away from the courthouse, to prevent any possibility of an adverse result, is another (Siegel, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5015, p 365, 1964-1982 Supp Pamph). In fact, from a policy point of view, there is little if any difference between a default judgment obtained by 'sewer service' and one obtained where the defendant might be properly served, but then, through some device, trick or deceit, is led to believe that he or she need not defend the suit. Both are frauds on the court and on the defendant (see *Matter of Holden*, 271 NY 212, 218). It is not surprising, therefore, that a judgment obtained through extrinsic fraud, like one

> obtained without proper service, is considered a nullity (*Tamimi v Tamimi*, 38 AD2d 197 . . .” (*Shaw v Shaw*, 97 AD2d 403, 404 [1983]).

That the 1985 judgment is, or at least was, a nullity is supported as well by the venerable holding of *Riggs v Palmer* (115 NY 506 [1889]) that a person may not profit from his own wrongdoing. Moreover, what the Court of Appeals has said about foreign judgments surely is true of judgments issued by New York State courts: “foreign judgments generally should be upheld unless enforcement would result in the recognition of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense” (*Greschler v Greschler*, 51 NY2d 368, 377 [1980] [internal quotation marks and emphasis omitted]).

Assuming the truth of the wife’s factual allegations, the husband committed a fraud on the court and the 1985 judgment is, or at least was, a nullity. Given the invalidity of the judgment when it was issued, any belief by the wife that it nonetheless was valid must be irrelevant. Any such belief could not have the alchemistic effect of transforming that nullity into a valid judgment. Notably, Supreme Court cited no authority for the proposition that the onus is on the party victimized by a fraud on the court to undertake and bear the cost of a legal challenge

to the fraudulently obtained judgment. If a divorce judgment is fraudulently obtained and the spouse committing the fraud is living with the defrauded spouse and their children, it is particularly indefensible to rule that after learning of the fraud the defrauded spouse, on pain of validating the judgment by inaction, must bring a legal action to challenge it.

It may be that a judgment obtained by the commission of a fraud on the court can be transformed by waiver or estoppel into a judgment that is valid in the sense that it binds the innocent party (*see Shaw v Shaw*, 97 AD2d at 404, *supra*). But no estoppel or fraud can be found on this record as "there is no evidence that [the husband] has been prejudiced by virtue of [the wife's] conduct subsequent to h[er] learning of the divorce judgment" (*id.*). In his sworn affidavit, the husband makes no assertion that the wife made any statement or did anything about the 1985 judgment that he relied on to his detriment. To be sure, the husband swore that he had recently told his counsel that he recalled the wife telling a Family Court judge "on or before 1992 . . . that she had obtained a divorce, and at that time she handed a piece of paper to the court." Even assuming that she made this statement, the defendant does not assert that he relied on it to his detriment in any way.

In its decision and order, Supreme Court wrote that "[t]he

[husband] avers, with documentary evidence, and the [wife] does not deny that a copy of the 1985 divorce judgment was submitted to the court in a 1992 Queens County Family Court proceeding brought by the [wife] for child support." Supreme Court may have intended this sole reference to the husband's claim to be construed as a finding that the wife in fact submitted the 1985 judgment to the Family Court. For several reasons, however, it would not matter if that is what Supreme Court intended. First, to repeat, the husband did not make the essential assertion that he was prejudiced (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006] ["[t]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted"]). Second, Supreme Court is plainly wrong in stating that the wife did not deny the husband's assertion. Indeed, at the outset of its decision and order, Supreme Court correctly noted that the wife "generally denies all the allegations made in the [husband's] responding papers." Even putting aside that there is a substantial basis to conclude that the husband had committed a fraud on the court, absent an admission by the wife Supreme Court should not have accepted the truth of the husband's version of the facts. Nor does the wife's denial strain

credulity. To the contrary, particularly given the factual basis for concluding that the husband fraudulently orchestrated the 1985 divorce, the husband's assertion smacks of a *deus ex machina*. It may be that the 1985 judgment was put into the Family Court file by one of the parties rather than a court employee, but nothing other than the husband's say so supports the conclusion that the wife rather than the husband was the guilty party. Moreover, as the wife points out on appeal, the copy of the 1985 judgment in the Family Court file was certified two days after its issuance. If the husband fraudulently orchestrated the 1985 judgment, it is reasonable to infer that he obtained the certified copy two days after the judgment's issuance. And if that is so, it also may be reasonable -- I would not, of course, decide the point -- to infer that he eventually placed it in the Family Court file in an attempt to pin the blame on the wife.

Third, even if the wife did tell Family Court about the 1985 judgment and defendant thereby was prejudiced (I doubt, however, that the requisite prejudice could be supplied by child support payments he may have been required to make) it does not follow that the wife would be estopped from asserting her right to challenge the validity of the judgment. As the Court of Appeals has stated:

> "The law imposes the doctrine [of equitable estoppel] as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J.*, 7 NY3d at 326).

Although I need not decide the point, suffice it to say that if the husband fraudulently orchestrated the 1985 judgment, it is far from clear that he could make any coherent claim of entitlement to the doctrine on fairness grounds (*cf. Riggs v Palmer*, *supra*).

Nor can waiver be found on this record. Again, *Shaw v Shaw* is right on point:

> "A judgment which might otherwise be subject to vacatur may, in certain circumstances, not be disturbed if the proponent of such a measure has, by word or deed, waived his right to relief. Waiver, being a matter of intent, is generally an issue of fact to be established at a hearing or trial. Whether defendant has waived any complaint he may have on the ground of extrinsic fraud is not, on this record, something which can be resolved as a matter of law" (97 AD2d at 404-405 [internal citations omitted]).

Supreme Court also erred in concluding that the wife's "credibility and bona fides are further cast in doubt" because her verified pleadings in the Queens County matrimonial action she commenced in April 2008 "falsely recit[ed] that 'there is no

judgment of divorce in favor of either party and against the other' without any reference to the 1985 judgment." This conclusion depends completely and fatally on the validity of Supreme Court's antecedent conclusion that the wife did not believe the 1985 judgment to be invalid. Moreover, the conclusion wrongly excludes the possibility that the wife's attorney was responsible for making no mention of the 1985 judgment in the belief that it was invalid. In any event, even if she did not believe the 1985 judgment was invalid, neither estoppel nor waiver can be found on the basis of the non-disclosure of the 1985 judgment.

Before addressing the majority, a final point should be made: the commission of a fraud on the court is more than a serious wrong to the defrauded party in the litigation. Obviously, because the court, too, is defrauded, it is a public wrong as well. As it is in the public interest to determine who committed this fraud on the court, an evidentiary hearing should have been ordered for this additional reason.

Because the commission of the particular fraud on the court alleged by the wife necessarily entails the conclusion that Supreme Court lacked jurisdiction to issue the 1985 judgment, I think it irrelevant that the wife's motion did not expressly challenge the judgment on that ground. After correctly

concluding that a challenge on jurisdictional grounds is properly before it, the majority incorrectly disposes of it. Even if the holding of *Calderock Joint Ventures, L.P. v Mitiku*, 45 AD3d 452 [2007]) were as broad as the majority reads it to be, the majority errs in concluding that the wife "waived any objection to the court's jurisdiction over her." The factual predicate for the waiver appears to be that "the IAS court determined that . . . the wife did not deny that she submitted the 1985 divorce judgment to the Queens County Family Court in 1992 to obtain support for herself and her children." As discussed above, however, the wife did deny this assertion by denying *all* the allegations in the husband's affidavit in response. The most that can be said is that the wife did not specify that this particular allegation of the husband was included within the allegations she denied. The majority does not dispute this point or argue that the wife had some obligation to single out this particular allegation. Moreover, if the wife waived any objection on jurisdictional grounds, the majority should explain why its waiver analysis does not apply to her objection that the husband obtained the judgment by committing a fraud on the court.

The majority states that "[i]f . . . it was the husband who was fraudulent, then Supreme Court can reach the issue of whether the wife's delay in seeking to vacate the judgment was

reasonable." This statement is unfortunate because it implies -- and the majority does not disavow the implication -- that mere inaction by the wife may be sufficient to warrant denying her motion. I agree with the majority that it is not "necessary at this juncture to draw inferences" about which party did what. But more importantly, it is not appropriate to draw any such inferences on this record. The need for an evidentiary hearing is manifest, but not for the reasons given by the majority. A hearing is necessary because who is telling the truth about material issues of fact cannot be determined from the papers and the rights of the parties may turn on who is telling the truth.

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

ENTERED: DECEMBER 28, 2010

CLERK

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

3286 Jackson & Nash LLP, Index 102265/06
Plaintiff-Appellant,

-against-

E. Timothy McAuliffe PLLC, et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

Dunnington, Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for appellant.

Lebow & Sokolow, LLP, New York (Mark D. Lebow of counsel), for respondents.

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Order, Supreme Court, New York County (Herman Cahn, J.), entered December 15, 2008, which granted the motion of the individual defendant (McAuliffe) for summary judgment dismissing that portion of the complaint that sought an accounting and recovery of commissions he received as co-executor of an estate, and denied plaintiff's cross motion for partial summary judgment on its claims sounding in, inter alia, breach of contract, breach of fiduciary duty and unjust enrichment for damages for alleged unbilled time for the period July 1-August 14, 2003, affirmed, with costs.

A client of McAuliffe died in April 2003 while he was a partner at plaintiff firm. Her will named McAuliffe co-executor, and McAuliffe received preliminary letters testamentary in May

2003. He continued to carry out his duties as executor after he left the firm on August 14, 2003. In November 2003, he received letters testamentary; in December 2005, the estate was settled by agreement. McAuliffe received an executor's commission (*see* SCPA 2307) in December 2005.

The firm partnership agreement provided that "commissions payable to a Partner for acting as an executor . . . shall belong to the Firm." However, since the Surrogate's Court Procedure Act provides that compensation for the administration of an estate "shall be payable in such proportions and upon such accounting *as shall be fixed by the court settling the account of the person holding successive or different letters . . .*" (SCPA 2307[5][b] [emphasis added]), no commission was "payable" until December 2005 (*see Matter of Maurice*, 74 AD2d 906 [1980], *appeal dismissed* 50 NY2d 1059 [1980]; *Matter of Boddy*, 136 Misc 2d 87, 89 [1987]), and at that time McAuliffe was no longer a partner of the firm. Had the partnership agreement used another term, such as "earned," there might be an issue of fact precluding summary judgment, but the agreement specifically uses the same word "payable" that the SCPA uses.

Plaintiff submitted no evidence of McAuliffe's work product during the summer of 2003 before he left the firm, and, contrary to its contention, the telephone records it submitted do not conclusively demonstrate that during that time McAuliffe performed billable work and failed to record the billable hours.

All concur except Nardelli and McGuire, JJ. who dissent in part in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting in part)

It may well be that under the Surrogate's Court Procedure Act the executor's commission paid to McAuliffe was not "payable" to him until after he left the law firm. But nothing in ¶ 8.5(b), the relevant provision of the partnership agreement, requires the conclusion that the parties to the agreement intended the meaning of the word "payable" to be determined in accordance with the Surrogate's Court Procedure Act. The word is used in other provisions of the agreement having nothing to do with such commissions, and those provisions similarly do not require the conclusion that a sum of money is "payable" only when there is an unqualified legal entitlement to the receipt of the entire sum. An agreement, moreover, should be construed in a commercially reasonable fashion (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [2003]). Under Supreme Court's reading of the word "payable," however, the firm would have no claim for even a penny if a partner worked on firm time for hundreds of hours marshaling the assets of an estate and then left the firm days before his commission was "payable" under the Surrogate's Court Procedure Act. Because the word "payable" in the agreement is ambiguous, Supreme Court should have denied McAuliffe's motion for summary judgment dismissing the complaint

to the extent it seeks an accounting and recovery of the commission. I agree with the majority that Supreme Court correctly denied the law firm's cross motion for partial summary judgment.

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

ENTERED: DECEMBER 28, 2010

CLERK

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

3289 William Boyle, et al., Index 17227/02
Plaintiffs-Respondents-Appellants,

-against-

City of New York,
Defendant.
- - - - - -
City of New York,
Third-Party-Plaintiff,

-against-

Hougen Manufacturing, Inc.,
Third-Party Defendant-
Appellant-Respondent.

_____

Cerussi & Spring, White Plains (Kevin P. Westerman of counsel), for appellant-respondent.

Tomkiel & Tomkiel, PC, Scarsdale (Matthew Tomkiel of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 27, 2009, which denied third-party defendant Hougen's motion for summary judgment as to the strict products liability causes of action based on design defect, manufacturing defect and failure to warn, and granted the motion as to the negligent design, manufacturing and failure to warn and the breach of implied and express warranty causes of action, unanimously modified, on the law, to grant the motion as to the strict products liability cause of action based on failure to warn and

to deny the motion as to the negligent design and manufacturing causes of action, and otherwise affirmed, without costs.

With regard to the strict products liability causes of action based on design and manufacturing defects, the motion was correctly denied. Hougen failed to meet its initial burden of establishing prima facie entitlement to judgment as a matter of law. Its expert failed to set forth any information demonstrating that the subject drill was "designed and manufactured under state of the art conditions," "that its manufacturing process complied with applicable industry standards" or that proper testing and inspection was performed on the products before they left defendant's possession (*Ramos v Howard Industries, Inc.*, 10 NY3d 218, 223-24 [2008]). The expert's affirmation was replete with speculation and did little more than attempt to disprove plaintiff's version of the facts. It failed to establish that the drill, as designed and manufactured, was reasonably safe. However, the strict products liability cause of action based on failure to warn should have been dismissed because the injured plaintiff admitted that he never read the instruction manual (*see Yun Tung Chow v Reckitt & Colman, Inc.*, 69 AD3d 413, 414 [2010]).

The cause of action for negligent design fails because there is no evidence that the alleged design defects were the result of

negligence or lack of care on Hougen's part. The cause of action for negligent manufacture is viable, however, because it is predicated on the same facts as the cause of action for strict products liability based on manufacturing defect (*see Searle v Suburban Propane Div. Of Quantum Chem. Corp.*, 263 AD2d 335, 338-39 [2000]).

The court properly declined to sanction plaintiff for spoliation by dismissing the manufacturing defect causes of action because there is no evidence that the injured plaintiff disposed of the drill either intentionally or negligently with knowledge of its potential evidentiary value (*see Diaz v Rose*, 40 AD3d 429 [2007]).

Finally, as to the breach of warranty and negligent failure to warn causes of action, plaintiffs failed to controvert the relevant facts outlined in Hougen's motion papers (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

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

ENTERED: DECEMBER 28, 2010

CLERK

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

3292 In re Destiny S.,

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

Hilda S.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Ronnie Dane of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about September 18, 2007, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, affirmed, without costs.

Clear and convincing evidence supports the determination that respondent permanently neglected the child by failing to plan for her future despite the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social

Services Law § 384-b[7][a]). The record shows that the agency formulated a realistic plan that was tailored to respondent's needs and addressed the problems that caused the child's removal. It is undisputed that respondent failed to adhere to the service plan and to submit to drug testing and that she tested positive for illegal drugs during the statutory period (*see Matter of Antonia Mykala P.*, 52 AD3d 224 [2008], *lv denied* 11 NY3d 705 [2008]).

A fair preponderance of the evidence submitted at the dispositional hearing establishes that the best interests of the child will be served by terminating respondent's parental rights so as to facilitate the child's adoption by her foster mother, who is also her paternal aunt, with whom the child has lived since August 2004 and under whose care she has thrived (*see Matter of Lenny R.*, 22 AD3d 240 [2005], *lv denied* 6 NY3d 708 [2006]). The circumstances do not warrant a suspended judgment.

We have considered respondent's remaining arguments and find them without merit.

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

McGUIRE, J. (dissenting)

In finding that the allegation of permanent neglect had been proven, Family Court stressed that appellant "failed to complete substance abuse treatment, which was the lynchpin of her service plan, and failed to remain drug free." Appellant's daughter, who was then 7 ½ years old, came into the care of petitioner ACS on August 17, 2004. The child neglect petition was filed on or about December 23, 2005, and it alleged that appellant had failed to plan for the child's future. It is undisputed that following her referral to Odyssey House in August 2004, appellant enrolled in the programs offered, completed an anger management course, enrolled in a mental health program provided by Soundview Mental Health and remained drug free for a substantial portion (from December 2004, and perhaps earlier, through April 2005) of the 16-month period from mid-August 2004 to December 23, 2005. On the other hand, it also is undisputed that appellant then relapsed and failed to follow through with drug testing referrals on eight occasions between June and October of 2005. In June of 2005, appellant admitted that she was "mixing chemicals in Mt. Vernon" for $500 a day.

In relevant part, Social Services Law § 384-b(7)(a) defines a permanently neglected child as one "whose parent or custodian has failed *for a period of more than one year* following the date

such child came into the care of an authorized agency *substantially and continuously or repeatedly* to . . . plan for the future of the child" (emphasis added).[1] In cases in which the lynchpin of a neglect charge is a parent's failure to complete substance abuse treatment, the meaning of the statutory requirement of a failure for more than one year that is "substantial[] and continuous[] or repeated[]" is unclear. If appellant's success in staying off drugs for at least four to five months had occurred at the end rather than the beginning of that 16-month period, I think it clear that a neglect finding could not be sustained. I do not mean to suggest, however, that a failure at the end of the period is no more significant than a failure at the beginning. Unquestionably, substance abuse by a parent presents a serious risk of harm to the parent's child. Accordingly, I do not doubt that a parent who is able to stay off drugs for only a brief period or intermittently could claim no immunity from a neglect finding. But given both the reality that

[1]An amendment to the statute, effective the day before the petition was filed, provides for "a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care . . ." (2005 McKinney's Session Laws of NY, c. 3, Pt. A, § 57). The parties appear to have litigated this case on the assumption that it is governed by the unamended version of the statute. The parties did not alert us to the amendment and do not base any arguments on it.

those who are attempting to conquer drug addictions face enormous difficulties and the long-standing and fundamental importance of New York's policy in favor of "keeping biological families together" (*Nicholson v Scoppetta*, 3 NY3d 357, 374 [2004][internal quotation marks and citations omitted]), I would conclude that the statute requires a failure for a more protracted period than the one established here. Determining where the line should be drawn is a job best left to the Court of Appeals. We sometimes must be, and sometimes should be, carpenters rather than architects. For these reasons, I would reverse the permanent neglect finding.

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

ENTERED: DECEMBER 28, 2010

CLERK

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

3354 The People of the State of New York, Docket 55442C/05
Respondent,

-against-

Eddie Abelo,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered January 18, 2007, convicting defendant, after a nonjury trial, of aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him to a term of 60 days with 3 years' probation and a $1,500 fine, reversed, on the law, and the matter remanded for a new trial.

The conviction should be reversed and the matter remanded for a new trial on the ground that it was error to admit the notice of suspension mailed in 1992. As the trial court found, the People were required to demonstrate that "defendant had or should have had knowledge of the fact that his license was suspended and revoked" (14 Misc 3d 818, 828 [2006]; see Vehicle and Traffic Laws 511[2][a][iv]). While the remaining evidence was sufficient to establish that he was driving with a suspended

license in 2005, the foregoing error was not harmless and thus a new trial is required.

On October 25, 2005, defendant was stopped by a police officer because his car had a broken front headlight. Upon checking his registration and what appeared to be a valid license in the central dispatch system, the officer learned that defendant's license was suspended based on 1992 and 1993 unpaid fines. He was then charged with aggravated unlicensed operation of a motor vehicle Vehicle and Traffic Law § 511(2)(a)(i)(iv) because he had more than three open suspensions.

The Department of Motor Vehicles (DMV) issued numerous suspensions to defendant in 1992 and 1993 for failure to pay fines for various parking violations and traffic infractions. In 1996, defendant surrendered his New York State license in order to obtain a Pennsylvania license. In 1997, he applied for and was issued a New York license using all of his identifying information. In 1998, he again surrendered his New York State license for a Pennsylvania license but surrendered his Pennsylvania license for a New York license in 2001. He again applied for a New York license in 2004 after surrendering a Pennsylvania license. On the application for the 2001 license, he used his mother's name, Melendez, while he used Abelo, on his 2004 application. None of these applications was rejected based

on his having had a previously suspended license, and New York licenses were issued. In 2004 and 2005, defendant incurred traffic violations and suspensions were issued, but they were lifted after defendant paid the fines. Defendant also took two courses in accident prevention that were designed to lower insurance rates and achieve points reduction on his license in September 2005. This circumstantial evidence, although not overwhelming, would have been sufficient to support defendant's conviction.

The evidence which gives rise to the trial error was the testimony of one Kimberly Shaw, a customer representative for the DMV, who was first employed in 2002. She testified to mailing procedures at DMV. Shaw testified that based on an abstract generated on November 23, 2005, defendant's license had been suspended 57 times on 16 dates between 1983 and 1994 for unpaid tickets. Shaw testified that a driver's license suspension is mailed to the address on file at the DMV, that such a mailing had occurred in December 1992, and that defendant's license was suspended on January 4, 1993. The court admitted the 1992 notice of suspension. On cross-examination Shaw acknowledged that she did not work for DMV in 1992, and could not testify concerning standard mailing procedures during that year or those in place in 1993. She also acknowledged that procedures had changed. The

court then refused to admit the 1993 suspension notices because Shaw was not familiar with the business practices in place at that time or earlier, but it refused to strike the already admitted 1992 notice.

Defense counsel moved to dismiss the charge on the ground that the People failed to prove that defendant knew or had reason to know that his license was suspended or that he knew he had three or more suspensions. In *People v Pacer* (6 NY3d 504 [2006]), the Court of Appeals held that documentary evidence of a license suspension was inadequate and violated the Confrontation Clause as in *Crawford v Washington* (541 US 36 [2004]) because the affidavit in *Pacer* was a testimonial statement. The Court stated that, without an opportunity to cross-examine the affiant, defendant was unable to challenge the People's proof on a critical matter.

The People here argue that, having produced Kimberly Shaw, they satisfied their obligation to produce a witness who was subject to cross-examination. While defendant acknowledges that it was clearly not necessary to produce someone who was employed at the time the notice was mailed, he argues that the People were obligated to produce someone who had at least familiarized herself with the procedures current at the time. Moreover, as defendant argues, the trial court's refusal to admit the 1993

notices of suspension because Ms. Shaw was unfamiliar with the mailing practices in 1993 was inconsistent with admission of the 1992 notice of suspension. The witness made it clear that she was not familiar with the practice in either year.

At the outset, we reject defendant's claim that the statute under which he was convicted, Vehicle and Traffic Law § 511(2)(a)(iv), aggravated unlicensed operation of a motor vehicle in the second degree, requires knowledge that one is driving with three license suspensions. Although the aggravating factor is that there were three or more suspensions, the statute only requires knowledge or reason to know of one such suspension, not of three suspensions.

However, the only basis for admitting the required notice of suspension was the testimony of a witness who was not qualified to testify concerning procedures in use at the time that the notice was sent. Admitting such evidence contravenes the rationale of *People v Pacer* (6 NY3d 504 [2006], *supra*). A witness who on cross-examination denies knowing what procedures were used at the time of mailing does not satisfy the obligation to produce a witness who can be adequately cross-examined concerning notice to defendant. In essence, the notice of suspension was admitted without foundation, and under the facts of this case its admission constituted reversible error.

The fact that DMV continued to issue him new and facially valid licenses upon the surrender of his Pennsylvania licenses renders the circumstantial evidence that defendant knew he was driving with a suspended license less than overwhelming. For this reason, the aforementioned error in admitting the notice of suspension cannot be deemed harmless and the matter must be remanded for a new trial.

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

DeGRASSE, J. (dissenting)

I respectfully dissent and would affirm the judgment of conviction. The crime of second-degree aggravated unlicensed operation of a motor vehicle has a mens rea element. Conviction requires proof that, among other things, a defendant knew or had reason to know that his or her driving privileges in this State have been suspended, revoked or otherwise withdrawn by the Commissioner of Motor Vehicles (Vehicle and Traffic Law § 511[2]). Defendant's driving abstract, a business record of the Department of Motor Vehicles (DMV), established that his driver's license had been revoked, with 61 suspensions in effect at the time of his arrest in October 2005. To establish defendant's mens rea, the People called Kimberly Shaw, a DMV customer service representative, as a witness. On Shaw's examination, a driver's license suspension order dated December 19, 1992 was admitted in evidence. Shaw testified that DMV's practices in 1992 required that the suspension order be mailed to the address of the motorist on file with DMV. This suspension order reflected that defendant's license was suspended on January 4, 1993. After the 1992 suspension order was received in evidence, the court conducted a voir dire as to three 1993 notices of suspension. On voir dire, Shaw testified that she was not familiar "with the business practices and the generation of business records as it

was in 1993 [*sic*]." Based on that concession, the court sustained defendant's objection to the three additional notices of suspension. At the conclusion of the People's case, defendant unsuccessfully moved for a trial order of dismissal on the ground that the People failed to prove that he knew or had reason to know that his license had been suspended at the time of his arrest.

Citing *People v Pacer* (6 NY3d 504 [2006]), defendant and the majority posit that Shaw's testimony regarding the 1992 suspension order violated the Confrontation Clause in light of her concession that she was not familiar with DMV's 1993 business practices. The argument misinterprets the holding in *Pacer*. The *Pacer* Court held that a defendant's right of confrontation was violated by the prosecution's introduction of an affidavit prepared for trial as opposed to live testimony to prove that DMV had previously mailed a notice or license revocation to that defendant. The Court reasoned that a defendant faced with nothing more than an affidavit has no means of challenging the prosecution's proof on mens rea, an element of the crime charged (*id.* at 512). By contrast, Shaw's testimony in this case provided defendant with an undeniable opportunity to exercise his confrontation right. As noted above, defendant claims that his right of confrontation was violated due to Shaw's unfamiliarity

with DMV's 1993 practices. On this score, it is noteworthy that the *Pacer* Court observed that past agency practices is an avenue of inquiry that can be pursued with a live witness as opposed to an affidavit (*id.*). Accordingly, there was no violation of defendant's right of confrontation.

I would also reject defendant's argument that his conviction was not supported by legally sufficient evidence that he knew or had reason to know of the 1992 suspension of his license. Evidence is legally sufficient when a valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the factfinder on the basis of the trial evidence, viewed in the light most favorable to the People (*People v Williams*, 84 NY2d 925 [1994]). Notwithstanding her testimony on voir dire, Shaw's direct examination viewed with the driving abstract and the 1992 suspension notice provides the requisite valid line of reasoning. Evidence need not be unassailable to be legally sufficient as long as a valid line of reasoning for the factfinder's conclusion exists. Moreover, the trial court's conclusion is also supported by circumstantial evidence of defendant's knowledge of the suspension of his license.

As reflected by the driving abstract, in 2001, defendant used an alias to obtain a New York State license, exchanged that

license for a Pennsylvania license and then obtained another New York State license in exchange for the Pennsylvania license.[1] Shaw testified that even if a motorist's license has been revoked DMV will issue a new driver's license under a different identification number if an application for one is made under a different name. By analogy, a defendant's use of an alias upon arrest constitutes evidence of consciousness of guilt (*see People v Severino,* 200 AD2d 522 [1994], *lv denied* 84 NY2d 832 [1994]; *People v Theiss,* 198 AD2d 17 [1993]. Accordingly, the trial court properly inferred that defendant obtained driver's licenses under an alias because he knew that his New York State drivers license had been suspended or revoked. Even if erroneous, the receipt in evidence of the 1992 suspension order was harmless. I reach this conclusion upon consideration of the evidence that defendant used an alias and traded licenses between New York and Pennsylvania on numerous occasions (*see e.g. People v Carney,* 41 AD3d 1239 [2007], *lv denied* 9 NY3d 873 [2007]). As noted above, this circumstantial evidence provides the requisite valid line of reasoning for the court's conclusion that defendant knew his license had been suspended.

[1]In all, defendant exchanged drivers licenses between the States of New York and Pennsylvania six times between 1996 and 2004.

Like the majority, I reject defendant's argument that the statute under which he was convicted requires proof that he knew or had reason to know of more than one license suspension (*see* Vehicle and Traffic Law § 511[2]). I would also find defendant's remaining contentions unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Tom, J.P., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3644 Performance Comercial Importadora E Exportadora Ltda, Plaintiff-Respondent, Index 603490/01

-against-

Sewa International Fashions Pvt. Ltd., et al., Defendants,

Star of India Fashions, Inc., Defendant-Appellant.

_____

Glen Backer, New York, for appellant.

Strongin Rothman and Abrams, LLP, New York (Lena Davydan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 13, 2010, which denied the motion by defendant Star of India Fashions for partial summary judgment dismissing the third cause of action, unanimously reversed, on the law, with costs, and the cause of action dismissed.

Under the third cause of action, it is alleged that Star of India breached a March 1998 oral agreement to deliver dress samples and swatches to plaintiff, an apparel vendor. Defendant Sewa International Fashions was the manufacturer of the dresses. Star of India, the designer of the dresses, moved for summary judgment on the ground that it was the agent for Sewa, a disclosed principal. Supreme Court denied the motion, finding an

issue of fact as to whether the parties intended that Star of India would be bound by the agreement. We reverse.

An agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of the principal (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]). It is categorically stated in the verified complaint that Star of India was Sewa's agent for purposes of the contract. Such a statement in a pleading constitutes a formal judicial admission and evidence of the fact admitted (*Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1994], *lv denied* 84 NY2d 803 [1994]). To be sure, plaintiff's president, Daniel Mendes, testified that it was his understanding from the complaint that Star of India was acting on behalf of Sewa. In light of plaintiff's admission, the court erred in finding that an issue of fact was raised by Mendes's testimony that he was not aware of the agency relationship (*see e.g. Karasik v Bird*, 104 AD2d 758 [1984]). For the same reason, we reject plaintiff's argument that a reasonable juror might conclude that Sewa was an undisclosed principal.

Given the standard of "clear and explicit evidence," we further find the parties' correspondence insufficient to raise an issue of fact as to whether Star of India intended to superadd or

substitute its own liability for, or to, that of Sewa (*see Savoy Record Co.* at 4). Nothing in the record sets Star of India apart from any agent acting on behalf of a disclosed principal. We nevertheless reject Star of India's argument that plaintiff elected its remedy by obtaining a default judgment against Sewa in a separate action (*see* CPLR 3002 [a]).

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

ENTERED: DECEMBER 28, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Richter, JJ.

3627 Columbus 95th Street, LLC, Index 113148/07
Petitioner-Appellant,

-against-

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

Columbus House Tenants Association, et al.,
Intervenors-Respondents-Respondents,

The Attorney General for the
State of New York,
Statutory Intervenor-Respondent.

_____

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Maria I. Beltrani of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David Hershey-Webb of counsel), for Columbus House Tenants Association and Leslie Burns, respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered December 4, 2009, affirmed, without costs.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
Eugene Nardelli
Rosalyn H. Richter, JJ.

3627
Index 113148/07

_____x

Columbus 95th Street, LLC,
Petitioner-Appellant,

-against-

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

Columbus House Tenants Association,
et al.,
Intervenors-Respondents-Respondents,

The Attorney General for the
State of New York,
Statutory Intervenor-Respondent.

_____x

Petitioner appeals from a judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered December 4, 2009, inter alia, denying those portions of the petition seeking a declaration that Rent Stabilization Code (9 NYCRR) § 2522.3(f)(4) is invalid or, in the alternative, prohibiting its retroactive application and directing respondent

Division of Housing and Community Renewal (DHCR) to process petitioner's applications for adjustment of initial legal regulated rents for the apartments in the subject building pursuant to the Rent Stabilization Code in effect at the time of the filing of the applications, except to the extent of directing DHCR to proceed forthwith to process petitioner's applications.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Maria I. Beltrani of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David Hershey-Webb and Serge Joseph of counsel), for Columbus House Tenants Association and Leslie Burns, respondents.

MAZZARELLI, J.

In March 2006, Columbus Housing, Inc. (Housing) dissolved and petitioner Columbus 95th Street (Columbus) immediately became the owner of 95 West 95th Street, New York, New York. Housing had operated the building as a "Limited-Profit Housing Company," or "Mitchell-Lama," for approximately 36 years, and had enjoyed the benefits, and was bound by the restrictions, embodied in article II of the Private Housing Finance Law (PHFL).

The PHFL was enacted to encourage the development of low- and middle-income housing by offering State and municipal assistance to developers in the form of long-term, low-interest government mortgage loans and real estate tax exemptions. In return, developers agreed to regulations that restricted the rents they charged, their profits, and their selection of tenants. At the inception of the program in 1955, Mitchell-Lama buildings were required to operate pursuant to PHFL for 35 years before they could prepay their mortgage and exit the program. However, in 1960, because the 35-year period was discouraging participation in the program, the Legislature amended the PHFL to reduce that minimum to 20 years, and to permit buildings to leave the program without approval.

Upon leaving Mitchell-Lama, the rents which a landlord could charge were still regulated, not pursuant to PHFL, but rather by

the New York City Rent Stabilization Law of 1969 (RSL), either directly or by virtue of the Emergency Tenant Protection Act of 1974 (ETPA) (*see Matter of KSLM-Columbus Apts. v New York State Div. of Hous. & Community Renewal*, 6 AD3d 28, 30 [2004], *mod on other grounds* 5 NY3d 303 [2005]). The ETPA was enacted in 1974 for the express purpose of bringing within the scope of the RSL those apartments that had become deregulated by virtue of the Vacancy Decontrol Law of 1971 (VDL) or that had escaped the grip of the Rent Control Law of 1946 (RCL). It reaffirmed the need for affordable housing in New York City and "captured" into the RSL apartments which had been, or which otherwise would be, deregulated. The ETPA also authorized DHCR to adopt the Rent Stabilization Code (RSC), which would apply to rent-stabilized buildings in New York City and allowed DHCR to adopt regulations necessary to fully implement the RSL.

The RSL, as applied by the ETPA, provides the mechanism for calculating the initial, or base, rents for all apartments entering the rent stabilization system. Specifically, RSL (Administrative Code of City of NY) section 26-512, provides:

> "b. The initial regulated rent for housing accommodations subject to this law on the local effective date of the emergency tenant protection act of nineteen seventy-four or which become subject to this law thereafter, pursuant to such act, shall be:

> "(1) For housing accommodations which were regulated pursuant to this law or the city rent and rehabilitation law prior to July first, nineteen hundred seventy-one, and which became vacant on or after such date and prior to the local effective date of the emergency tenant protection act of nineteen seventy-four, the rent reserved in the last effective lease or other rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.
>
> "(2) For housing accommodations which were regulated pursuant to the city rent and rehabilitation law on the local effective date of the emergency tenant protection act of nineteen seventy-four, and thereafter become vacant, the rent agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.
>
> "(3) *For housing accommodations other than those described in paragraphs one and two of this subdivision, the rent reserved in the last effective lease or other rental agreement*" (emphasis added).

It is undisputed that in the case of Columbus, the RSL applied pursuant to the ETPA, because each of the apartments in the building had experienced at least one vacancy after July 1, 1971

(*see KSLM-Columbus Apts.*, 5 NY3d at 315). Because none of the apartments owned by Columbus had been deregulated by virtue of the VDL (*see* RSL 26-512[b][1]), or had been controlled by the RCL and then vacated after January 1, 1974 (*see* RSL 26-512(b)(2), they are covered by RSL 26-512(b)(3), which serves as a "catch-all." Thus, upon their emergence from Mitchell-Lama, the apartments owned by Columbus could not be rented for any more than "the rent reserved in the last effective lease or other rental agreement."

On or about April 20, 2006, Columbus filed 248 individual applications (one for each of the apartments in the building) with DHCR, asking that the initial rent allowable by the RSL be increased. The applications sought relief under RSL 26-513(a), which provides, in pertinent part, as follows:

> "The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four may, within sixty days of the local effective date of this section or the commencement of the first tenancy thereafter, whichever is later, file with the commissioner an application for adjustment of the initial legal regulated rent for such housing accommodation. *The commissioner may adjust such initial legal regulated rent upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted*

> *in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations"* (emphasis added).

In the applications, Columbus contended that they were entitled to the increase because the building had previously been in the Mitchell-Lama program and had been subject to artificially depressed rents constituting a "unique or peculiar circumstance." This circumstance, they asserted, materially affected the initial stabilized rents which could be charged for all of the apartments in the building, insofar as they were based on "the rent reserved in the last effective lease or other rental agreement" (RSL 26-512[b][3]), and were thus substantially below market.

DHCR did not immediately take action on the applications, other than consolidating them under a common docket number. Rather, over the ensuing year and a half, representatives of Columbus and representatives of the agency met approximately seven times to negotiate a settlement of Columbus's demands. In the meantime, on or about August 1, 2007, DHCR proposed RSC (9 NYCRR) §2522.3(f)(4), a regulation clarifying RSL 26-513(a). The proposed amendment provided as follows:

> "Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic

> circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (b) and (c) of section 2522.4 of this code."[1]

On November 21, 2007, after extensive public hearings, DHCR adopted the new regulation. On September 28, 2007, after publication of the new regulation, but before its adoption, Columbus commenced this article 78 proceeding to compel DHCR to process its applications under separate docket numbers. After the new regulation was formally adopted, Columbus sought leave to amend its petition to include allegations that the new regulation was arbitrary, unconstitutional, and ultra vires. Columbus argued that RSL 26-513(a) provided former Mitchell-Lama buildings with an absolute right to a rent increase by virtue of the "unique" or "peculiar" circumstance that their rents had been artificially depressed by the PHFL. The new regulation, they argued, directly contravened that statutory mandate. Columbus also sought and secured a temporary injunction, staying DHCR from processing any of its applications. By interim order dated March

[1] RSC 2522.4(b) and (c) permit a landlord to apply for a rent reduction based on "hardship." "Hardship" is evaluated by considering "the relationship between the annual rent and a calculation of either the annual net income or the annual operating expenses of the building" (*KSLM-Columbus Apts.*, 6 AD3d at 32-33).

11, 2008, the court granted petitioner's motion for leave to amend the petition and continued the stay. On or about March 3, 2008, the Attorney General and the DHCR filed motions to dismiss the amended petition.

Supreme Court granted the petition to the limited extent of directing DHCR to proceed with processing Columbus's application, and to determine the matter within 150 days. The court otherwise denied the petition. In so deciding, the court found that

> "[a]dopting the owner's arguments in this case would permit a wholesale increase in rents on a building-wide basis in excess of 200% per tenant as soon as the building becomes rent stabilized. Such a result would be at odds with the existing statutory and regulatory scheme and the overall policy behind the rent laws to prevent excessive rent inceases."

Furthermore, the court held that DHCR had not exceeded its authority in promulgating RSC 2522.3(f)(4), noting that the term "unique or peculiar" had a history of being interpreted as applicable only to discrete circumstances

> "such as unusual pressure or necessity affecting the rental of a single housing accommodation at an unusually low rent; rent established by a prior owner who was mentally impaired or suffering from a condition rendering him incapable of normal business judgment; a building in receivership where the receiver set the initial maximum rents substantially below prevailing rents for

> comparable accommodations; or where a prior owner was renting at below-market rates to a family member."

The court rejected Columbus's position that the Court of Appeals' decision in *KSLM-Columbus Apts.* (5 NY3d 303 [2005], *supra*) controlled the outcome of this case and required that RSC 2522.3(f)(4) be struck down. Supreme Court found that while *KSLM* authorized owners of post-1974 Mitchell-Lama buildings to apply for rent increases based upon RSL 26-513(a), it did not mandate that those owners were automatically entitled to rent increases solely on the basis of having been in the Mitchell-Lama program.

The court declined to rely on certain DHCR opinion letters which Columbus contended established that DHCR actually shared its interpretation of RSC 2522.3(f)(4). It stated that the letters "cannot be construed as binding policy or precedent that a building's former Mitchell-Lama status, standing alone, automatically entitles an owner to a [unique or peculiar] rent increase." Finally, the court held that there was no basis to limit the November 2007 regulation to prospective application, as there had been no change in the law, or willful or negligent delay by DHCR.

The Court of Appeals has repeatedly held that our role as a reviewing court, when determining the validity of a challenged regulation, "is a limited one" (*Ostrer v Schenck*, 41 NY2d 782,

786 [1977]). It has said that the challenger of a regulation must establish that the regulation "is so lacking in reason for its promulgation that it is essentially arbitrary" (*id.* [internal quotation marks and citation omitted]; *see Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995] ["(t)he standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious"]). Thus, a regulation should be struck down only if it is in conflict with the provisions of an enabling statute or inconsistent with the design and purpose of an overarching statutory scheme (*see Matter of City of New York v Stone*, 11 AD3d 236 [2004]).

In determining a statute's intent, we resort to standard rules of statutory construction, which have been well established. The Court of Appeals has stated that "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature," but has also "correspondingly and consistently emphasized that where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 106-107 [1997] [internal quotation marks, citation and emphasis

omitted]).

According to Columbus, RSC 2522.3(f)(4) contravenes the purpose of the RSL, which it correctly describes as having been designed to balance the need for affordable housing with the need to ensure that building owners can make a reasonable profit. It argues that the RSL must be read in a way that avoids situations where landlords are saddled with unreasonably deflated rents because of regulation. Columbus urges us to read RSL 26-512 (b)(3) and RSL 26-513(a) together, and conclude that, in combination with each other, the two sections reflect the Legislature's intent to peg *all* initial post-Mitchell-Lama stabilized rents to market value. In other words, Columbus contends that, notwithstanding section 26-512(b)(3)'s clear mandate that the initial stabilized rents for all emerging Mitchell-Lama apartments be based on the last existing rent during the Mitchell-Lama regime, section 26-513(a) permits DHCR to conclude that the very fact of former Mitchell-Lama regulation constitutes a "unique or peculiar" circumstance necessitating a more fair rent.

Columbus attempts to bolster its argument by citing to this Court's decision in *KSLM-Columbus Apts.* (6 AD3d 28 [2004], *supra*). The *KSLM* building, which, like the Columbus building, had recently emerged from Mitchell-Lama, applied for rent

increases pursuant to RSL 26-513(a) on the same ground as Columbus, that is, that former regulation under PHFL was a "unique or peculiar" circumstance which if not corrected would keep rents artificially low. Unlike here, DHCR did not reject the application on the merits. Rather, it took the position that RSL 26-513(a) did not apply because the building was regulated directly by the RSL and not by the RSL through the ETPA (again, section 26-513(a) expressly applies only to the latter situation). DHCR never took a position in the *KSLM* case as to whether a "unique or peculiar circumstance" existed by virtue of that building having left Mitchell-Lama regulation, so as to justify a rent increase. Accordingly, neither this Court, nor the Court of Appeals, was asked to determine the issue presented here. Rather, the issue in *KSLM* was limited to whether DHCR initially had jurisdiction to consider the petitioner's application at all. This Court held that the building was rent stabilized pursuant to the ETPA, as opposed to being regulated directly by the RSL. Thus, we determined that the petitioner was entitled to apply for a base rent increase pursuant to RSL 26-513(a), and was not limited to filing a "hardship" application under RSC 2522.4(b) and (c). The Court of Appeals modified by holding that only those apartments which became vacant after July 1, 1971 were subject to ETPA. Focusing on this Court's decision

in *KSLM*, Columbus presents the following argument, which consists of disparate quotations cut from the opinion and then pasted back together:

> "[A]s this Court found, 'the economic disadvantage a building owner would encounter upon losing its Mitchell-Lama financing and tax incentives," which justified DHCR's original 'awareness that housing developments emerging from a more stringent state or federal regulatory system,' such as the PHFL, 'should be entitled to use that as a basis for the 'unique or peculiar circumstances' requirement necessary to apply for an initial rent adjustment under RSL 26-513(a).' [6 AD3d] at 39, 772 N.Y.S.2d at 673."

Columbus separately argues that DHCR was estopped from adopting the new regulation. In support of its position, Columbus relies on a letter dated October 19, 1994, in which former DHCR Commissioner Donald M. Halperin, writing to the Deputy Assistant Secretary of the United States Department of Housing and Urban Development, suggested that owners of former Mitchell-Lama apartments might find some success in applying for rent increases under RSL 26-513(a) based strictly on their former Mitchell-Lama status. Columbus also cites to two additional letters to HUD from a DHCR official dated August 24, 1995 and May 16, 1996, which opined that rent increases "may be warranted based on the unique and peculiar circumstance of the development emerging from a more stringent state or federal regulatory

program."

Columbus further argues that DHCR is bound by certain actions the agency took in the immediate wake of the Court of Appeals decision in *KSLM*. Specifically, it points out that, after that case was decided, DHCR considered the applications which the Court of Appeals ruled were properly submitted under RSL 26-513(a) and, for those applications which were not disposed of by settlement, accepted the petitioner's argument that the rents should be increased to market rates based on the very fact that the building was formerly in the Mitchell-Lama program.

Finally, Columbus contends that, even if the new regulation was properly enacted, it should not be applied to it retroactively. This, it claims, is because DHCR acted in bad faith by delaying any determination of Columbus's applications so it would have sufficient time to promulgate the regulation.

Having considered all of these arguments, we conclude that Columbus did not overcome its "heavy burden" of establishing that RSC 2522.3(f)(4) is inconsistent with RSL 26-512 (b)(3) and 26-513(a) is thus unreasonable and arbitrary (*Consolation Nursing Home*, 85 NY2d at 331). We are required to read the statute according to its plain language, and the plain language of RSL 26-512(b)(3) is clear. The initial rent for *all* apartments that become regulated for any reason other than because they were

previously deregulated by the VDL (26-512[b][1]), or because they were previously rent controlled but then vacated (26-512[b][2]), is not the market rate, but the rent reserved in the previous lease. There is no concrete legislative history or other evidence to establish that the Legislature meant to permit former Mitchell-Lama owners to charge market rents to tenants upon exiting the program. There is some appeal to Columbus's claim that the statute provides a disincentive for Mitchell-Lama buildings to leave the program. However, in light of the plain language of the statute, this argument is better addressed to the Legislature (*see Joblon v Solow*, 91 NY2d 457, 465, n2 [1998]). We note, further, that Columbus fails to account for the fact that the result of our adopting its position would be anathema to the stated goals of the RSL, as it would cause a drastic increase in the rents of existing tenants who had no control over their landlord's decision to opt out of Mitchell-Lama.

Columbus's argument that RSL 26-513 reflects the Legislature's intention that initial rents for emerging Mitchell-Lama buildings should always be pegged to market rates, notwithstanding the plain language of RSL 26-512 (b)(3), would require a tortured interpretation of the RSL. It is simply not reasonable to conclude that, instead of declaring all initial rents to be tied to the market rate in the very section providing

for initial rents, the Legislature instead stated the opposite but then devised a mechanism by which all emerging Mitchell-Lama buildings could realize market rents. This is the very type of "artificial or forced construction" which is not to be employed by a reviewing court (*Matter of Schmidt v Roberts*, 74 NY2d 513, 520 [1989] [internal quotation marks and citation omitted]).

In any event, much like RSL 26-512(b)(3), the language of RSL 26-513(a) does not, by itself, permit the interpretation ascribed to it by Columbus. Columbus contends that the word "unique," when affording it its dictionary definition of "uncommon" or "unusual," can apply to former Mitchell-Lama buildings. This, it argues, is because there are relatively few such buildings when compared to all of the other types of multiple dwellings found throughout New York City. While this may be true, it does not permit the conclusion that the Legislature meant to afford a step-up to market rents based on the simple fact that a building had left the Mitchell-Lama program. A far more sensible interpretation of the phrase "unique or peculiar" is that it applies to situations which would not have been reasonably foreseeable to a landlord when forming its assumptions as to the initial rent it could charge under rent stabilization.

The correct view of the term "unique or peculiar

circumstances" was illustrated in *207 Realty Assoc. v New York State Div. of Hous. & Community Renewal* (297 AD2d 569 [2002]). In that case, this Court agreed with DHCR that the landlord

> "established the existence of unique and peculiar circumstances over a 17-year period based on the expulsion of a prior owner from the Rent Stabilization Association, pervasive mismanagement of the subject premises by a manager appointed by the court pursuant to RPAPL article 7-A, and numerous inconsistent rulings as to the status of various units at the premises issued by administrative agencies, including respondent" (*id.* at 570).

Similarly, DHCR has permitted rent increases based on the "unique or peculiar" circumstance of a previous owner having rented to relatives at depressed rates.[2] In contrast, it simply cannot be said that emerging from Mitchell-Lama was a "unique" or "peculiar" circumstance when Columbus's reasonable expectation, based on the clear language of RSL 26-512(b)(3), should have been that upon its emergence the initial regulated rent would be "the rent reserved in the last effective lease or other rental agreement" (RSL 26-512[b][3]).

Neither the decision of this Court in *KSLM*, nor that of the Court of Appeals, lend any support to Columbus's position. The

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[2] *See e.g. Matter of the Administrative Appeal of Saul Perlstein*, DHCR Docket No. FG2202278RO (1992); *Matter of the Administrative Appeal of Wendy Kaufman*, DHCR Docket No. BL410784-RT (1988).

question of whether the mere fact of emergence from Mitchell-Lama constituted a "unique or peculiar" circumstance justifying a base rent increase, was not directly addressed by either Court. Rather, the issue before this Court and the Court of Appeals in *KSLM* focused on different language in RSL 26-513(a), that is, whether the applicant was the "owner of a housing accommodation *made subject to this law by the emergency tenant protection act of nineteen seventy-four"* (emphasis added). Columbus, in forming its argument here, focuses on certain language in this Court's decision which, when taken out of context, can be read as endorsing the view that emergence from Mitchell-Lama, in and of itself, constitutes a "unique or peculiar" circumstance justifying an increase in base rent. However, the passages it quotes are not controlling. Moreover, nowhere in the Court of Appeals decision is there any language which supports the holding urged on this Court by Columbus. We note that, notwithstanding our determination that Columbus cannot rely on RSL 26-513(a) based only on its leaving the Mitchell-Lama program, it is still entitled to make an application pursuant to that section if it can identify circumstances which indeed are "unique or peculiar" within the meaning of the statute described herein. Further, nothing in this opinion precludes Columbus from asserting in an application pursuant to RSC 2522.4(b) and (c) that, if it meets

the criteria thereunder, it has suffered a "hardship" entitling it to an increased rent.

We reject Columbus's position that DHCR is estopped from taking the position it does on this appeal. First, it is well settled that estoppel cannot serve to bar a governmental agency from exercising its governmental functions (*see Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]). In any event, the 1994 letter from a DHCR official which discusses the possibility that a former Mitchell-Lama building *could* argue that the very fact of past regulation constitutes a "unique or peculiar circumstance" for purposes of RSL 26-513(a) is inconclusive. That letter expressly recognized the hypothetical and "amorphous" nature of the discussion and stated that it "should not be construed as a[n] official statement of DHCR's position in any particular case." One of the other two letters quoted Halperin's 1994 letter, in which Halperin had emphasized that "[a]n official agency determination cannot be made" under the circumstances. In the absence of proof of any official policy by DHCR, we decline to bind the agency to what can at best be expressed as musings in response to requests for its position on the setting of initial rents. Nor should DHCR be bound by its conduct after the Court of Appeals ruled in *KSLM*. DHCR's action in the wake of that case does not constitute adequate grounds to

bind the agency for all future applications.

Finally, we find little merit in Columbus's argument that DHCR acted in bad faith by delaying consideration of Columbus's application until after the agency adopted RSC 2522.3(f)(4). This argument assumes that the new regulation actually changed the existing law to Columbus's detriment. However, as discussed above, the regulation does not change existing law. Rather, it clarifies that existing law does not provide the relief now urged by Columbus. Accordingly, its retroactive application is not "unexpected and indefensible by reference to the law as it then existed" (*Rogers v Tennessee*, 532 US 451, 464 [2001]; *see also Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 430 [2007], *affd* 11 NY3d 859 [2008]).

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

Accordingly, the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered December 4, 2009, inter alia, denying those portions of the petition seeking a declaration that Rent Stabilization Code (9 NYCRR) § 2522.3(f)(4) is invalid or, in the alternative, prohibiting its retroactive application and directing respondent Division of Housing and Community Renewal (DHCR) to process petitioner's applications for

adjustment of initial legal regulated rents for the apartments in the subject building pursuant to the Rent Stabilization Code in effect at the time of the filing of the applications, except to the extent of directing DHCR to proceed forthwith to process petitioner's applications, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 28, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Manzanet-Daniels, JJ.

2999 Tiffany Applewhite, etc., et al., Index 22234/98
Plaintiffs-Respondents,

-against-

Accuhealth, Inc., et al.,
Defendants,

Linda Russo, R.N.,
Defendant-Appellant.

_____

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for appellant.

Murray S. Axelrod, New York, for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about October 29, 2009, affirmed, without costs.

Opinion by Mazzarelli, J.P. All concur except Saxe and Nardelli, JJ. who concur in part and dissent in part in a separate Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Eugene Nardelli
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

2999
Index 22234/98

_____x

Tiffany Applewhite, etc., et al.,
Plaintiffs-Respondents,

-against-

Accuhealth, Inc., et al.,
Defendants,

Linda Russo, R.N.,
Defendant-Appellant.
_____x

Defendant Linda Russo appeals from an order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about October 29, 2009, which denied her motion for summary judgment dismissing the complaint and all cross claims as against her.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), and Edward Garfinkel, Brooklyn, for appellant.

Murray S. Axelrod, New York, for respondents.

MAZZARELLI, J.P.

Defendant Linda Russo is a registered nurse whose work is exclusively limited to the performance of home infusions of intravenous medication. On February 21, 1998, she visited the 12-year-old plaintiff at home to administer to her a dose of methylprednisolone (Solu-Medrol). Russo worked for Accuhealth, Inc., a company which specialized in home infusions.

Solu-Medrol had been prescribed by an opthamologist who was treating plaintiff for uveitis, a vision-threatening form of eye inflammation. The physician had ordered that the medication be given for three-day periods on consecutive months. The first month that the medication was administered was January 1998, and plaintiff accepted the infusion without incident. Russo performed the infusion, which takes approximately one hour, on one of the January days. Other nurses from Accuhealth covered the other two days. Although not entirely clear from the record, it does not appear that the physician who prescribed the Solu-Medrol worked for Accuhealth.

The incident in question occurred on the day that the February series of infusions began. When Russo arrived at plaintiffs' apartment, the only medical equipment she had with her was a blood pressure cuff, a stethoscope and a one-way

breather, which is used during cardiopulmonary resuscitation. All of the items which Russo would need for the infusion itself, such as needles, intravenous lines, the pole to support the bag of medication and the medication itself, had been delivered directly to plaintiffs' apartment in anticipation of Russo's visit. The infusion materials were shipped by Accuhealth, without Russo's involvement.

Within seconds after the Solu-Medrol began to flow into plaintiff's veins, plaintiff complained that she could not breathe. Russo testified at her deposition that she was next to plaintiff at all times and immediately stopped the drip. She said she instructed plaintiff's mother, who was observing the infusion, to call 911 and tell the operator that her daughter was having difficulty breathing and to send an ambulance immediately. Plaintiff then began to have a seizure, and Russo directed her mother to bring her a spoon with padding around it. Russo used the spoon to force plaintiff's mouth open. She then inserted the one-way breather and began breathing into plaintiff's mouth through the device. Plaintiff's condition rapidly deteriorated and she went into full respiratory, and then cardiac, arrest. Russo claims that she lowered plaintiff from the sofa, where she had been situated at the beginning of the infusion process, to

the floor, where she began to administer CPR until the arrival of emergency medical services personnel. Tragically, by the time emergency responders were able to stabilize her condition, plaintiff had suffered significant oxygen loss, which resulted in permanent brain damage, leaving her unable to eat, speak or communicate.

It is not in dispute that plaintiff's condition was caused by an allergic reaction to the Solu-Medrol, which caused her to go into anaphylatic shock. This is a known side effect of the drug. It is also not in dispute that epinephrine is a prescription drug commonly given to counteract the effects of those allergens that can cause anaphylatic shock. Russo did not have epinephrine with her on the day in question. She testified that epinephrine was not included in the box of supplies that Accuhealth had delivered to plaintiffs' apartment before her arrival. She further stated that she would not have been permitted to carry epinephrine with her without a prescription.

Plaintiff's mother testified at her deposition that, when plaintiff first complained about having difficulty breathing, Russo was writing notes in the kitchen, approximately 20 feet from where plaintiff was situated in the living room. She stated that it took approximately one minute from the time she told

Russo that plaintiff could not breath until Russo instructed her to call 911. She further contended that, after she brought the padded spoon to Russo and Russo commenced rescue breathing, Russo asked her to help place plaintiff in a lying position on the couch, not on the floor as Russo testified, where she performed CPR on plaintiff.

Plaintiffs commenced this action against Russo, Accuhealth, the City and its Emergency Medical Service.[1] As concerns Russo, plaintiffs' bill of particulars alleged that she committed professional malpractice by, inter alia, failing to properly supervise and attend to plaintiff, failing to properly and immediately perform CPR on plaintiff, failing to personally advise the 911 operator of the nature of the emergency, and failing to have ensured that epinephrine was available to counteract the allergic reaction which caused plaintiff's anaphylaxis.

Russo moved for summary judgment to dismiss the complaint. She primarily relied on the expert affidavit of Anne Heuser, a registered nurse. Heuser opined that Russo, in each and every

[1] Plaintiffs did not name the physician who prescribed the Solu-Medrol that Russo administered. Accuhealth, Inc. is no longer a party, having been dissolved in bankruptcy.

aspect of her treatment of plaintiff, acted "well within the standards of good and accepted nursing practice." With respect to Russo's failure to have epinephrine available with which to treat plaintiff, the entirety of Heuser's opinion was as follows:

> "Furthermore, Nurse Russo was *not authorized* to carry epinephrine or an Eppi pen without a specific order from a physician. Here, neither Dr. Weiss nor Dr. Ahuja ordered epinephrine for the infant Plaintiff. It would have been a violation of good and accepted nursing practices for Nurse Russo to somehow obtain epinephrine on her own and administer it to the infant plaintiff."

In opposition to Russo's motion, plaintiffs submitted two expert affidavits. One was from Lynn Hadaway, a registered nurse from Georgia who specializes, like Russo, in home infusion therapy. Hadaway attached to her affidavit the drug monograph for Solu-Medrol, which identifies anaphylaxis as a side effect, and advises those administering the drug to "keep epinephrine immediately available." She concluded that Russo fell short of national standards for infusion therapy by failing to have the requisite knowledge about Solu-Medrol and failing to ensure the presence of epinephrine in plaintiffs' apartment on the day in question. Finally, Hadaway rendered her opinion that Russo improperly administered CPR to plaintiff on the sofa, because CPR

should be properly performed on a sturdy, rigid surface.

Plaintiffs' second expert affirmation was from Michael Wajda, a medical doctor. Dr. Wajda stated that Russo was responsible for handling any complications caused by administration of Solu-Medrol to plaintiff. He stated that if Russo was not prepared to address any such eventualities on the day in question, including by not having epinephrine at her disposal, she was required not to perform the infusion. Dr. Wajda further stated that it was unclear to him whether Russo stopped the flow of Solu-Medrol immediately after plaintiff went into shock, and whether she began to give intravenous fluids to plaintiff at the same time as she did stop the medication. This infusion of liquids would have been critical, Dr. Wajda stated, to keep plaintiff's veins open to allow the maximum volume of blood to flow through them. Dr. Wajda also opined that Russo did not properly maintain plaintiff's airway.

Plaintiffs also questioned the qualifications of Heuser to act as an expert for Russo, since Heuser did not specialize in home infusion nursing. In reply, Russo submitted a supplemental affidavit from her expert, Heuser, in which she attempted to counter plaintiffs' argument that she was not qualified to render an opinion in this case. While admitting that she did not

specialize in home infusion nursing, Heuser stated that because, during her 19 years of nursing, she had worked in emergency rooms and in trauma centers, she was "more than qualified to comment on the treatment rendered by a home infusion nurse."

Supreme Court denied Russo's motion. It found that questions of fact existed as to where Russo was at the time plaintiff first complained of trouble breathing and whether her location may have rendered her incapable of intervening quickly enough in case of an emergency. The court rejected Heuser's affidavit, finding that her lack of experience as a home infusion nurse rendered her opinion meaningless in a case where the standard of care to be applied was that of a home infusion specialist and not a generalist. The court credited the affidavits of both Nurse Hadaway and Dr. Wajda, and expressly rejected Russo's argument "that [p]laintiff falls short of defeating her entitlement to summary judgment because it is irrefutable that Nurse Russo had no authority to order or administer epinephrin [*sic*]."

Plaintiffs' expert submissions raised triable issues as to whether Russo's alleged failure, after the onset of plaintiff's reaction, to properly maintain plaintiff's airway, to flush the IV, to perform CPR on a rigid surface, and to ensure a prompt

response from emergency medical services, contributed to the severity of plaintiff's brain injury (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Further, Russo failed to even shift the burden to plaintiffs on the issue of whether she breached a professional duty by administering Solu-Medrol without an available supply of epinephrine.

It is basic that the party moving for summary judgment has the burden of establishing the absence of any factual issues to entitle it to judgment as a matter of law. Here, it was Russo's obligation to establish the absence of a departure from good and accepted practice (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, Heuser's affidavit is completely silent regarding plaintiffs' allegation that Russo had a duty to request a dose of epinephrine before beginning to infuse plaintiff with Solu-Medrol. As such, Heuser's affidavit is insufficient to shift the burden to plaintiffs to submit evidence creating an issue of fact (*see Wasserman v Carella*, 307 AD2d 225, 226 [2003]). To the extent that Heuser states that Russo "acted in accordance with good and accepted nursing practices," without addressing specific allegations, such bare conclusory statements are also insufficient (*id.*).

The concurrence has confused the parties' respective burdens

on a summary judgment motion by arguing that Russo should have been awarded summary judgment because plaintiffs failed to establish that it is common practice for Solu-Medrol infusion kits to include epinephrine. It ignores the fact that even Heuser's affidavit, which the motion court correctly determined, in relevant part, lacked probative value, does not state that epinephrine is *not* ordinarily prescribed by physicians in conjunction with the administration of Solu-Medrol. Rather, it states only that Russo would have needed a specific order from a doctor. This statement is clearly insufficient to shift any burden to plaintiffs.

The statements in Heuser's affidavit regarding Russo's duty to secure epinephrine failed to shift the burden on that issue for the additional reason that, as the motion court correctly determined, Heuser was not qualified to render such an opinion. We note that our review of this issue is limited to whether the court providently exercised its discretion, and that we will not disturb its determination "absent a serious mistake or an error of law" (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [2008]). Here, the motion court was correct as Heuser did not have any experience in home infusion. There is no evidence that her general nursing experience afforded her any insight into

those skills unique to home infusion nurses. That absence is critical here. Because none of the experience Heuser did purport to have was necessarily transferable to the issue of whether Russo should have carried out the infusion on plaintiff without having epinephrine available, and because she failed to lay any other "foundation . . . tending to support the reliability of" her opinion, the motion court properly rejected Heuser's affidavit when considering the epinephrine issue (*see Behar v Coren*, 21 AD3d 1045, 1047 [2005], *lv denied* 6 NY3d 705 [2006]).[2]

Even if Heuser had succeeded in shifting her burden on the epinephrine issue, plaintiffs amply demonstrated the existence of an issue of fact. Plaintiffs do not contend, as Russo suggests, that Russo should have prescribed epinephrine herself or otherwise obtained it without the proper authorization. Rather, plaintiffs claim that Russo had a duty to inquire if epinephrine was available before she proceeded with the infusion. To impose

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[2] We disagree with the court to the extent that it refused to consider those portions of Heuser's affidavit which opine on such general nursing skills as the proper way to maintain an airway, to flush an IV and to perform CPR. Heuser's general nursing experience was sufficient to qualify her to discuss those basic nursing functions (*Behar at* 1046-1047). However, the court's error is of no consequence, because, as stated above, plaintiffs introduced sufficient evidence to create an issue of fact as to whether Russo properly performed those skills.

such a duty on a nurse is not, as Russo also suggests, to grant the nurse a license to practice medicine. Rather, it recognizes the critical role of nurses as a check against medical error.

The Court of Appeals discussed the crucial job nurses perform in *Bleiler v Bodnar* (65 NY2d 65 [1985]). In *Bleiler*, the plaintiff suffered an eye injury at work and went to the emergency room the next day. An emergency room nurse and the supervising physician both separately took medical histories which failed to elicit information that would have led to proper treatment of the eye. The plaintiff sought to hold the hospital vicariously liable for the misconduct of the doctor and the nurse. The Court of Appeals had to consider whether the applicable statute of limitations was for negligence or for medical malpractice. In finding that the latter limitations period applied with respect to the conduct of both the doctor and the nurse, the Court observed that

> "[w]hile courts have in the past held that a nurse could be liable for negligence, but not for malpractice, the role of the registered nurse has changed, in the last few decades, from that of a passive, servile employee to that of an assertive, decisive health care provider. Today, the professional nurse monitors complex physiological data, operates sophisticated lifesaving equipment, and coordinates the delivery of a myriad of patient services. As a result, the

> reasonably prudent nurse no longer waits for and blindly follows physicians' orders" (65 NY2d at 71 [internal quotation marks and citations omitted]).

The court concluded that by not taking a proper medical history of the plaintiff, the nurse failed to carry out her "role as an integral part of the process of rendering medical treatment to a patient" (*id.* at 72).

Here, there is no evidence that the physician who prescribed the Solu-Medrol affirmatively decided that it was unnecessary to direct that epinephrine be included in the supply box that was delivered to plaintiffs' apartment. Consequently, it cannot be said as a matter of law that Russo was simply carrying out a prescribed treatment plan. If, on the other hand, the physician's failure to ensure the availability of epinephrine was an oversight, or the result of a mistaken assumption by the doctor that Accuhealth would independently procure an epinephrine prescription, Russo could have served as a critical backstop by assuring that epinephrine was available. After all, the injuries plaintiff suffered were a medically recognized consequence of the infusion. Again, the Court of Appeals in *Bleiler* identified one of the crucial roles of the modern professional nurse as that of one who "coordinates the delivery of a myriad of patient

services" (65 NY2d at 71 [internal quotation marks and citation omitted]). Here, the allegation is that Russo failed in that role, and that her actions constituted those of "a passive, servile employee" (*id.* [internal quotation marks and citation omitted]) and not those of "an assertive, decisive health care provider" (*id.* [internal quotation marks and citation omitted]). Plaintiffs have certainly submitted sufficient evidence to require that a jury determine the issue.

Contrary to the concurrence's claim, we are not suggesting that, in all cases, a professional registered nurse must "possess the same knowledge of pharmaceuticals that we properly demand of those who are authorized to prescribe them." Nor are we creating any new duty for registered professional nurses. Rather, our holding is informed by the fact that, in this case, as concerns the lack of epinephrine, plaintiffs' allegation of malpractice does not depend on a finding that Russo should have taken extraordinary steps or made inquiry into an area of medicine that far exceeded the knowledge ordinarily expected of a nurse. To the contrary, the notion that a nurse should be aware of the importance of having epinephrine available when administering medication in the home setting is not a difficult one to embrace. After all, the fact that epinephrine is the antidote to

anaphylaxis is widely known among laypeople. Indeed, many individuals who care for a child with severe allergies, or who have a spouse or partner prone to anaphylatic shock, are known to carry a dose of epinephrine in pockets and purses, regardless of their medical background.

Moreover, the administration of epinephrine is far from a radical procedure. Rather, the medicine is easily transportable in the form of auto-injector devices, commonly known as "epi-pens," and apparently easily administered, as evidenced by the fact that the Legislature has expressly authorized summer camp personnel to use them (Public Health Law § 3000-c). This fact further undermines the already inconsequential statement by the concurrence that "[t]he monograph Hadaway cited, saying that epinephrine *should* always be available when Solu-Medrol is administered, does not establish that this recommendation has actually been followed in the general practice of home infusion therapy." In other words, the idea of having a dose of epinephrine available in cases where, as here, a person may encounter a substance known to cause anaphylaxis, is so obvious that common sense would seem to dictate that it be routine. Indeed, it is so intuitive, even to a layperson, that the antidote for anaphylaxis should accompany a medicine known to

cause anaphylaxis, that lack of empirical proof that this "recommendation" is "followed" by the medical community should hardly compel the dismissal of the complaint. This is especially true in this case, where defendant has not offered any plausible reason why a physician would *not* prescribe epinephrine for use by a home infusion nurse if, in her role as "coordinate[r of] the delivery of . . . patient services" (*Bleiler*, 65 NY2d at 71 [internal quotation marks and citation omitted]), the nurse suggested that it was medically indicated.

The concurrence invokes Education Law § 6902 in arguing that, by holding that Russo should have inquired into the availability of epinephrine, we are holding her to a standard in excess of what is required by statute. As conceded by the concurrence, however, the definition of the practice of the profession of nursing as a registered professional nurse, as provided by § 6902, "encompasses a wide variety of tasks," including:

> "diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and *provision of care supportive to or restorative of life and well-being*, and executing medical regimens prescribed by a licensed physician, dentist or other licensed health care provider legally authorized under this title and in

> accordance with the commissioner's regulations (emphasis added)."

That this definition does not mention prescription medication is irrelevant to the issues in this case. Certainly that part of a registered professional nurse's job which the Legislature has identified as the "provision of care supportive to or restorative of life and well-being" is broad enough to embrace inquiring into the availability of epinephrine during home infusions of medications known to cause anaphylaxis. Moreover, we note that the definition of "nurse practitioner" also does not include any mention of prescription medication (Education Law § 6902[3][a]). Although we recognize that nurse practitioners are separately authorized to prescribe medicine under certain circumstances (Education Law § 6902[3][b]), it is evident that these definitional sections were not intended to provide exhaustive descriptions of what nurses can and cannot do.

That a home infusion nurse live up to the standards established by the Court of Appeals in *Bleiler* is critical. Home infusion nurses work without the resources normally available in a medical office or hospital setting. The issue in this case is what steps must a nurse with no readily available support take to ensure that any and all reasonably foreseeable problems can be

addressed so as to minimize patient harm. Nurses have become a crucial element in the provision of medical care. As recognized by the Court of Appeals in *Bleiler*, no longer are they automatons who operate by rote, but professionals who are expected to be proactive in their work, while always deferring to the reasonable directives of the doctors they work with. There is sufficient evidence in this record that Russo failed to comport herself in accordance with this more modern model of nursing, and that if she had, the disaster that befell plaintiff and her family could have been averted. Consequently, we find that the motion court correctly denied Russo summary judgment.

Accordingly, the order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about October 29, 2009, which denied defendant Linda Russo's motion for summary judgment dismissing the complaint and all cross claims as against her, should be affirmed, without costs.

All concur except Saxe and Nardelli, JJ. who concur in part and dissent in part in a separate Opinion by Saxe J.

SAXE, J. (concurring in part and dissenting in part)

This appeal concerns the scope of the duty owed by a nurse to a patient, a relatively new and developing area of tort law. As the Court of Appeals has noted in *Bleiler v Bodnar* (65 NY2d 65 [1985]),

> "the role of the registered nurse has changed, in the last few decades, from that of a passive, servile employee to that of an assertive, decisive health care provider. Today, the professional nurse monitors complex physiological data, operates sophisticated lifesaving equipment, and coordinates the delivery of a myriad of patient services. As a result, the reasonably prudent nurse no longer waits for and blindly follows physicians' orders" (*id.* at 71 [internal quotation marks and citations omitted]).

But, though the practice of nursing today entails greater responsibilities than ever before, it is inappropriate to impose on nurses duties that belong within the sphere of obligations assigned by statute to medical doctors. Yet, part of the majority's ruling today holds, in effect, that it is a nurse's legal duty to oversee or supervise the work of physicians, by requiring that they make an affirmative inquiry where a physician has prescribed for the nurse's patient a medication which carries with it a risk of anaphylaxis, but has not prescribed epinephrine to accompany that medication. While initially this holding seems

innocuous, because the duty is framed as merely a duty of inquiry, it imposes a duty that neither statute, regulation, nor case law has previously imposed, a duty that is better left to be imposed, if it is to be imposed at all, by statute or regulation, rather than by common law. Moreover, the imposition of this duty of inquiry on the administering nurse is particularly unfair where the plaintiffs have not even claimed that the prescribing physician was negligent for failing to prescribe epinephrine to accompany the prescribed medication. I therefore dissent from that aspect of the majority's ruling.

This tragic case concerns 12-year-old Tiffany Applewhite, who suffered catastrophic brain injury on February 21, 1998 as the result of an anaphylactic shock reaction to medication being administered in her home through intravenous infusion by defendant registered nurse, Linda Russo, to treat an eye inflammation. While plaintiffs sued the home health care agency that sent Nurse Russo, as well as the Emergency Medical Service and the City of New York, this appeal considers only the claim brought directly against Nurse Russo. The theories of liability offered in support of the claim against Nurse Russo were that she failed to take various necessary steps at the necessary speed in response to Tiffany's reaction, and that she failed to ensure

that epinephrine was available before beginning the intravenous infusion.

Nurse Russo's motion for summary judgment was denied by the motion court. This court now affirms. I write separately because although I concur in the result that summary judgment should be denied, in view of the issues of fact as to whether Nurse Russo's actions in response to Tiffany's reaction comported with professional standards of care, I strongly disagree with the aspect of the ruling permitting plaintiffs to proceed on the theory that Nurse Russo should have ensured that an epi-pen was available. The question of whether Nurse Russo may be charged with that duty is for the court; I submit that as a matter of law, Nurse Russo should not be held liable based upon the failure to inquire regarding the lack of an epi-pen.

Accuhealth, Inc. was a home health agency which provided various nursing services to clients in their homes pursuant to orders by the patients' physicians. One such service was home infusion therapy, for which Accuhealth sent nurses throughout the New York metropolitan area to administer intravenous medication at patients' homes. The necessary medical supplies, including prescribed medications, would be dispensed by Accuhealth's pharmacists and sent to the patient's home in advance. While

Accuhealth employed nurses at its headquarters, as well as field nurses and pharmacists, the record contains no evidence as to whether Accuhealth employed its own physicians to consult about the prescribing physician's orders. The day before the services were to be performed on a patient, the nurse would receive the doctor's orders and the "demographic" information via fax, including the patient's name, address, age, primary diagnosis and type of therapy to be administered. Upon arriving at the location, the nurse would open the package of supplies and perform the prescribed procedure. Defendant Linda Russo was one of the nurses employed by Accuhealth to perform intravenous infusions and provide other home nursing services.

Tiffany Applewhite had been diagnosed with uveitis, an inflammation of the sclera, or the whites of the eye. Solu-Medrol, a steroid medication, was prescribed for her by Dr. Ahuja, at the direction of Dr. Michael Weiss, director of the Uveitis Service at the Harkness Eye Institute of Columbia Presbyterian; it was to be administered intravenously each day for three consecutive days, with a second course to run for two consecutive days one month later. Tiffany's first course of the Solu-Medrol was administered at her apartment in the Bronx by Accuhealth nurses from January 22 to January 24, 1998 without

incident or any adverse reaction. Different nurses administered the first course of treatment on each of the three days; Nurse Russo was one of them.

The second course of medication began on February 21, 1998. Nurse Russo arrived at plaintiffs' apartment at about 11:00 A.M. on that day. Tiffany's mother, Samantha Applewhite, testified at her deposition that Nurse Russo spent about 5-10 minutes setting up the equipment to administer the Solu-Medrol. Nurse Russo explained that to administer the drug she had to open a vein and insert a "hep lock," a device that ensured that the blood would not clot, and then begin administering the medication. This was accomplished in a routine manner without incident. After this point, the facts are disputed. Ms. Applewhite testified that Nurse Russo went to the kitchen, about 20 feet away, to take notes, while Nurse Russo testified that she remained next to Tiffany until the girl cried out for help. Both women claim that Tiffany complained of breathing difficulties, screaming "Mommy, I can't breathe!" but Nurse Russo claims that this happened after three to five seconds, while Ms. Applewhite claims the IV was running for about 10 minutes before Tiffany complained she could not breathe. Ms. Applewhite agrees that immediately after Tiffany complained, Nurse Russo approached Tiffany and shut off

the IV.

Within a minute Nurse Russo told Ms. Applewhite to call 911. Ms. Applewhite's deposition states Nurse Russo told her to tell the 911 operator to send an ambulance because Tiffany was having a "reaction." Ms. Applewhite's affidavit, on the other hand, alleged that Nurse Russo told her to tell the operator that Tiffany was "having difficulty breathing" and that Nurse Russo did not tell her to say anything about Tiffany having an allergic reaction. By the time the call was over, Tiffany was unconscious. Ms. Applewhite testified that Nurse Russo asked her to help lay Tiffany on the sofa and get a padded spoon to open Tiffany's mouth. Nurse Russo did so, opened Tiffany's mouth using the spoon to "keep her tongue from going into her throat" and began CPR.

The accounts differ as to where the CPR began. Nurse Russo claims she immediately moved Tiffany from the couch to the floor. Ms. Applewhite claims that Nurse Russo began CPR on the sofa and that Tiffany was not moved to the floor until about five minutes later, when two-person CPR began when "an ambulance arrived with two EMT's" and a female EMT began CPR alongside Nurse Russo. Ms. Applewhite's version is corroborated by the New York City Fire Department ambulance call report, which stated "12 year old

female . . . found supine on couch."

According to Ms. Applewhite, two minutes after the first 911 call, she made a second 911 call at the request of Nurse Russo. About 20 minutes after Tiffany first claimed she could not breathe, a "male and [a] female" arrived from "[t]he first ambulance." The male went downstairs to call EMS. The female commenced two-person CPR with Nurse Russo. When the male returned about 15 minutes later he was with four EMS responders from two other ambulances, according to Ms. Applewhite. They then took over Tiffany's treatment, putting an oxygen mask on her and taking her downstairs to the ambulance.

Ms. Applewhite brought suit on behalf of Tiffany against Nurse Russo, Accuhealth, the Emergency Medical Service and the City of New York for her catastrophic brain injuries. No claim was made against the physician who prescribed the Solu-Medrol that was administered on February 21, 1998.[1]

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[1] The action was stayed for several years due to the bankruptcy of Accuhealth and its insurer, which was not covered by the New York Property/Casualty Insurance Security Fund. Accuhealth's general liability policy was written by Reliance Insurance Company of Illinois, a non-admitted carrier not licensed to do business in New York State. Accordingly, there was no coverage provided to Accuhealth for the loss under the New York Property/Casualty Insurance Security Fund under Insurance Law § 7603 because the Property/Casualty Fund is only used to pay claims from the insolvency of authorized insurers, and

Nurse Russo moved for summary judgment pursuant to CPLR 3212, offering in support her own affidavit and that of her expert, Anne Heuser, R.N., asserting that the treatment Nurse Russo rendered to Tiffany was "well within the standards of good and accepted nursing practices." According to Heuser's affidavit, it was proper for Nurse Russo to direct Ms. Applewhite to call 911 and inform them of Tiffany's inability to breathe, as well as to promptly open an airway and administer CPR. Heuser noted that Nurse Russo was not authorized to carry the medical antidote to anaphylactic shock, epinephrine, without a physician's order, and there was "nothing else" that Nurse Russo could have done.

In opposition, plaintiffs submitted an affidavit from their own expert, Lynn Hadaway R.N., who is licensed in Georgia. Hadaway's affidavit attacked Nurse Russo's qualifications on the grounds that she did not possess a "Certified Registered Nurse Intravenous" (CRNI) credential. Hadaway also cited a monograph stating that anaphylaxis is a side effect of Solu-Medrol and epinephrine should be kept "immediately available." Hadaway further criticized Nurse Russo's failure to treat Tiffany with

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"authorized" insurers are those licensed to do business in New York.

epinephrine and intravenous fluids and her failure to perform CPR on a "sturdy, rigid surface."

Plaintiffs also submitted the affirmation of Dr. Michael Wadja, an anesthesiologist, who stated that lack of oxygen can cause irreversible brain damage within 5-7 minutes. Wadja criticized Nurse Russo's alleged failures to administer epinephrine, properly maintain the patient's airway, and administer IV fluids to combat blood-vessel dilation. Wadja stated that it was unclear whether Nurse Russo immediately stopped the administration of Solu-Medrol when Tiffany began have anaphylaxis symptoms. He also asserted that Nurse Russo should have brought Tiffany to the hospital herself rather than waiting for the first responders even though Tiffany was on the fifth floor of an apartment building, stating "if an emergency hospital facility was only minutes away from the scene, then in my medical opinion, Tiffany most probably would have had a better outcome going immediately to the hospital, rather than waiting with the Nurse and first responders, who did not provide the proper initial therapy for anaphylaxis."

In reply, Nurse Russo disputes plaintiffs' position that it would have taken "minutes" for Nurse Russo to get from the living room to Tiffany, since -- even if Nurse Russo had been in the

kitchen, as Ms. Applewhite claims -- it would only have taken a few seconds. Nurse Russo also pointed out that even assuming that she began CPR while Tiffany was on the couch, as plaintiffs contend, plaintiffs submitted no evidence as to the quality of the couch so as to establish that it was an inappropriate surface on which to perform CPR. She further argues the other alleged departures from the standard of care were not shown to constitute proximate causes of Tiffany's injury. Finally, Nurse Russo disputes plaintiffs' challenge to her expert, offering an affidavit by Heuser defending her qualifications, asserting that she had 19 years of experience as a registered nurse and had worked in trauma centers and emergency rooms in various New York hospitals and therefore was more than qualified as an expert witness. Heuser's affidavit also countered Hadaway's challenge to her expertise on the basis of her lack of CRNI certification, pointing out that CRNI is not required for a RN to administer home infusion therapy, in that the American Board of Nursing Specialties only accredited this designation in July 2006, more than eight years after the events in question.

The motion court denied Nurse Russo's motion for summary judgment on various grounds. The court held that a question of fact was presented as to whether by situating herself in the next

room Nurse Russo failed to properly evaluate Tiffany's condition and failed to recognize her reaction and stop the IV as quickly as possible. The motion court found that Nurse Russo's expert, Nurse Heuser, was not qualified to give an expert opinion because Nurse Russo must be judged according to the standards of a specialist in home infusion nursing, and Heuser was not a home infusion nurse. The court also rejected Nurse Russo's argument that since a nurse may not order or administer epinephrine, she may not be held liable for that failure; the court pointed to a monograph cited by Hadaway which claimed that epinephrine should be kept immediately available.

The majority affirms, finding issues of fact as to whether Nurse Russo breached a duty of care by failing to inquire regarding the availability of epinephrine, whether she properly maintained Tiffany's airway and whether she failed to properly flush the IV. As stated earlier, while I agree with the remainder of the majority's reasoning, I take issue with this Court's ruling to the extent it allows plaintiffs to proceed in reliance on the theory that Nurse Russo breached a duty to inquire regarding the failure to provide epinephrine. Finally, because the matter will proceed to trial, I would also reject the motion court's ruling regarding Nurse Heuser's qualifications to

give an expert opinion in regard to Nurse Russo's handling of Tiffany's case.

While nursing malpractice is a relatively new area of law (*see Bleiler v Bodnar*, 65 NY2d 65 [1985], *supra*), there is a long history of claims being sustained against hospitals based upon nurses' failure, usually entailing the failure to follow nursing plans or medical orders (*see Toth v Community Hosp. at Glen Cove*, 22 NY2d 255 [1968]; *Pacio v Franklin Hosp.*, 63 AD3d 1130 [2009], *affg* 2008 NY Slip Op 31702[u] [Sup Ct, Nassau County 2008]), failing to properly take the patient's history (*see e.g. Bleiler v Bodnar*, 65 NY2d at 72), or failing to physically protect patients from injury in their weakened or compromised state (*see e.g. N.X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]). However, the present case goes well beyond these typical grounds for liability; here, liability is sought against a nurse based on the nurse's claimed failure to properly exercise her independent professional skills and judgment in treating the patient, in particular, in failing to question the prescribing physician's failure to include a prescription for epinephrine to be used in the event the patient experienced an anaphylactic reaction to the medication.

For all malpractice claims, the critical issue is the

existence and scope of the defendant's duty. There is no dispute here that Nurse Russo owed a duty of care to her patient. It is the nature and extent of that duty that must be determined.

I recognize that where a defendant owes a professional duty to a plaintiff, the scope of that duty is often determined by courts with the input of experts in the same field.

> "The law generally permits the medical profession to establish what the standard is (*Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 689 [1981]). Once the existence of a duty has been established, resort to an expert is usually necessary. 'To establish what the existing standard is or that there has been a departure from it, because laymen ordinarily are not deemed possessed of a sufficient knowledge, training or experience to have attained the competence to testify on this subject, a plaintiff nearly always will be required to produce expert testimony" (*Cregan v Sachs*, 65 AD3d 101, 109 [2009], quoting *Topel*, 55 NY2d at 690).

However, where, as here, statutes define and limit the parameters of the professional's responsibilities in a particular area, courts should hesitate to use their authority to impose, through case law, duties previously not contemplated by the controlling statutory authorities.

Education Law § 6902 defines the practice of nursing. The statutory definition encompasses a wide variety of tasks:

> "casefinding, health teaching, health

> counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens prescribed by a licensed physician, dentist or other licensed health care provider legally authorized under this title and in accordance with the commissioner's regulations" (§ 6902[1]).

The tasks for which a registered professional nurse may be held responsible in this state do not include prescribing medication, a responsibility which the Education Law leaves as the province of medical doctors, or other appropriately credentialed professionals such as those nurses who have received advanced certification as "nurse practitioners" and have the necessary additional credentials and supervision (Education Law § 6902[3][b]; § 6909[4]). It is undisputed that epinephrine is available only by prescription; indeed, it would have been illegal for Nurse Russo to dispense epinephrine without a physician's order (Education Law § 6902; Public Health Law § 3000-c).

Even though prescribing medication is the responsibility of physicians, and is not within nurses' statutorily-defined sphere of responsibility, the majority today in effect imposes on nurses a requirement that they possess the same knowledge of pharmaceuticals that we properly demand of those who are authorized to prescribe them. A new duty of inquiry would blur

the line between physicians and nurses, and substantially extend the responsibilities of registered professional nurses. Indeed, it cannot be reconciled with the long-standing rule that nurses are normally protected from liability if they are merely following a physician's orders, except where the physician's orders are clearly contraindicated by normal practice (*see Toth v Community Hosp. at Glen Cove*, 22 NY2d at 265 n 3; *Warney v Haddad,* 237 AD2d 123 [1997]). While *Bleiler* acknowledged the increasingly complex duties of modern nurses, it did not go so far as to permit courts to require nurses to act as the de facto supervisors of prescribing physicians.

The majority suggests that the new duty it is imposing on nurses is minimal and acceptable, in view of the common knowledge that epinephrine is an antidote to anaphylaxis, and of the widespread use of epi-pens. Of course, it is common knowledge that many drugs can cause severe allergic reactions, and many people with known life-threatening allergies have been prescribed epinephrine as an antidote to carry with them. But, that fact does not justify a legal requirement that a nurse, before administering such drugs, must question the prescribing physician as to whether he or she failed to consider the need for a precautionary dose of epinephrine. In imposing that duty of

inquiry, we have undertaken a task that courts are not equipped to handle: that of defining the circumstances in which nurses have the obligation to challenge a physician's prescription.

A new affirmative duty on the part of a nurse to inquire as to whether the prescribing physician overlooked the need for epinephrine, if it is to be imposed at all, should be imposed by the legislative bodies that define those responsibilities, rather than by the common law.

Moreover, even if we use the opinions of the parties' experts to formulate our own rule regarding whether a home infusion nurse has a duty to inquire as to whether a treatment for a possible anaphylactic reaction must be on hand, I disagree with the motion court's ruling rejecting the qualifications of defendant's expert and accepting the view of plaintiffs' expert.

In the context of a defendant's motion for summary judgment dismissing a malpractice claim, the defendant must initially establish a prima facie right to relief through an expert's opinion responding to the essential factual allegations of the complaint (*Cregan v Sachs*, 65 AD2d at 108). Contrary to the motion court's assertion, defendant's expert, Nurse Anne Heuser, was sufficiently qualified to give an expert opinion as to Nurse Russo's professional conduct, even though she was not a home

infusion nurse.

While experts must possess the requisite skill, training, knowledge or experience to establish that their opinion is reliable, they do not have to be specialists in the same field as that of the defendant, as long as they lay the foundation to support the reliability of their opinions (*Behar v Coren*, 21 AD3d 1045, 1046-1047 [2005], *lv denied* 6 NY3d 705 [2006]). It is not required in New York that an expert witness possess a particular certification in order to be qualified as an expert as long as the expert had the requisite degree of knowledge to testify as to the tasks at issue (*see Bodensiek v Schwartz*, 292 AD2d 411 [2002]). Under New York law, the practice of all nurses, other than nurse practitioners, is governed by the same statute (Education Law § 6902). As Nurse Russo pointed out at her deposition, registered nurses working in hospitals regularly encounter anaphylactic reactions to emergency treatment; anaphylaxis is not a complication that occurs uniquely in the home infusion setting. Therefore, any registered nurse with hospital experience would be qualified to testify on the issue of the standard of care relevant to an anaphylactic patient. Anne Heuser was a registered nurse with 19 years of experience, who had worked in emergency rooms and trauma centers, including

hospitals in the New York area. This adequately laid the foundation for her opinion, and her affidavit should not have been rejected as a matter of law. While the question of whether an expert witness is qualified generally rests in the sound discretion of the trial court (*Matter of Pringle v Pringle*, 296 AD2d 828, 829 [2002]), in the context of this motion, Nurse Heuser's affidavit was competent to establish that Nurse Russo's conduct comported with the applicable standard of care.

It is therefore necessary to turn to the issue of what issues of fact are presented as to Nurse Russo's liability so as to preclude summary judgment.

New York case law is not well developed in regard to the standard to which specialty nurses should be held. Furthermore, even assuming specialized nurses are held to a higher standard of care than ordinary nurses, it is not clear how that standard should be established, whether through the adoption of national standards as proposed by plaintiffs' expert, Nurse Hadaway, or by local standards. No court in New York has addressed the standard of care to be applied to a nurse who specializes in a field for which New York does not issue advanced certification.

While Nurse Russo did not possess CRNI certification, at the time such certification was not a recognized accreditation by the

American Board of Nursing Specialties. However, even in areas without professional certification, New York may hold specialized nurses to a heightened standard of care, just as physicians in this state are held to a standard under which they must employ any superior knowledge and skill they have, even if it exceeds that of the average doctor or specialist in the community where they practice (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]).

To the extent it is asserted that Nurse Russo did not properly handle her patient's anaphylactic reaction, such as in the manner and position in which she provided CPR to her patient, plaintiffs' claims create issues of fact which preclude summary judgment. The issue of whether proximate causation was established is also properly left to trial.

However, the portion of the ruling permitting liability to be based on Nurse Russo's failure to take steps to ensure that epinephrine was available in the event of an anaphylactic reaction should not stand. If, as plaintiffs' expert claims, anaphylaxis is a medically-recognized side effect of Solu-Medrol such that epinephrine should be "immediately available" when it is administered, it would have been the responsibility of the prescribing physician to provide the administering nurse with the necessary antidote along with the medication. Yet, plaintiffs do

not claim that the *physician* who prescribed the course of treatment with Solu-Medrol committed malpractice by failing to make sure that epinephrine was available.[2] How can we allow plaintiffs to contend that the administering nurse's failure to independently take steps to arrange for the availability of a prescription medication constituted nursing malpractice, particularly where the prescribing physician is not even named as a defendant?

Notably, plaintiffs do not even claim that ensuring that epinephrine is available along with a prescription for Solu-Medrol is such a standard practice that its absence would be recognized as a clear impropriety by any competent nursing professional, which forecloses any reliance on the theory mentioned in *Toth v Community Hospital*, namely, that nurses may be liable for following a physician's orders when they are clearly contraindicated by normal practice (*see Toth*, 22 NY2d at 265 n 3). Additionally, although plaintiffs' experts assert that epinephrine should have been administered, neither of plaintiffs' experts testified that epinephrine was normally made available to nurses whenever home infusion therapy was performed. The

[2] Indeed, plaintiffs' appellate counsel affirmatively took the position that the physician committed no malpractice.

monograph Hadaway cited, saying that epinephrine *should* always be available when Solu-Medrol is administered, does not establish that this recommendation has actually been followed in the general practice of home infusion therapy. Indeed, Nurse Russo pointed out that in the course of her entire career in home nursing care, no anaphylaxis kit had ever been dispensed to her along with medication to administer, although as admitted by Dr. Wadja, plaintiffs' expert witness, *any* medication at all may trigger anaphylaxis. There was no existing standard or duty in the law requiring epinephrine to be made available when performing home infusion therapy, and there is certainly no law in New York imposing a duty on the part of a nurse to obtain an anaphylaxis kit when administering home infusion therapy.

Finally, I observe that the use of home infusion therapy to administer powerful medications, rather than administering them in a hospital setting where crash carts and antidotes are at hand, certainly has many cost benefits and personal benefits to the patient. But, if plaintiffs are correct and such powerful medications are accompanied by a substantial possibility of a life-threatening adverse reaction, the medical profession and our society in general ought to reconsider the advisability of employing home infusion therapy without providing the medical

provider administering the infusion with at least an epi-pen to combat such a reaction.

Based upon the showing made, disputed issues of fact as to whether Nurse Russo properly handled Tiffany's anaphylaxis, such as in performing CPR, justify denying her motion for summary judgment. However, the issues of fact remaining for trial should not include the possibility that liability be based on the failure to administer or procure epinephrine.

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

ENTERED: DECEMBER 28, 2010

CLERK