SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 15, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2275 Josefina Martinez-Garo, et al., Index 27642/02
Plaintiffs-Appellants,

-against-

Riverbay Corporation,
Defendant-Respondent.

Brown & Gropper, LLP, New York (Joshua Gropper of counsel), for appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 21, 2008, in an action for personal injuries sustained in a trip and fall on defendant's premises, upon a jury verdict in defendant's favor, dismissing the complaint, unanimously affirmed, without costs.

The trial court included in the jury's verdict sheet a question, Question #7, asking whether plaintiff suffered a traumatic tear of the knee as a result of her fall on defendant's premises, to which the jury unanimously answered "No." In response to a previous question, the jury unanimously answered

"Yes" as to whether defendant's negligence was "a substantial factor in causing [plaintiff's] accident." During trial, the issue of whether plaintiff's knee injury was degenerative in nature or caused by trauma was in dispute. Although Question #7 should have been framed in terms of proximate cause and should have asked whether the accident or defendant's negligence was a proximate cause of plaintiff's knee injury, rather than a "traumatic tear," the actual terms of the question do not warrant a new trial. On the particular facts of this case, including the overwhelming evidence that the knee injury was degenerative in nature, the jury's response demonstrated that the requisite causal nexus between the accident and plaintiff's claimed injury was absent (*see Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 222 [2007]; *Bustamante v Westinghouse El. Co.*, 195 AD2d 318 [1993]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: JUNE 15, 2010

David Apolony

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2689-
2689A The People of the State of New York, Ind. 630/07
Respondent, 1236/07

-against-

Robert Matwa,
Defendant-Appellant.

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

Judgments, Supreme Court, New York County (Bonnie Wittner, J. at plea; Richard D. Carruthers, J. at sentence), rendered on or about January 4, 2008, unanimously affirmed.

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

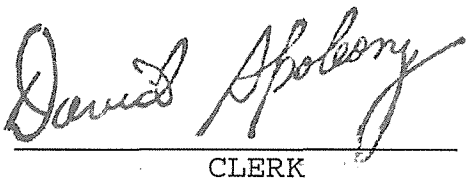
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 15, 2010



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Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2121 Jermaine Jesse Wilson, as the Administrator of the Estate of Jacinto Carmona, Plaintiff-Appellant, Index 8601/07

-against-

Yemen Realty Corp., et al., Defendants-Respondents.

William A. Gallina, Bronx (Frank V. Kelly of counsel), for appellant.

Law Office of W.H. Grae, Ridgewood, NJ (William H. Grae of counsel), for Yemen Realty Corp. and Moshin A. Mofrehi, respondents.

Wade Clark Mulcahy, New York (John Mulcahy of counsel), for Lucky Star Discount Stationery, respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered January 12, 2009, which denied plaintiff's decedent's motion for partial summary judgment with leave to renew upon completion of discovery, unanimously affirmed, without costs.

The decedent alleged that he fell and struck his head when the ladder on which he was standing while painting the front of defendants' store "shook, slipped and collapsed." He asserted that the ladder lacked rubber feet and that he was not supplied with any safety device which might have prevented his fall.

The affidavit of the principal of defendant Lucky Star, denying any involvement in supplying the ladder from which the decedent fell, as well as notations in medical records pointed to

by defendants suggesting that the fall from the ladder may have been precipitated by the worker's lightheadedness, raise material issues of fact warranting denial of summary judgment (*see Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]; *Trippi v Main-Huron, LLC*, 28 AD3d 1069 [2006]).

Moreover, in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature (*see Groves v Land's End Hous. Co.*, 80 NY2d 978 [1992]; *Harvey v Nealis*, 61 AD3d 935 [2009]; *McGlynn v Palace Co.*, 262 AD2d 116, 117 [1999]).

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

ENTERED: JUNE 15, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2808 Callisto Pharmaceutical, Inc., Index 601914/07
Plaintiff-Appellant,

-against-

Donald H. Picker,
Defendant-Respondent.

Jaroslawicz & Jaros LLC, New York (David Jaroslawicz of counsel), for appellant.

Stewart Occhipinti, LLP, New York (Frank S. Occhipinti of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 5, 2009, which, in an action alleging, inter alia, breach of an employment agreement, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly granted defendant summary judgment dismissing the third and fourth causes of action alleging fraud and conversion, respectively. Plaintiff failed to oppose defendant's motion on these causes of action and we decline to review the arguments presented for the first time on appeal (*see e.g. Kohn v City of New York*, 69 AD3d 463 [2010]). Were we to consider the merits of these two causes of action, we would find summary judgment to have been appropriate. Plaintiff's claim for fraud is predicated on the assertion that defendant was negotiating with nonparty Tapestry Pharmaceuticals

for employment while plaintiff was considering entering into a business partnership with Tapestry. This argument has no support in the record, which indicates that Tapestry approached defendant about joining its company after plaintiff rejected the partnership proposal. There is no evidence, other than plaintiff's speculation, that defendant was negotiating during the two companies' ultimately fruitless discussions (*see Abrahami v UPC Constr. Co.*, 224 AD2d 231, 233 [1996] [fraud must be proven by clear and convincing evidence; "loose, equivocal or contradictory" evidence will not suffice] [internal quotation marks and citations omitted]). There is also no basis for plaintiff's conversion claim, as the record shows that defendant already returned materials he took from his office that were the property of plaintiff.

The court properly dismissed the claim alleging that defendant acted as a faithless employee because there is no evidence that defendant was negotiating for his new position with Tapestry during the pendency of the business discussions between Tapestry and plaintiff. Nor is there any support for plaintiff's contention that defendant was making use of confidential information while negotiating his employment with Tapestry.

With respect to the breach of contract claim, we need not determine whether plaintiff waived its ability to enforce the 60-day notice provision, because the court correctly deemed the

factual assertions contained in defendant's statement pursuant to Rule 19-a of the Rules of the Commercial Division of Supreme Court (22 NYCRR 202.70[g]) to be admitted by plaintiff. Plaintiff's counter-statement, as well as the affidavits supporting its motion, are virtually bereft of citations to evidence supporting its contentions and thus inadequate to the task of contravening defendant's statement of undisputed facts (*see e.g. Moonstone Judge, LLC v Shainwald*, 38 AD3d 215 [2007]; Rule 19-a[d]).

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

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2868-
2868A Jacques Thys, Index 600855/08
Plaintiff-Appellant,

-against-

Fortis Securities LLC, et al.,
Defendants-Respondents.

Liddle & Robinson, LLP, New York (Ethan A. Brecher of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Brian S. Kaplan of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered January 5, 2010, dismissing the complaint, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered December 29, 2009, which granted defendants' motion to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that defendants promised him an employment bonus of €375,000 for 2005; that thereafter they deposited in plaintiff's bank account the sum of $198,230.73 -- purportedly his bonus after taxes -- which plaintiff believed was inadequate; that the parties agreed that plaintiff would return $192,000 of the deposited money and defendants would then deposit in plaintiff's bank account the correct bonus amount in euros; and that, although plaintiff returned the $192,000, as agreed,

defendants failed to deposit any funds. Plaintiff seeks damages for conversion.

An action for conversion of money may be made out "where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1990], *lv denied* 77 NY2d 803 [1991]). Although the action must be for recovery of a particular and definite sum of money, the specific bills need not be identified (*Jones v McHugh*, 37 AD2d 878 [1971]).

The allegations that specified funds "were entrusted to [defendants'] custody only for a particular purpose," namely, the purpose of recalculating and repaying the bonus due to plaintiff, and that instead defendants improperly retained the funds without making such recalculation and repayment, state a cause of action for conversion (*see Meese v Miller*, 79 AD2d 237 [1981] [internal quotation marks omitted]). The funds of which defendants took possession were represented by plaintiff's check for $192,000, and that $192,000 is "specifically identifiable and . . . subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]).

Finally, the motion court was incorrect in suggesting that the voluntary nature of plaintiff's delivery of his check to defendants precludes a conversion claim (*see Soma v Handrulis*, 277 NY 223, 231 [1938]).

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3027 The People of the State of New York, Ind. 4609/08
Respondent,

-against-

Betty Johnson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered March 18, 2009, as amended April 9, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing her, as a second felony offender, to a term of 2 to 4 years, unanimously reversed, on the law, and the matter remanded for a new trial.

As the People concede, the court improperly denied defendant's challenge for cause to a prospective juror. The totality of the panelist's responses, culminating in her statement that she was "not sure" if she could use defendant's prior larceny convictions only to judge his credibility and not as propensity evidence, failed to provide an unequivocal

assurance of impartiality (*see People v Johnson*, 94 NY2d 600, 610-614 [2000]).

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3029 In re Miguel R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Judith S. Stern of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about November 17, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree and resisting arrest, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court's finding was based upon legally sufficient evidence. There is no basis for disturbing the court's determinations regarding credibility. Two officers observed appellant punch another individual in the face, apparently for no reason. When the officers identified themselves and tried to investigate appellant's conduct, he fled, ignoring the officers' directives to stop, and he struggled when they caught up with

him. We conclude that there was sufficient physical interference with an official police function to constitute obstructing governmental administration (*see Matter of Luis L.*, 58 AD3d 543 [2009]). Since appellant's arrest for obstructing governmental administration was authorized, his struggle to avoid being handcuffed constituted resisting arrest.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3030 James Williams, Index 104676/07
Plaintiff-Appellant,

-against-

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

James Williams, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered December 17, 2008, which granted the motion of defendant Health and Hospitals Corporation (HHC) to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, by his own admission, served the New York City Comptroller rather than HHC within one year and 90 days after his treatment at the Bellevue dental clinic. However, service on the Comptroller does not constitute service on HHC (*see Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606 [2005]). Since service of the notice of claim on the proper entity is a condition precedent to suit (*see id.* at 609) and more than a year and 90 days elapsed after accrual of the claim before HHC was served, the court correctly dismissed the complaint (*see Pierson v City of New York*, 56 NY2d 950 [1982]).

HHC is not equitably estopped from seeking dismissal of the complaint.

Plaintiff was treated at Woodhull more than a year after his treatment at Bellevue. The fact that Woodhull and Bellevue are both HHC entities does not automatically invoke the continuous treatment doctrine (*see Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 340 [1997]). In any event, plaintiff admitted, in a complaint letter to Woodhull, that the treatment he received there was unrelated to the treatment he had received at Bellevue.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3031 406 W. 48th LLC, Index 113284/08
Plaintiff-Appellant,

-against-

Viktoras Vaituzis,
Defendant-Respondent,

"John" Vaituzis, et al.,
Defendants.

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Jeffrey S. Goldberg, White Plains, for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered November 27, 2009, which, to the extent appealed from, granted defendant tenant's cross motion for summary judgment dismissing the complaint without prejudice to litigating the claims and defenses in Civil Court, Housing Part, and denied plaintiff landlord's motion to compel the tenant to comply with discovery demands, unanimously affirmed, without costs.

The tenant in this ejectment action was entitled to notice of the grounds on which termination of the tenancy was sought (*see* Rent Stabilization Code [9 NYCRR] § 2524.3; *Domen Holding Co. v Aranovich*, 1 NY3d 117 [2003]). This rent-stabilized tenant was not served with the requisite notice, warranting dismissal of the action.

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

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3032 Tunishia R. Murray, Index 113800/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

David M. Goldberg, Amenia, for appellant.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 29, 2009, which denied plaintiff's motion for summary judgment on her cause of action for false arrest and false imprisonment, unanimously affirmed, without costs.

Plaintiff failed to submit evidence in admissible form sufficient to establish entitlement to judgment as a matter of law, but relied solely on an affirmation of counsel annexing an arrest report, and a complaint verified by counsel, who had no personal knowledge of the facts (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Furthermore, plaintiff is incorrect that she can prevail by establishing that she was arrested in the late afternoon after a search warrant was executed at her apartment, held overnight, and released the next day after the District Attorney's office declined to prosecute. An action for false imprisonment may arise, even if an arrest was lawful in its inception, if there was an "unnecessary delay" in

arraigning the plaintiff (*Lewis v Counts*, 81 AD2d 857, 857 [1981]), or if the conduct of the police "toward plaintiff after the arrest was not legally justifiable" (*Clark v Nannery*, 292 NY 105, 108 [1944]). However, plaintiff's bare showing, assuming it were based on admissible evidence, was insufficient to establish that there was any unnecessary delay in arraignment (*see* CPL 140.20[1]; *People ex rel. Maxian v Brown* 77 NY2d 422, 424 [1991]), or that she continued to be held without legal justification after a determination was made that there was not reasonable cause to believe she had committed the offense for which she was arrested (*see* CPL 140.20[4]). Plaintiff's failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the City's opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3033 Westchester Fire Insurance Company, Index 117236/01
Plaintiff,

-against-

MCI Communications Corporation,
Defendant-Appellant,

The Aetna Casualty & Surety Company, etc., et al.,
Defendants,

CNA Insurance Company, et al.,
Defendants-Respondents,

- - - - -

Chubb Indemnity Insurance Company, et al.,
Third-Party Plaintiffs,

-against-

MCI WorldCom Network Services, Inc.,
Third-Party Defendant-Appellant.

Dickstein Shapiro LLP, New York (Linda Kornfeld, of the California Bar, admitted pro hac vice, of counsel), for appellants.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph D'Ambrosio of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 22, 2009, which, inter alia, granted CNA Insurance Company's motion for summary judgment declaring that it does not have a duty to pay MCI's "first dollar" defense costs and denied as moot MCI's motion for summary judgment declaring that CNA has a duty to defend it in numerous landowner actions, unanimously affirmed, with costs.

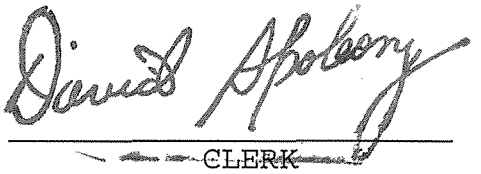
The court, in a well-reasoned decision, properly found

endorsement 30 in the 1992-95 policies at issue unambiguous in providing that MCI is liable for its own defense costs. Contrary to MCI's contention, the provision is not an exclusion (*see Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 AD3d 287, 288 [2008]). Absent ambiguity, extrinsic evidence is inadmissible. Nor is there a need to resort to contra proferentum, which, in any event, would be inapplicable to this sophisticated policyholder (*see Cummins, Inc. v Atlantic Mut. Ins. Co.*, 56 AD3d 288, 290 [2008]).

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

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

ENTERED: JUNE 15, 2010



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Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3034 Christine W.,
Petitioner-Respondent,

-against-

Adrian B.,
Respondent-Appellant.

The Law Firm of Steven J. Mandel, P.C., New York (James Nemia of counsel), for appellant.

Steven N. Feinman, White Plains, for respondent.

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about July 20, 2007, which denied respondent father's objections to the Support Magistrate's order of support, unanimously affirmed, without costs.

No basis exists to disturb the Support Magistrate's finding that the gross income of the subchapter S corporation of which respondent father was the sole proprietor did not include the $88,528 of expenses described in the corporation's tax return as "reimbursed expenses" and claimed by respondent as an expense that reduces his income for present purposes. Certainly, other than pointing to the corporation's tax return itself, respondent offered no evidence that such reimbursed expenses were actually included in the corporation's gross income or paid by the corporation. Nor is there any basis to disturb the imputation of income to respondent, where his own testimony revealed that the corporation paid many of his personal expenses, such as marriage

counseling, tax arrears, utilities, and pet care, and that he deducted those expenses on the corporation's tax return (*see Mellen v Mellen*, 260 AD2d 609, 609-610 [1999]; *Kosovsky v Zahl*, 257 AD2d 522, 523 [1999]). We have considered and rejected respondent's other arguments and petitioner's argument that the appeal should be dismissed.

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

ENTERED: JUNE 15, 2010

David Spokony
CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3035 The People of the State of New York, Ind. 5560/07
Respondent,

-against-

Rafael Pion,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 (Laura A. Ward, J.), rendered on or about July 13, 2009,

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: JUNE 15, 2010

CLERK

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

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3036-
3037 The People of the State of New York, Ind. 6458/07
Respondent,

-against-

Kinanchy De Aga,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 14, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously reversed, as a matter of discretion in the interest of justice, the plea vacated, and the matter remanded for further proceedings. Appeal from order, same court and Justice, entered on or about July 21, 2009, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously dismissed as moot.

The record is clear that defendant was improperly adjudicated a second violent felony offender, based on a New Jersey conviction of aggravated assault (NJ Stat Ann § 2C:12-1[b][2]) that does not qualify as a New York felony, whether violent or otherwise. The statute encompasses conduct

that would not be a felony in New York (*see generally People v Gonzalez*, 61 NY2d 586 [1984]), since it can be committed through nonintentional conduct (*cf. People v Muslim*, 23 AD3d 319 [2005], *lv denied* 7 NY3d 760 [2006] [similar subdivision of same statute not a New York felony]), and also because its definition of "bodily injury" is broader than "physical injury," as defined in Penal Law § 10.00(9). Defendant's New Jersey indictment does not establish that he committed a New York felony, and while the New Jersey complaint provides more information, it was superseded by the indictment and therefore may not be used to resolve this issue (*see People v Yancy*, 86 NY2d 239, 246-247 [1995]).

Although defendant failed to preserve this claim (*see* CPL 400.15[3]; *People v Smith*, 73 NY2d 961 [1989]; *People v Kelly*, 65 AD3d 886 [2009], *lv denied* 13 NY3d 860 [2009]), we reach the issue in the interest of justice. Misinformation as to defendant's status impacted plea negotiations. The parties were under the misapprehension that defendant was receiving the most lenient disposition permitted by law. Furthermore, whether defendant was a first felony offender or a second violent felony offender made a dramatic difference in the minimum sentence upon a conviction after trial for the original charge of completed

second-degree weapon possession. These misapprehensions may have affected the People's offer, as well as defendant's decision to accept it.

Accordingly, we vacate the plea.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

3038-
3038A Robert V. Cattani, M.D., Index 114442/08
Plaintiff-Appellant,

-against-

Richard A. Marfuggi, M.D.,
Defendant-Respondent.

Richard Paul Stone, New York, for appellant.

Lustberg & Ferretti, Glens Falls (Robert M. Lustberg of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 4, 2009, which granted plaintiff's motion to reargue a prior order, same court and Justice, entered on or about May 15, 2009, dismissing the complaint, adhered to the prior determination, imposed sanctions of $1,000 each on plaintiff and his counsel, awarded defendant reasonable attorneys' fees and expenses incurred in defending the action to be paid jointly and severally by plaintiff and his counsel, and held the matter in abeyance pending a report of a Special Referee on the issue of attorneys' fees and expenses, unanimously affirmed, with costs. Appeal from the prior order unanimously dismissed, without costs, as subsumed in the appeal from the subsequent order.

Plaintiff brought the instant action for fraud, defamation, and prima facie tort alleging that defendant's testimony and/or

submission of affidavits as an expert witness in three prior medical malpractice actions against plaintiff herein were knowingly false when made. The court gave plaintiff and his counsel time to consider whether to withdraw the complaint in light of the absolute immunity from suits like this afforded counsel, witnesses, and parties in civil judicial proceedings, and provided plaintiff's counsel with relevant case law articulating this general, well-established principle, including *Tokler v Pollak* (44 NY2d 211 [1978]) and *Mosesson v Jacob D. Fuchsberg Law Firm* (257 AD2d 381 [1999], *lv denied* 93 NY2d 808 [1999]) (*see also Biegeleisen v Jacobson*, 198 AD2d 57 [1993], *lv denied* 83 NY2d 754 [1994], *cert denied* 513 US 874 [1994] [does not avail plaintiff, who was a defendant in a prior medical malpractice action, to argue that certain statements made by defendant as an expert witness in the prior action were perjurious, unless statements were "so obviously irrelevant as to warrant an inference of express malice" (internal quotation marks omitted)]). Plaintiff and his counsel, however, declined to withdraw the complaint, whereupon the court dismissed it and directed a hearing on sanctions. Plaintiff's counsel then sought reargument, relying on *Newin Corp. v Hartford Acc. & Indem. Co.* (37 NY2d 211 [1975]) for the proposition that an action for fraud based on perjured testimony in a prior civil proceeding may be maintained where "the perjury is merely a means to the

accomplishment of a larger fraudulent scheme" (*id.* at 217). According to plaintiff's counsel, defendant committed perjury in the prior malpractice actions in furtherance of a larger fraudulent scheme "to create claims in three cases in support of which he could charge a series of fees."

Assuming that a scheme to artificially maintain cases with perjured expert testimony for the purpose of generating expert fees is an actionable larger fraud, such scheme as articulated here by plaintiff is woefully lacking in the particulars necessary to support it (CPLR 3016[b]). Plaintiff alleges only defendant's participation as a paid witness in the malpractice actions, defendant's testimony in those actions, and the knowing falsity of that testimony without stating exactly how or what was false about it. As the motion court found, plaintiff's conclusory allegation of a larger fraudulent scheme appears to be "a transparent and patently insufficient attempt to bring this action within the *Newin* exception." Given the complete lack of necessary detail, the well-established nature of the absolute immunity from suits like this afforded witnesses in civil judicial proceedings, and the fact that plaintiff's counsel, by his own admission, was not even aware of the larger-fraudulent-scheme exception to absolute-immunity bar when he brought the instant action and when he declined to withdraw it, the court

properly found the action to be frivolous (*see* 22 NYCRR 130-1.1[c][1]), dismissed the complaint, and imposed appropriate sanctions.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3039 In re Mark Ozdoba, Index 110566/08
Petitioner-Appellant,

-against-

Chelsea Landmark LIC, LLC, et al.,
Respondents-Respondents.

Mark Ozdoba, appellant pro se.

Lebensfeld Borker Sussman & Sharon LLP, Mount Vernon (Stephen Sussman of counsel), for Chelsea Landmark LIC, LLC, Rose Associates, Inc. and Marine Estates, LLC, respondents.

Andrew M. Cuomo, Attorney General, New York (Ann P. Zybert of counsel), for New York State Housing Finance Agency, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for New York City Department of Housing Preservation and Development, respondent.

Order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered March 30, 2009, which in this proceeding brought pursuant to CPLR article 78, denied the petition seeking, among other things, to reverse respondents' determination that petitioner did not meet the income eligibility requirements for an affordable apartment, and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner's request for an award of an affordable apartment is plainly in the nature of mandamus to compel the performance of a duty on the part of respondents. While mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an

act in respect to which the officer may exercise discretion or judgment (*see Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]).

Petitioner can show no legal right to an affordable apartment since the decision to terminate his application involved the exercise of judgment based on the fact that petitioner failed to submit sufficient data to enable the owner-respondents to accurately calculate his income. Moreover, the methodology used by the owner-respondents to calculate self-employment income, which was what petitioner presented them with by producing IRS Form 1099s reflecting self-employment income at the eligibility interview, was rational and not arbitrary or capricious. Given the problems raised, to wit, that 1099s reflect gross income and when calculating annual income owners must include net income, i.e., income net of business-related expenses, and that there needs to be a demonstration of continuity in self-employment income, it was entirely reasonable for the owner-respondents to require back-up data in the form of past tax returns and schedules and IRS transcripts to document such self-employment and business-related expenses. Although petitioner acknowledges that the Housing and Urban Development Guidelines provide that owners are expected to make a reasonable judgment as to the most reliable approach to estimating what a tenant will receive in income during the year, he overlooks the import of that provision. The provision clearly gives owners the

discretion to employ whatever methodology they believe will yield accurate results in determining income eligibility.

In addition, it was entirely rational and neither arbitrary nor capricious for owner-respondents to make a determination on eligibility based on petitioner's circumstances at the time petitioner's log number was called up. Given the large number of applicants (6,000) and the small number of apartments involved (83), there needed to be finality to the owner-respondents' determination.

The petition as against respondent New York City Department of Housing Preservation and Development (HPD) was properly dismissed as it is undisputed that HPD was not the agency which administered the 80/20 program in the subject building, and had no power to award petitioner an apartment in that building. In addition, the petition as against respondent New York State Housing Finance Agency (HFA) was properly dismissed as, although it is undisputed that HFA did indeed administer the 80/20 program in the subject building, in order to receive financing from HFA, owner-respondents had to enter into a Regulatory Agreement with HFA and submit a marketing plan in compliance with HFA's affirmative fair housing marketing guidelines, which they did. The marketing plan set forth the criteria for eligibility and rejection. Under the marketing plan, the owner-respondents had exclusive control over selecting qualifying low income tenants.

It is undisputed that HFA played no role in the application screening and selection process, and did not make the determination of ineligibility. Moreover, HFA lacks the power to compel the owner-respondents to provide petitioner with an affordable apartment in the subject building.

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

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3040 Sureeva Stevens, Index 104978/08
Plaintiff-Respondent,

-against-

Lincoln Center for the
Performing Arts, Inc., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Marilyn Shafer, J.), entered on or about December 15, 2009,

And upon the stipulation of the parties hereto dated May 24, 2010,

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3041 The People of the State of New York, Ind. 1256/07
M-2743 Respondent,

-against-

Rodney Freeman,
Defendant-Appellant.

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

Rodney Freeman, appellant pro se.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered October 31, 2007, convicting defendant, after a jury trial, of bail jumping in the first degree, and sentencing him to a term of 1⅔ to 5 years, unanimously affirmed.

After removing defendant for disruptive conduct, the court properly exercised its discretion in declining counsel's request for a recess to determine whether defendant could cease his outbursts and return to the courtroom. Given defendant's pattern of disruptive conduct, there was no reason to delay the trial further in the hope that his behavior would improve (*see People v Branch*, 35 AD3d 228 [2006], *lv denied* 8 NY3d 919 [2007]). Defendant did not preserve his argument that he was unconstitutionally deprived of an opportunity to reclaim his right to be present, and we decline to review it in the interest

of justice. As an alternative holding, we also reject it on the merits.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury properly rejected defendant's meritless excuse for failing to appear for sentencing on his burglary conviction (*see* Penal Law § 215.59[1]). Defendant's related challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

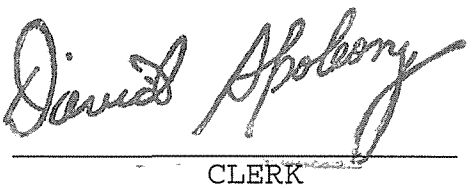
We have considered and rejected defendant's pro se claims.

M-2743 ***People v Rodney Freeman***

Motion seeking leave to file supplemental reply brief granted.

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

ENTERED: JUNE 15, 2010



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3042 Melissa Hernandez, Index 22179/05
Plaintiff-Respondent,

-against-

42/43 Realty LLC, et al.,
Defendants-Appellants.

[And a Third-Party Action]

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Robert A. Spolzino of counsel), for appellants.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 4, 2009, which, to the extent appealed from, as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on her cause of action pursuant to Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff, a field technician, was injured in the course of installing digital subscriber line jacks in a residential building under construction. Specifically, it was her job to ascend a ladder, situated in the sub-basement, while a co-worker on an upper floor was to feed her fiber optic cable through a conduit in the ceiling. After she positioned the ladder, checked to ensure that it was firmly planted, and climbed it, it started to shake and toppled over, causing her to sustain injuries.

It is well settled that while Labor Law § 240(1) imposes

nondelegable, absolute liability upon an owner and/or contractor for any breach thereof which was proximately responsible for the plaintiff's injury (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50 [2004]), liability does not attach where a plaintiff's actions are the sole proximate cause of his or her injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). "[C]ontributory negligence[, however,] will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake* at 286)).

Defendants contend, for the first time on appeal, that a question of fact exists as to proximate cause, due to the allegedly conflicting accounts of the incident that plaintiff offered at her two deposition sessions. However, a review of her testimony does not reveal any significant conflict. Moreover, notably, defendants did not produce testimony from a foreman or anyone else on the scene to dispute plaintiff's version of what took place, nor did they present any opinion, expert or otherwise, that there was anything inherently dangerous or hazardous about the manner in which plaintiff was doing her job. In addition, it is undisputed that plaintiff was not offered any

protective devices or another type of ladder, and that smooth flooring was not available.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3043 C C Vending, Inc., Index 600394/10
Plaintiff-Appellant,

-against-

Berkeley Educational Services of New York, Inc.,
Defendant-Respondent.

Ernest H. Hammer, New York, for appellant.

Kavanagh Maloney & Osnato LLP, New York (David F. Bayne of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 8, 2010, which denied plaintiff's motion for a *Yellowstone* injunction and a preliminary injunction and granted defendant's cross motion to stay arbitration, unanimously affirmed, without costs.

Plaintiff has failed to show entitlement to a *Yellowstone* injunction. It is well settled that "[t]he purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" (*Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 227 [1997]). A party seeking such an injunction must demonstrate that it holds a commercial lease; that it received from the landlord either a notice of default, a

notice to cure or a threat of termination of the lease; that it requested injunctive relief prior to termination of the lease; and that it is prepared and has the ability to cure the alleged default by any means short of vacating the premises (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]).

The contract at issue gives plaintiff an exclusive right to operate various concessions. Because "such exclusive right is not a lease," plaintiff was not a commercial lessee but rather "a licensee or concessionaire without interest in the realty" (*Senrow Concessions v Shelton Props.*, 10 NY2d 320, 325 [1961]). Since plaintiff has no control over defendant's premises where the vending machines are located, it has no tangible interest in the property, and thus no right to a *Yellowstone* injunction.

To establish grounds for a preliminary injunction, a party must demonstrate "probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Plaintiff's moving papers are devoid of any such showing. Moreover, plaintiff could be made whole by monetary damages (*see Somers Assoc. v Corvino*, 156 AD2d 218 [1989]).

Plaintiff waived the right to arbitrate its breach-of-

contract claims by seeking a declaratory judgment on whether the agreement had been breached (*Sherrill v Grayco Builders, Inc.*, 99 AD2d 965; aff'd 64 NY2d 261).

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3044N Jill Genson, etc., Index 109105/06
Plaintiff-Appellant,

-against-

Sixty Sutton Corp.,
Defendant-Respondent.

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

Flynn, Gibbons & Dowd, New York (Ann Teresa McIntyre of counsel), and Wolf, Haldenstein, Adler, Freeman & Herz, LLP, New York (Mitchell Flachner of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about October 19, 2009, which, to the extent appealed from as limited by the briefs, transferred all but the sixth cause of action to Civil Court, and in effect denied plaintiff compensation for breach of the warranty of habitability, unanimously affirmed, without costs.

Plaintiff, who was not a full-time resident of her cooperative apartment, was not entitled to compensation for breach of warranty of habitability during a period in which she was not living there (*see Leventritt v 520 E. 86th St.*, 266 AD2d 45 [1999], *lv denied* 94 NY2d 760 [2000]), especially in light of her admitted inability to recall or document the amount of time she spent there before the mold infection allegedly prompted her to begin staying in hotels. Transfer of this matter to Civil Court (CPLR 325[d]) was not an improvident exercise of

discretion, since the "action was commenced in the Supreme Court and . . . the monetary jurisdiction of that court . . . will govern any recovery" (*Tobias v New York Hosp.*, 279 AD2d 374 [2001]), and since Civil Court has subject matter jurisdiction over all transferred causes of action but for the amount in controversy (*cf. Cadle Co. v Lisa*, 46 AD3d 422 [2007]).

Supreme Court did not improperly exercise its discretion in severing and retaining the cause of action for a declaratory judgment, which focused solely on which party should be awarded the maintenance payments now in escrow, which is essentially a damages question. We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: JUNE 15, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3045N Jason Farinacci, etc., Index 113390/07
Plaintiff-Respondent,

-against-

Bryan A. Powell, et al.,
Defendants-Appellants.

Buckley & Curtis, P.A., New York (Robert N. Mizrahi of counsel), for appellants.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Rhonda E. Kay of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered June 17, 2009, which, in an action for personal injuries and wrongful death arising out of a collision involving a vehicle operated by defendant Powell and owned by defendant Mercedes Benz USA, LLC, denied defendants' motion pursuant to CPLR 2201 for a stay of proceedings pending Powell's appeal of his criminal conviction of, inter alia, vehicular manslaughter and driving while intoxicated, unanimously affirmed, without costs.

Defendants do not argue that Powell's pending appeal could result in a new trial, and otherwise fail to show how Powell's testimony in this civil action could adversely affect him in any future criminal proceedings (*see* CPL 1.20[16][c] ["criminal

action . . . terminates with the imposition of sentence or some other final disposition in a criminal court"]).

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3047-
3048-
3049
M-2534 In re Christy C., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Jeffrey C., et al.,
Respondents-Appellants,

The Administration for Children's Services,
Petitioner-Respondent.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jane C. Schuster of counsel), for Jeffrey C., appellant.

George E. Reed, Jr., White Plains, for Katrina T., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Randall S. Carmel, Syosset, Law Guardian.

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about May 19, 2009, which, upon findings of neglect, inter alia, released the subject children to the custody of the mother with twelve months of supervision by the Administration for Children's Services (ACS), on conditions that the mother and children receive family counseling for domestic violence, that the father receive anger management therapy, enroll in a batterer's program and be referred for psychiatric evaluation and for family counseling, and entered a final order of protection against the father for twelve months

with respect to the children, allowing only supervised visits, unanimously reversed, on the law and the facts, without costs, the findings of neglect vacated and the petitions dismissed.

We find that the record does not support the finding of neglect inasmuch as a preponderance of the evidence did not demonstrate that the children's physical, mental or emotional condition has been impaired or is in danger of becoming impaired, or that the actual or threatened harm to the child is a consequence of the failure of the parents to exercise a minimal degree of care in providing the child with proper supervision or guardianship (*see Nicholson v Scopetta*, 3 NY3d 357, 368 [2004]; FCA §§ 1012[f], 1046[b][i]). While incidents of domestic violence can provide a permissible basis upon which to make a finding of neglect (*see Matter of Daphne G.*, 308 AD2d 132, 135 [2003]; *Matter of Deandre T.*, 253 AD2d 497, 498 [1998]), here, the hearing testimony pertained to a single act of domestic violence which occurred outside the presence of the children and thus was insufficient to establish that the children's physical, mental or emotional condition was in imminent danger of becoming impaired (*see Matter of Davin G.*, 11 AD3d 462, 462-463 [2004]; *Matter of Daphne G.*, 308 AD2d at 134-135).

What the hearing court characterized as a "repeated atmosphere of domestic violence" was based upon improper reliance on hearsay statements by respondent mother and respondent father contained in police domestic incident reports that did not fall within another exception to the hearsay rule (*see Matter of Imani B.*, 27 AD3d 645 [2006]; *see generally Matter of Leon RR*, 48 NY2d 117, 122 [1979]), and the police reports were inadmissible since the information contained in the reports came from witnesses not engaged in the police business in the course of which the memorandum was made (*see Holiday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [2003], *lv dismissed, lv denied* 100 NY2d 636 [2003]; *Yeargans v Yeargans*, 24 AD2d 280, 282 [1965]).

Furthermore, a preponderance of the evidence did not support a finding of neglect based on excessive corporal punishment on one of the subject children, and derivatively on the other subject children. The father acknowledged that he "popped" or "tapped" the child, but there was no basis to conclude that the force he used was excessive or that it went beyond his common-law right to use reasonable force (*see Matter of Peter G.*, 6 AD3d 201, 206 [2004], *appeal dismissed* 3 NY3d 655 [2004]; Penal Law § 35.10[1]), particularly since the child sustained no injury and was laughing after his father hit him, his brother told the

caseworker that the child was in good spirits after being hit, and the case based on the child's initial report to the school guidance counselor was closed as unsubstantiated.

M-2534 - ***In re Christy C., and Others***

Motion to strike portions of brief denied.

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3050 Summit Development Corp., etc., Index 601432/08
Plaintiff-Appellant,

-against-

Richard Fownes, et al.,
Defendants-Respondents.

Mastropietro-Frade, LLC, New York (John P. Mastropietro of counsel), for appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (George Tzimopoulos of counsel), for Richard Fownes, Cocoa Condominium Sales, LLC and Cocoa Partners, LP, respondents.

Frydman LLC, New York (David S. Frydman of counsel), for Cocoa Exchange, respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about January 25, 2010, which denied plaintiff's motion for partial summary judgment as to liability, unanimously affirmed, with costs.

In this action alleging breach of a construction contract, the court properly found that plaintiff failed to demonstrate a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party

must comply with them" (*Gulf Ins. Co. v Fid. & Deposit Co. of Md.*, 16 Misc 3d 1116A [2007, Helen Freedman, J.], citing *A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 381-82 [1957]). Here, there were factual issues as to whether the contract was properly terminated pursuant to section 19.2.2, and whether plaintiff was denied access to the site or had failed to substantially complete and/or had abandoned the project by, inter alia, failing to supply properly certified welders as required by the drawings and specifications. Issues also existed as to the amount of damages, if any, pursuant to section 19.2.4 in the event of termination.

We have considered plaintiff's remaining arguments and find them to be unavailing.

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

ENTERED: JUNE 15, 2010

David Apolony

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3056 The People of the State of New York, Ind. 6049/05
Respondent,

-against-

Kathleen Connors,
Defendant-Appellant.

Barry S. Turner, New York, for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 10, 2008, convicting defendant, upon a plea of guilty, of manslaughter in the first degree, and sentencing her to a term of 23 years, unanimously affirmed.

Defendant's guilty plea forecloses appellate review of the sufficiency of the evidence presented to the grand jury (*see People v Kazmarick*, 52 NY2d 322, 326 [1981]).

We perceive no basis for reducing the sentence. To the extent defendant is claiming her sentence was unconstitutional, that claim is unpreserved and we decline to review it in the

interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3059 The People of the State of New York, Respondent, Ind. 5437/07 SCI 4225/08

-against-

Maria Arnjas, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about October 2, 2008,

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

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

ENTERED: JUNE 15, 2010

CLERK

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

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3060 205 W. 19th St. Corp., Index 116116/08
Plaintiff-Respondent,

-against-

Plymouth Management Group, Inc.,
Defendant-Respondent,

Laura Mercier,
Defendant-Appellant.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for appellant.

Ruta & Soulios LLP, New York (Joseph A. Ruta of counsel), for 205 W. 19th St. Corp., respondent.

D'Amato & Lynch, LLP, New York (Meleena M. Bowers of counsel), for Plymouth Management Group, Inc., respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 24, 2010, which, insofar as appealed from as limited by the briefs, denied defendant Laura Mercier's motion for summary judgment dismissing the third cause of action for breach of contract and the sixth cause of action for legal fees, unanimously affirmed, with costs.

The court properly found that, while Mercier did not demonstrate that a vote taken at a special shareholders' meeting, which resulted in the passage of a resolution calling for a transfer tax, was invalid or improper, questions of fact exist in this regard, including those involving witness credibility (*see e.g. Welch v Riverbay Corp.*, 273 AD2d 66 [2000]). Furthermore,

material issues of fact must be resolved before any determination can be made regarding Mercier's claims based on waiver and estoppel (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). In view of the foregoing, the court properly denied Mercier's request to dismiss the cause of action seeking legal fees.

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3061 Sasha Cutter Nye, Index 304191/05
Plaintiff-Respondent,

-against-

Timothy Nye,
Defendant-Appellant.

Elliott Scheinberg, Staten Island, for appellant.

Blank Rome LLP, New York (Jay D. Silverstein of counsel), for respondent.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered December 9, 2009, which granted plaintiff's application for child support arrears in the amount of $148,334 and counsel fees of $5,625, unanimously affirmed, without costs.

The child support provision in the separation agreement, which was incorporated by reference in the 2005 divorce judgment, called for a voluntary upward modification from the "basic child support obligation." Defendant's argument that this provision failed to comply with the requirements of the Child Support Standards Act (Domestic Relations Law § 240[1-b][h]) is not properly before this Court because he never raised this objection in opposing plaintiff's application for child support arrears in the first place.

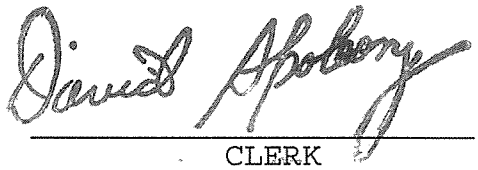
In any event, the clause in question did not omit any of the nonwaivable statutory requirements that would render the child support obligation void, and it substantially provided each

acknowledgment and advisement in compliance with § 240(1-b)(h) and Family Court Act § 413(1)(h) (*see Gallet v Wasserman*, 280 AD2d 296 [2001]; *Blaikie v Mortner*, 274 AD2d 95 [2000]).

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

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

ENTERED: JUNE 15, 2010



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3062 CVL Real Estate Holding Co., LLC, Index 602868/07
Plaintiff-Respondent,

-against-

Eli Weinstein,
Defendant-Appellant.

David Carlebach, New York, for appellant.

Reed Smith LLP, New York (Wallace B. Neel of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 30, 2009, which, in this action brought by a judgment creditor to collect upon an outstanding debt, granted plaintiff's motion to hold defendant in contempt and directed that a warrant be issued for his arrest, unanimously affirmed, with costs.

Following defendant's default on a certain promissory note, plaintiff creditor obtained a judgment in its favor and thereafter served a notice of post-judgment discovery upon defendant, seeking his testimony and the production of certain documents. However, when defendant repeatedly failed to comply with the subpoenas that had been served upon him, plaintiff moved for an order directing defendant to show cause why he should not be held in contempt of court. A hearing was scheduled; defendant did not appear, but his counsel was present and the court heard arguments concerning, in part, the validity of the service upon

defendant, a New Jersey resident. Following a recess for lunch, the court reviewed the material that had been provided by the respective attorneys, concluding that service had been properly made and that defendant should have come to court. Consequently, the hearing was adjourned until the next day so that defendant could appear, but when he did not, the court granted plaintiff's motion to hold him in contempt. Defendant now contends that the contempt order against him should be vacated on the ground that it was entered in violation of his right to due process.

A review of the record reveals that defendant was intent upon impeding the enforcement of plaintiff's judgment against him by failing to comply with plaintiff's disclosure demands and then refusing to present himself in court in response to plaintiff's motion to hold him in contempt. In that connection, the court determined that defendant had been properly served with the subpoenas, which he never endeavored to quash, as well as the ensuing order to show cause. Defendant did not challenge the court's determination directly and may not now do so through an appeal from the contempt order (*see Bergin v Peplowski*, 173 AD2d 1012, 1014 [1991]). Contrary to defendant's argument that he was deprived of due process of law when he was held to be in contempt of court, he received all of the process to which he was entitled (*see James W.D. v Sandra C.*, 44 AD3d 423, 424 [2007]), including two separate opportunities to appear at the hearing. By his

refusal to attend, he forfeited his right to object to being found in contempt (*see id.*; *Green v Green*, 288 AD2d 436, 437 [2001]).

Under these circumstances, the motion court appropriately decided the motion for contempt upon the papers submitted. We have considered defendant's remaining arguments and find them unavailing.

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3063-
3063A The People of the State of New York, Ind. 2585/06
Respondent, 3121/06

-against-

Steven Gilmore,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Jones Day, New York (James A.A. Kirk of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 28, 2007, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (three counts), attempted robbery in the second degree, and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 30 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the first-degree robbery conviction to 20 years, and directing that all sentences be served concurrently, resulting in a new aggregate term of 20 years, and otherwise 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 determinations concerning

identification. Defendant's guilt was established by reliable identification testimony and compelling circumstantial evidence.

The court properly denied defendant's suppression motion. The lineup at issue was not unduly suggestive, since the participants were reasonably similar to defendant in appearance, and any differences, when viewed in light of the descriptions given by the witnesses, did not create a substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]; *People v Santiago*, 2 AD3d 263, 264 [2003], *lv denied* 2 NY3d 765 [2004]).

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 15, 2010

David Spolberg

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3064 Shimshon Wexler, Index 600656/09
Plaintiff-Appellant,

-against-

Aaron Wexler, et al.,
Defendants-Respondents,

ABC LLC, et al.,
Defendants.

Kera & Graubard, New York (Martin S. Kera of counsel), for appellant.

Moritt Hock Hamroff & Horowitz LLP, Garden City (Robert M. Tils of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Ira S. Gammerman, J.H.O.), entered on or about December 15, 2009, which granted defendants' motion to dismiss the complaint, deemed an appeal from judgment, same court and J.H.O., entered January 15, 2010, dismissing the complaint (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, with costs.

Plaintiff failed to allege fraudulent inducement in the execution of the parties' unambiguous Stipulation of Settlement and Release with sufficient particularity and failed to allege facts establishing that his reliance on defendant Aaron Wexler's alleged misrepresentations was reasonable (*see New York City*

School Constr. Auth. v Koren-DiResta Constr. Co., 249 AD2d 205, 205-206 [1998]).

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

ENTERED: JUNE 15, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3066N Arnick Singh, et al., Index 111546/09
Plaintiffs-Appellants,

-against-

Turtle Bay Towers Corp.,
Defendant-Respondent.

Michael C. Manniello, P.C., Westbury (Michael C. Manniello of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Alexa Englander of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 12, 2009, which denied plaintiffs' application for an injunction prohibiting defendants from issuing or transferring the shares of stock and proprietary lease to the subject apartment to anyone other than plaintiffs and to stay any proceedings by defendant to issue, transfer, and affect the stock shares and proprietary lease of said unit, unanimously affirmed, with costs.

Plaintiffs' request for injunctive relief was properly denied, as they have not demonstrated that there is a cause of action under which they have a likelihood of success on the merits. Defendant exercised its right of first refusal to deny plaintiff Navpreet Singh's purchase application, and there is no question that plaintiffs were aware of the valid, enforceable right of first refusal and that they agreed to be bound by it

(*see e.g. Anderson v 50 E. 72nd St. Condominium*, 119 AD2d 73 [1986], *appeal dismissed* 69 NY2d 743 [1987]). Furthermore, the record shows that the decision to deny the purchase application was based upon the determination that the purchase price for the subject unit was significantly below market value (*see 40 W. 67th St. v Pullman*, 100 NY2d 147 [2003]; *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]).

We have considered plaintiffs' remaining arguments, including that the exercise of the right of first refusal was a pretext for discriminating against them, and find them unavailing.

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

ENTERED: JUNE 15, 2010

CLERK

JUN 15 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

2834
Index 115836/08

x

Sofia Frankel,
Petitioner-Appellant,

-against-

Jeffrey Sardis, et al.,
Respondents-Respondents,

Goldman, Sachs & Co., et al.,
Respondents.

x

Petitioner appeals from a judgment of the Supreme Court, New York County (Emily Jane Goodman, J.), entered July 22, 2009, to the extent appealed from, confirming arbitration awards against her and respondent Lehman Brothers in favor of respondents Jeffrey Sardis, Lauren Sardis and JAS Holding in the principal sums of $600,000, $600,000 and $1,300,000, respectively, and dismissing this proceeding to modify the awards as to joint and several liability.

Kraus & Zuchlewski LLP, New York (Robert D. Kraus of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill and Michael P. Burke of counsel), and Law Offices of Dan Brecher, New York, for respondents.

RENWICK, J.

Petitioner, a stock trader, commenced this Article 75 proceeding to challenge an award rendered against her by the Financial Service Regulatory Authority (FINRA), after a protracted arbitration proceeding. Petitioner claims that the arbitrators ruled on a matter not submitted to them by finding her jointly and severally liable with her former employer. Respondent investors crossed-moved to confirm the award. Supreme Court denied the petition and confirmed the award, finding petitioner had not demonstrated that the arbitration panel exceeded the scope of its authority.

Petitioner was a technology-oriented trader for Goldman Sachs from 1994 to 2000. In 1999, the Sardis respondents and a related holding corporation, JAS, invested about $19 million with her. Petitioner left Goldman Sachs and went to Lehman Brothers in 2000, and these investors followed her. In May 2004, however, the investors commenced an arbitration before FINRA's predecessor, NASD, against petitioner, Goldman Sachs and Lehman Brothers. In a 44-page statement of claim, the investors detailed the wrongs allegedly committed against them by petitioner and the investment firms. In essence, the investors

claimed they lost approximately $9.6 million through fraudulent "churning" activities undertaken by petitioner, in which the firms were complicit.

Churning refers to the excessive buying and selling of securities in an account by a broker, for the purpose of generating commissions and without regard to the client's investment objectives. For churning to occur, the broker must exercise control over the investment decisions in the account, either through a formal written discretionary agreement or otherwise. In this case, the investors claimed that petitioner used, among other things, "false representations and fraudulent charts purporting to show the outstanding past performances of her customers' accounts," to obtain complete discretionary control over them. Then, in contravention of her customers' investment objectives, petitioner allegedly "overtraded on high margin, charging [improperly] high commissions, markups/markdowns and other costs."

The investors sought to hold Goldman Sachs and Lehman Brothers vicariously liable for petitioner's negligent and fraudulent activities, as well as for the firms' own acts of negligence because their supervisors "had to know she was engaged in improper activity which they failed to properly supervise and curtail." Thirty-seven hearings were held over a period of two

years. Substantial evidence was offered to indicate petitioner's alleged wrongdoing while employed by both firms, including, as applicable here, acts that occurred while working for Lehman Brothers. The panel found Goldman Sachs and petitioner jointly and severally liable for $1 million in compensatory damages, and Lehman Brothers and petitioner jointly and severally liable for $2.5 million in compensatory damages.

Petitioner commenced this proceeding in November 2008 to modify or vacate the award. The investors opposed the petition and cross-moved to confirm the award. Petitioner contended that the panel's finding of joint and several liability with Lehman Brothers should be vacated because the investors never sought such recovery in their statement of claim. Specifically, petitioner refers to the "damages" clause in which the investors sought various categories of money damages "against Goldman Sachs and Frankel, jointly and severally." In the next paragraph, respondents delineated several categories of loss "against Lehman Brothers." There was no demand in the damages clause for joint and several recovery against petitioner and Lehman Brothers, as there was against petitioner and Goldman Sachs.

The investors countered that petitioner's misfeasance while employed at Lehman Brothers was outlined in the demand for arbitration and was forcefully explored throughout the hearings,

so all parties were well aware that petitioner would be implicated in any liability found against Lehman Brothers. Supreme Court found that even though the issue of joint and several liability with Lehman Brothers was not initially pleaded in the damages clause, the issue was fully argued and defended by petitioner, who was aware from the outset that she was a target in the arbitration. It thus found that the arbitrators had not exceeded their authority, denied the petition to vacate or modify, granted the cross motion to confirm, and dismissed the proceeding. Petitioner appeals.

It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding (*see* CPLR 7511[b], [c]) is extremely limited (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299 [1984]; *Azrielant v Azrielant*, 301 AD2d 269 [2002], *lv denied* 99 NY2d 509 [2003]). Indeed, "[c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (*Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 [1986]; *see also Kern v Krackow*, 309 AD2d 650 [2003], *lv denied* 1 NY3d 505 [2004] [judicial intervention would contravene strong public policy of this State in favor of resolving disputes in arbitration as a means of conserving scarce judicial resources]). Accordingly, an award will not be overturned "unless it is

violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power" (*Silverman*, 61 NY2d at 308; *Matter of Board of Educ. of Dover Union Free School Dist. v Dover-Wingdale Teachers' Assn.*, 61 NY2d 913 [1984]).

The only ground advanced to overturn the award here is that the arbitration panel exceeded its authority by finding petitioner jointly and severally liable with her former employer Lehman Brothers.[1] Because arbitration is a creature of contract, the question of whether the panel exceeded its authority "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue" (*DiRussa v Dean Witter Reynolds Inc.*, 121 F3d 818, 824 [2d Cir 1997], *cert denied* 522 US 1049 [1998]; *see also Integrated Sales v Maxell Corp. of Am.*, 94 AD2d 221, 224 [1983]). The arbitrators' interpretation of the issues and the scope of their authority is accorded substantial deference, and courts will not overturn that decision unless there is absolutely no

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[1] A finding of joint and several liability means petitioner would be responsible for the full amount of the damages award because Lehman Brothers has filed for bankruptcy.

justification for it *(see Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310-311 [2004]; *United Transp. Union Local 1589 v Suburban Tr. Corp.*, 51 F3d 376, 379 [3d Cir 1995]). Therefore, the party seeking to upset an arbitration award bears a heavy burden (*see Lehman Bros., Inc. v Cox*, 10 NY3d 743 [2008]; *North Syracuse Cent. School Dist. v North Syracuse Educ. Assn.*, 45 NY2d 195, 200 [1978]).

We find that petitioner has failed to meet this heavy burden. As noted above, petitioner argues that the scope of the arbitrators' power was limited by the damage clause of the statement of claim. To be sure, such clause, if viewed in isolation, creates confusion as to whether respondents were seeking damages against petitioner jointly and severally with Lehman Brothers, as there was no paragraph in that clause for a joint and several recovery against these two parties, as there was against petitioner and Goldman Sachs.

Such apparent inconsistency is insufficient to vacate the award against petitioner for joint and several liability with Lehman Brothers. The language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings (*Kurt Orban Co. v Angeles Metal Sys.*, 573 F2d 739, 740 [2d Cir 1978]; *see also Roffler*, 13 AD3d at 310). Rather, "[i]f the allegations underlying the claims 'touch

matters' covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them" (*Genesco, Inc. v T. Kakiuchi & Co.*, 815 F2d 840, 846 [2d Cir 1987]).

Initially, it should be pointed out that the lengthy details in the statement of claim were clearly directed at petitioner's own negligent and fraudulent conduct, including her period at Lehman Brothers. Moreover, there is no contention that the issue of petitioner's potential joint and several liability with Lehman Brothers was not covered by the arbitration agreement. Nor does petitioner contend that there is no proper basis for the award against her personally, since it was her own active negligence and fraud that formed the basis of all the claims before the arbitration panel, including both investment firms (*see Wall St. Assocs. v Becker Paribas Inc.*, 27 F3d 845, 849 [2d Cir 1994] ["where a party claims the arbitrators based their holding on a claim not properly before the panel, the party challenging the award must show that no proper basis for the award can be inferred from the facts of the case"]).

Under the circumstances, it is inconceivable that the investors intended petitioner to be free of any liability. It bears repeating that during the arbitration proceedings, the investors submitted evidence and argued about petitioner's own

negligent and fraudulent conduct resulting in their losses. In addition, contrary to their current allegations, petitioner and her Lehman counsel clearly understood that the investors sought to hold her liable, which is why her counsel identified her as a respondent throughout the arbitration proceedings, and not merely as a witness. Likewise, at the end of the evidentiary phase of the arbitration, counsel moved to dismiss the claims asserted against "respondents," not just Lehman Brothers.[2]

In short, the arbitrators here were acting within the scope of their authority when considering whether to grant the investors affirmative relief against petitioner jointly and severally with her former employer, Lehman Brothers. The decision to do so was based upon a factual determination that should not be disturbed. To hold otherwise would unnecessarily elevate form over substance and preclude an otherwise meritorious arbitration award merely because the damage clause in the statement of claim asserted damages against Lehman Brothers alone, without including petitioner.

Petitioner's reliance on *Roffler* (13 AD3d 308) is unpersuasive, as it actually supports the investors' position.

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[2] Petitioner also amended her Form U4 (Uniform Application for Securities Industry Registration or Transfer), so as to disclose that these investors had asserted a claim against her for losses incurred during her employment with Lehman Brothers.

That case involved a dispute between Bullseye, a broker-dealer, and SLK, a limited partnership in the business of providing securities clearing for broker-dealers. The securities clearing services between SLK and Bullseye allowed the former to open accounts for the latter under its master account. Bullseye claimed that SLK engaged in unauthorized trading, which caused Bullseye to sustain losses and led to its liquidation. The arbitration panel found SLK liable and awarded Joseph and Eve Roffler, the owners of Bullseye, $1.25 million in compensatory damages.

On the first appeal, this Court upheld Supreme Court's grant of SLK's motion to vacate that portion of the award directing payment to the Rofflers personally (*Matter of Spear, Leeds & Kellogg & Bullseye Sec.*, 291 AD2d 255, 256 [2002]), because the panel had exceeded its authority by granting relief on claims not asserted in the statement of claim. Specifically, the panel had awarded damages to the individual petitioners even though they had made only derivative claims on behalf of their corporation. We found that even if the statement of claim could also be viewed as an assertion of individual claims, the individual claimants were barred from an award as a matter of law, and thus the award,

made without explanation, was properly vacated as in "manifest disregard" of the law.[3]

Upon remand, the arbitration panel granted the same award, but explained that it had found the corporation responsible for the actions of its partner because the partner had guaranteed the petitioners that any losses they incurred would be "made good" by the respondent corporation. Supreme Court granted a motion to vacate, but on the second appeal, we reversed, based on a factual finding that the explanation was sufficient to cure the previous defects in the panel's award (*Roffler,* 13 AD3d at 309).

As the foregoing illustrates, nothing in *Roffler* compels us to vacate the award. Indeed, in the second appeal, this Court did not find it significant that the statement of claim had asserted damages on behalf of the corporation (Bullseye) rather than the Rofflers personally. Consistent with our view in the instant case, that the language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings, we found in *Roffler* that the issue was undisputedly within the parameters of the arbitration agreement, and was in fact addressed during the course of the arbitration

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[3] We also found that the award was irrational, since it was granted against a corporation on derivative claims asserted against its partner, where all claims against that partner had been dismissed.

proceeding (13 AD3d at 310-311):

> In this case, both parties argued this issue of petitioners' individual claims to the panel. Indeed, respondent specifically argued that Mr. Roffler could not maintain a private cause of action nor receive an "affirmative award." Moreover, as noted by the arbitrators in making the award, the issue as to whether petitioners were entitled to damages was specifically submitted to the panel by this Court's prior determination.

Accordingly, the judgment of the Supreme Court, New York County (Emily Jane Goodman, J.), entered July 22, 2009, to the extent appealed from, confirming arbitration awards against petitioner and respondent Lehman Brothers in favor of respondents Jeffrey Sardis, Lauren Sardis and JAS Holding in the principal sums of $600,000, $600,000 and $1,300,000, respectively, and dismissing this proceeding to modify the awards as to joint and several liability, should be affirmed, with costs.

All concur.

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

ENTERED: JUNE 15, 2010

David Gallagher

CLERK