SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 29, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Abdus-Salaam, JJ.

2476 Debora K. Grobman, Index 111939/07
Plaintiff-Appellant,

-against-

Louis I. Sobel, M.D., et al.,
Defendants-Respondents,

East Side Optical Inc.,
Defendant.

Todd J. Krouner, Pleasantville, for appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for respondents.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about July 2, 2009, which granted the Sobel defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

It is undisputed that the Sobel defendants established prima facie entitlement to summary dismissal of allegations that they had misdiagnosed the nature of plaintiff's glaucoma condition and otherwise failed to render treatment in accordance with accepted medical standards for her condition, resulting in injury to her vision. Plaintiff's physicians offered no objective proof, based on examination, to contradict Sobel's objective proof that

plaintiff's optic nerves and cup-to-disc ratios remained stable and in good health during the management and treatment of her condition (*see generally Giampa v Shelton*, 67 AD3d 439 [2009]; *Abalola v Flower Hosp.*, 44 AD3d 522 [2007]). Plaintiff's expert opined that the visual-field tests indicated permanent damage to the optic nerve, but also acknowledged that optic nerve injury would be evidenced by overall cupping and changes to the rim of the optic nerve, such as notching and evacuation, yet no offer of objective proof was made to substantiate such claimed damage. Plaintiff's proof was deficient, even though it remained within her power to supply such evidence. Instead, plaintiff left her argument to speculation. The Sobel defendants, by contrast, offered objective proof that fully refuted such speculative assertions (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]).

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

ENTERED: JUNE 29, 2010

David Friedman

CLERK

Friedman, J.P., Catterson, Moskowitz, Renwick, JJ.

598 Mindaugas Blaudziunas, et al., Plaintiffs-Appellants, Index 102183/08

-against-

Edward Cardinal Egan, etc., et al., Defendants-Respondents.

Harry Kresky, New York, for appellants.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr., of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered November 24, 2008, which denied plaintiffs' motion for a preliminary injunction seeking to enjoin defendants from demolishing a church building and granted defendants' motion to dismiss the complaint, affirmed, without costs.

Within the hierarchical Roman Catholic Church, the decision to demolish the church building of the subject suppressed incorporated parish, duly made by the Archbishop and the trustees of the parish in accordance with applicable canon law and church by-laws, was ecclesiastical in nature. We adhere "to the long-standing and sensible prohibition against court involvement in the governance and administration of a hierarchical church" (*Committee to Save St. Brigid's Inc. v Egan*, 45 AD3d 375, 376 [2007]). Contrary to the arguments of the dissent and plaintiffs, Religious Corporation Law (RCL) § 5 does not require

that the demolition of the church be authorized by the parishioners. That statute and RCL § 91 vest approval authority for all actions taken by the trustees of an incorporated Roman Catholic church in the archbishop or bishop of the diocese to which that church belongs (*see Committee to Save St. Brigid's*, 45 AD3d at 376). The decision to demolish the church building of a suppressed incorporated parish, such as the one at issue here, is not a use of the corporation's property to further a religious, charitable, benevolent or educational object other than the support and maintenance of the corporation itself for which the authorization of "the members of the corporation at a meeting thereof" is required by RCL § 5, even assuming that the phrase "the members of the corporation" refers to the parishioners. Since RCL § 5 does not address the issue of the disposition of the property of a suppressed incorporated parish, and does not conflict with the decision-making authority vested in the archbishop and the trustees by applicable canon law and by-laws, we construe it to permit the demolition of a suppressed parish's church building without need for consultation with the former parishioners. Indeed, given that plaintiffs do not challenge the validity of the archbishop's suppression of the parish in question, it is undisputed that the parish's ecclesiastical existence has been extinguished (as the dissent recognizes).

Accordingly, plaintiffs, as former members of a now defunct religious society, have no standing to bring this action. For the same reasons, the court properly dismissed the claim for breach of fiduciary duty.

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

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

CATTERSON, J. (dissenting)

I must respectfully dissent. This is a dispute over the demolition of real property owned by a religious corporation. The plaintiffs in this case make no intrusion into ecclesiastical matters such as challenging the suppression of the parish. Indeed, the suppression, in August 2006, of the ecclesiastical entity that was Our Lady of Vilna Parish means that the focus of our analysis is a property owned by, and in the custody and control of, a legal entity, a religious corporation. That corporation is bound by the laws of this state, specifically the Religious Corporations Law (hereinafter referred to as "RCL"). The question arising on appeal is whether the members of that church are members of the corporation as that phrase is used in RCL § 5. In my view, this dispute concerns the statutory interpretation of an RCL provision pursuant to "neutral principles of law," and avoids the prohibition against court intrusion into ecclesiastical matters.

Indeed, the necessary corollary to the majority's holding is that any time a diocese suppresses a parish, regardless of the genesis of the parish or its corporate status under state law, its assets escheat to the Bishop and/or the diocese. While the majority states baldly this is in accordance with canon law, it does not cite to any such authority, nor is there any authority in canon law, as demonstrated more fully below, for a diocese to

plunder the assets of a parish.

The following facts are undisputed: Lithuanian immigrants built the Church of Our Lady of Vilna with their money "to have a place for worship and witness their love and faith in God" and established it to serve New York's Lithuanian community. The church was incorporated under the RCL in 1909 as the Church of Our Lady of Vilna. Between 1910 and 1912, the corporation obtained title in fee simple to the real property at 570 Broome Street in Manhattan on which the church building and the former rectory are located.

On August 1, 2006, Edward Cardinal Egan, head of the Archdiocese of New York (hereinafter referred to as "Archbishop") issued a decree of suppression of the parish of "Our Lady of Vilnius" (sic).[1] The decree stated that the parish was being suppressed because of a "serious decline in its parish population." More than five months later, on January 19, 2007, the archdiocese issued a press release making public its intention to close the Parish of Our Lady of Vilnius because,

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[1]Although it is clear that the decree of suppression applied to the parish in question, the Archbishop chose to use the modern designation of "Vilnius" rather than the actual name of the parish, namely, Vilna. The parish was apparently named for the Diocese of Vilna, established in Lithuania in 1387. "Vilnius" became the commonly used name for the capital city of Lithuania following the Soviet capture of the city from the retreating German Army in 1944. Thus, the Archbishop's decree may have been correct in using the post-German occupation denomination of "Vilnius", it was nonetheless in error with regard to the name of the century-old parish.

inter alia, "Sunday Mass attendance . . . had decreased to approximately 100 parishioners [,] . . . the Mass was celebrated in English, not in Lithuanian . . . [and] [t]here were virtually no weddings or baptisms at the parish in recent years."

On or about February 26, 2007, the Archbishop summoned Fr. Eugene Sawicki, the pastor of the parish to a meeting at the diocese office. While at the meeting, and without any prior notice to him, the lay trustees, or the parishioners, the Archbishop sent his representatives and agents to padlock the church. Security guards were placed at the doors, and neither the parishioners nor Fr. Sawicki were permitted entry into the church. Within 24 hours, 500 parishioners signed and presented a petition at the diocese office asking the Archbishop to re-open the church, but he refused to meet the petitioners and denied their request.

Subsequently, the defendants began to remove church property from the building including the sacramental records, the parish check book, a pulpit, two deacon's chairs and one celebrant's chair. The record further indicates that some of the frescoes above the altar were painted over in blue following the closure of the church. Others were peeled off the walls and ceiling, leaving bare cement. The apse was boarded over, the altar and pews were removed and stained glass windows and paintings were placed on the floor. Some paintings by Lithuanian artists were

also allegedly removed.

On March 21, 2007, the Archbishop dismissed Fr. Sawicki and appointed Monsignor Gilleece to replace him as rector on the board of trustees. As of that date, the three ex officio members of the board were the Archbishop, Monsignor Brucato as the Vicar-General of the diocese, and Monsignor Gilleece. On April 12, 2007, the church trustees appointed Claire and Thomas Libonati to be the lay trustees of the parish corporation.[2]

On April 30, 2007, the two former lay trustees of the church commenced an action (hereinafter referred to as "Our Lady of Vilna I"). The plaintiffs moved, inter alia, for a TRO and a preliminary injunction to stop the closing of the church and the removal of church artifacts.

In a decision issued in May 2007, the court (Shirley Werner Kornreich, J.) denied the plaintiff's motion, ruling that they had no standing as former trustees. The court noted that the defendants had denied that there was any plan to sell or transfer the church building, and that they were transferring only the personalty inside for safekeeping. The court held that the board of trustees had authority under the corporation by-laws to dispose of the personalty, and that the Archdiocese could proceed

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[2]Claire and Thomas Libonati replaced Joseph Pantuliano and Gertrude McAleer as trustees after their one-year term had expired on March 31, 2007. Thomas Libonati resigned from the parish board of trustees in September 2007, and was replaced by Roseanne Nunziato in a special meeting held on October 22, 2007.

with its plans to shut down the church as a matter of ecclesiastical governance. By stipulation filed August 16, 2007, Our Lady of Vilna I was discontinued with prejudice.

Approximately two months later, at a meeting held on October 22, 2007, the board of trustees voted to demolish the church. The record further reflects that a letter dated January 17, 2008 was sent to neighbors of the church by a demolition contractor stating that the church building would be demolished "in the near future." On February 4, 2008, Msgr. Gilleece applied for a New York City Department of Buildings permit for the demolition. It is undisputed that there was no meeting of the parishioners to consider this decision.

On February 7, 2008, the plaintiffs, as members of the church, commenced the instant action by bringing an order to show cause seeking a preliminary injunction preventing defendants from demolishing the Church. They also filed a verified complaint alleging, inter alia, that the defendants had violated RCL § 5 in going forward with the demolition without the approval of the members of the church.

On November 24, 2008, the court denied the plaintiffs' motion for a preliminary injunction and dismissed their complaint in its entirety. The court held that, to the extent the plaintiffs challenged the defendants' right to dispose of temporal church property, the issue was resolved in Our Lady of

Vilna I and it would not allow re-litigation of the matter. With respect to the issue of demolition, the court found that the board of trustees had been properly appointed and so the decision to demolish the building was properly made. While acknowledging that the defendants' prohibition against court intervention in this dispute was overstated, the court nevertheless rejected the argument that the defendants had violated the RCL in voting for demolition without the approval of the plaintiffs as members of the corporation. The court found that the plaintiffs were not members of the corporation. For that conclusion, it purported to rely on this Court's determination in Committee to Save St. Brigid v. Egan, (hereinafter referred to as "St. Brigid I") (30 A.D.3d 356, 819 N.Y.S.2d 7 (1st Dept. 2006)). On January 13, 2009, this Court granted a preliminary injunction barring demolition pending hearing and determination of this appeal.

On appeal, plaintiffs rely on RCL § 5 to argue that the court below erred in its denial of the preliminary injunction and the dismissal of the complaint. That section, in relevant part, states:

> "trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the

> corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object [. . .] and [the trustees] shall not use such property or revenues for any other purpose or divert the same from such uses" (emphasis added).

The plaintiffs claim that the defendants have violated this section specifically because the closing of the church means the property is no longer being administered for the support and maintenance of the corporation, the primary purpose of which is to "enable its members to meet for divine worship." RCL § 2. The plaintiffs further claim that pursuant to the provision, their authorization is needed for any other purpose such as the demolition of the church. See RCL § 5. The plaintiffs assert that under the plain meaning of RCL provisions and the church by-laws, the members of the parish and the corporation are the same. Moreover, the plaintiffs, citing Morris v. Scribner (69 NY2d 418, 515 N.Y.S.2d 424, 508 N.E.2d 136 (1987)), contend that allowing the defendants to proceed with the demolition without meeting with church members would undermine the very purpose for which the RCL was enacted, namely, to prevent the diversion of property from its true beneficiaries, the members of the congregation.

The defendants, on the other hand, assert that RCL § 5 is a general provision and that its reference to a meeting of the "members of the corporation" pertains to those denominations which are congregational and which permit votes by the parishioners, and not to the Roman Catholic Church which is

hierarchal in nature. In any event, the defendants assert that RCL §§ 91 and 92 recognize a Roman Catholic archbishop's authority and supremacy in the right to dispose of a church corporation's property, including real property.

The defendants focus on the wording that emphasizes the administration of property in accordance with the "discipline, rules and usages . . . of the ecclesiastical governing body," that is the Roman Catholic Church. They argue that the provision incorporates by reference the canons of Roman Catholic Canon Law; that Canon Law puts all control and custody of goods and property in the hands of the hierarchy, specifically the archbishop as head of the diocese, and therefore the archbishop does not need authority or approval from anyone for the demolition of the church. Moreover, they argue that the court below correctly relied on this Court's decision in St. Brigid I to conclude that the parishioners are not members of the corporation and that the only members of the corporation are the trustees. I disagree.

As a threshold matter, it should be noted that this Court did not consider the issue, nor did it reach the merits, of whether members of the church are members of the religious corporation either in St. Brigid I or Committee to Save St. Brigid's Inc. v. Egan, (hereinafter referred to as "St. Brigid II") (45 A.D.3d 375, 846 N.Y.S.2d 30 (1st Dept. 2007)). In

the first action, parishioners asked the court to direct the diocese to renovate and reopen St. Brigid's Church.[3] This Court held that "the relief sought by plaintiffs, i.e., an order mandating that the funds in question be used to restore the subject property *for use as a church*, would impermissibly involve the court in the governance and administration of a hierarchical church." 30 A.D.3d at 356, 819 N.Y.S.2d at 8 (emphasis added). This Court viewed St. Brigid II, as deriving from "the same circumstances as those dismissed in the first action" and thus continued to adhere to the "prohibition against court involvement in the governance and administration of a hierarchical church." 45 A.D.3d at 376, 846 N.Y.S.2d at 30, lv. granted, 10 N.Y.3d 756, 853 N.Y.S.2d 538; 883 N.E.2d 364 (2008), appeal withdrawn, 11 N.Y.3d 921, 874 N.Y.S.2d 6, 902 N.E.2d 440 (2009)).[4]

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[3]St. Brigid's, a church built by Irish immigrants in 1848, fell into disrepair. Parishioners raised more than $100,000 for renovations, but the archbishop decided to close it in 2004.

[4]The defendants in this case decried the granting of leave based on the sole judge dissent of Justice Kavanagh in St. Brigid II which the court below described as an "impassioned and thorough" dissent but which the defendants incomprehensibly characterized as "illogical, inconsistent and often incoherent." In any event, the appeal was subsequently withdrawn as moot after an anonymous donor came forward with $20 million for renovation of the church, and the Archbishop reversed the decision to close it. Additionally, it could, of course, be posited that a decision based on religious doctrine and "tenets of faith" could not be reversed by a mere infusion of cash, no matter how large.

Specifically, we rejected the argument that the facts before it in either action warranted an analysis of RCL section 5. In my opinion, the facts of the instant case are distinguishable. First, the Archbishop issued a formal canonical Decree of Suppression of the parish of "Our Lady of Vilnius" (sic). Second, the plaintiffs do not dispute the Archbishop's authority to do so, nor his authority to close the church for religious services. Hence, the ecclesiastical entity of the church of Our Lady of Vilna has been extinguished and no longer exists. Only the legal entity, the corporation that owns the church building and the real property on which it is located, remains. Since the board of trustees voted for demolition as a corporate matter without regard to the RCL requirement of meeting with the members of the corporation, this became solely a property dispute between the plaintiffs and diocese. As such, it may be adjudicated by this Court.

Indeed, the Court of Appeals reiterated the permissibility of judicial intervention in church property disputes as recently as October 2008. Episcopal Diocese of Rochester v. Harnish, 11 NY3d 340, 870 N.Y.S.2d 814, 899 N.E.2d 920 (2008). In so doing, the Court relied on the seminal First Amendment decision of the United States Supreme Court in Jones v. Wolf, 443 U.S. 595, 99 S.Ct.3020, 61 L.Ed.2d 775 (1979).

In Jones, the United States Supreme Court held that the

First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." Jones v. Wolf, 443 U.S. at 602, 99 St. Ct. at 3025; see also Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976). However, the Court acknowledged that states have a legitimate interest in providing a civil forum for the resolution of disputes over ownership of church property and can do so "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." 443 U.S. at 602, 99 S.Ct. at 3025 (internal quotation marks and citation omitted). The Court then provided a road map for determining property issues according to a "neutral-principles approach" which is the approach the Court of Appeals used in Episcopal Diocese of Rochester. 11 NY3d at 350-351, 870 N.Y.S.2d at 817-819).

In Episcopol Diocese of Rochester, such application of neutral principles of law required the Court to focus "on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning ownership and control of church property." Id., at 350, 870 N.Y.S.2d at 818. In this case, therefore, this Court is obliged to focus on the language of the deeds, and the

relevant provisions of the RCL as they appertain to the holding of church property. This necessarily includes the provisions that appertain exclusively to the Roman Catholic Church, the by-laws of Our Lady of Vilna Church and the relevant canons in the Roman Catholic Church's Code of Canon Law (the governing rules and laws of the Church), "scrutiniz[ing] [them] in purely secular terms" as the Court scrutinized the Dennis Canons in Episcopal Diocese of Rochester. 11 NY3d at 351, 870 N.Y.S.2d at 818.

Based on the certificate of incorporation, it is uncontroverted that Our Lady of Vilna Church was incorporated in 1909 pursuant to the Religious Corporation Law of 1895. The certificate states that the then Archbishop of the diocese, the vicar general, the rector and "two laymen members of said church" are "desirous of incorporating said Church, or the congregation thereof" and "we do hereby certify that the name or title by which we and our successors shall be known as a body corporate by said law is Church of Our Lady of Vilna."

There is also no dispute that the corporation owns the real estate, that is the real property of the church and rectory at Dominick Street. In 1910, the corporation executed a deed to the real estate on which the church and the rectory were subsequently built. The deed conveyed title to the real property in fee simple to the Church of Our Lady of Vilna, "a

religious corporation." In 1912, a second deed conveyed adjoining property to the corporation. Neither deed includes any provision for reversion to the diocese.

It is further undisputed that the RCL provides for the trustees of each religious corporation to administer the temporalities and property, real and personal of an incorporated church save that the trustees of a Roman Catholic church cannot transfer any property without the consent of the archbishop or bishop of the diocese. RCL § 5. Certain sections of the RCL appertain solely to the Roman Catholic Church. Specifically, section 91 applies to the governance of religious corporations affiliated with the Church. The defendants correctly assert that pursuant to the plain meaning of RCL § 91 the five trustees for each incorporated Roman Catholic church are not chosen by the parishioners, and the parishioners are not entitled to participate in the appointment or determination of the composition of the board of trustees. Section 91 further provides that the board will be comprised of the archbishop and vicar general of the diocese, as well as the rector of the church, and their successors in office are automatically trustees by virtue of their offices; and that these ex officio trustees will select two laypersons from the church to serve as the appointive trustees.

Further, the by-laws of the corporation adopted by the

trustees of Our Lady of Vilna in 1980 reinforce the hierarchical nature of the church by stating that the archbishop or bishop of the diocese is by virtue of the office the president and the chief executive officer of the corporation, the vicar general is vice-president and the rector is secretary-treasurer of the corporation; that these three trustees, or a majority of them, will appoint the two lay trustees. The by-laws provide that the trustees administer the temporalities and property of the corporation in accordance with "the discipline, rules and usages" of the Roman Catholic Church and of the archdiocese "for the support and maintenance of the Church and of its various religious, charitable, benevolent and educational activities." Further, the by-laws indicate that the duties of the trustees are severely limited, and the consent of the archbishop is required for, inter alia, the following: mortgaging, leasing, selling any of the corporation's real property; for acquiring any real property by lease, purchase, gift or devise; for accepting by gift or bequest any money or personal property and for any expense in making repairs to the property or purchasing equipment for the church. They fully mirror the provision in RCL § 91 that states: "[n]o act or proceeding of the trustees . . . shall be valid without the sanction of the archbishop or bishop of the diocese."

All of the foregoing is uncontroverted but it does not end the inquiry. The provision that any act or proceeding undertaken by the trustees of the corporation requires the consent of the bishop is not exclusive. It does not mean that every act or proceeding needs *only* the consent of the bishop - especially when the primary purpose of the corporation as defined by the RCL (enabling members to attend religious services) is no longer viable. In my opinion, the defendants have failed to show that the provision mandating a meeting and authorization by the members of the corporation when the property is to be administered by the trustees for a purpose other than the support and maintenance of the corporation does not apply to the Roman Catholic Church. Indeed, the first sentence of RCL § 5 unequivocally states that the section applies to the trustees of "every" religious corporation. Specifically, in my view, the defendants have failed to show that the plaintiffs in the instant case are not the type of "member of a corporation" to which section 5 applies.

First, I disagree with the defendants' contention that, because pursuant to RCL § 2-b(2) a religious corporation is a Type B corporation under the Not-For-Profit Corporation Law and may have no members, the subject religious corporation has no members. Under N-PCL 601(a), a corporation "shall have one or more classes of members, or, in the case of a Type B

corporation, may have no members, in which case any such provision for *classes of members or for no members* shall be set forth in the certificate of incorporation or the by-laws" (emphasis added). In this case, neither the certificate of incorporation nor the by-laws of Our Lady of St. Vilna set forth either eventuality. Neither document states unequivocally that the corporation has no members, and since they do not provide for different classes of members, by default the corporation has members - all of one class.

Second, the plain meaning of provisions in the RCL and the church's by-laws indicate that the terms members of the church and members of the corporation are interchangeable. According to RCL § 2 "[a]n 'incorporated church' is a religious corporation created to enable its members to meet for divine worship or other religious observances." The by-laws do not mandate a different conclusion. Article II of the by-laws contains the definitions of terms used in the document as follows: "4. 'Church' shall mean the ecclesiastical entity (parish) that was incorporated under civil law as this Corporation"; "6. 'Members of the Church' shall mean the parishioners of the aforesaid ecclesiastical entity (parish)." Hence, members of the church are members of the ecclesiastical entity as corporation.

While the parishioners of a hierarchical Roman Catholic

church may not have voting rights per se or membership certificates, RCL § 5's requirement that member authorization must be obtained to use church property for "other" religious or charitable purposes imposes no requirement that such members be "voting" members. Indeed, where a vote of qualified voting members is required, RCL § 5 so provides. See e.g. RCL § 5 (stating that the adoption or amendment of by-laws requires a two-thirds vote of the "qualified voters").

Third, the defendants' argument is that if the RCL § 5 provision is read "with an understanding of the unique and inviolate precepts of the particular religious society" then it is evident that the provision requiring "authorization by members of the corporation" cannot apply to the Roman Catholic Church. In my opinion, that argument is without merit as the defendants acknowledge that, "[a]lthough the Legislature has revised RCL § 5 numerous times over the last 200 plus years in attempting to make it applicable to other faiths and forms of religious societies, the language regarding 'members' was never expunged." Clearly, the Legislature intended, and still intends the provision to apply to *every* church that seeks the advantages of incorporation under the RCL.

Lastly, contrary to the defendants' assertions, the admittedly sparse case law that exists appertaining to incorporated Roman Catholic churches is not outmoded but is

still good law. Moreover, it indicates that the parishioners of Roman Catholic churches that incorporate have some, albeit restricted, role in the religious corporation. Notably, Baxter v. McDonnell, (155 N.Y. 83, 49 N.E. 667 (1898)), involved the Roman Catholic bishop of an *unincorporated* church in 1898 where the title to the church real estate was held by the bishop in his own name. The court found that, "[t]he purpose of this arrangement is to exclude the laity from that *power of interference which they would have were the title vested in a corporation*" (id., at 94, 49 N.E. at 668) (emphasis added).

Indeed, 35 years prior to that case, the 1863 amendment to the Religious Corporations Law revised the statute specifically with regard to the incorporation of Roman Catholic churches. With regard to that amendment, the Court of Appeals held in 1888 that while the amendment changed the mode of selection of trustees and had vested in them power of management and control it " does not constitute the trustees [as] the corporation in place of the congregation." People's Bank v. St. Anthony's R.C. Church, 109 N.Y. 512, 521, 17 N.E. 408, 409 (1888).

Ultimately, I disagree with the defendants' characterization of New York common law and statutory law as supporting the view that the disposition of church property and funds "are matters solely and exclusively within the Archdiocese's ecclesiastical and hierarchical authority." This

may be true to a large extent but it overstates the case. So far as statutory law is concerned, the defendants point to RCL § 92 as the provision that gives the Archbishop the power to distribute funds from a sale of property, at his discretion. RCL § 92, however, deals with a Roman Catholic parish that has been "duly divided" and where "the original . . . church corporation is given one part of the old parish, and a new or second . . . church corporation is given the remaining part of the old parish." This provision essentially speaks to a merger of parishes in the same diocese. That is not this case. No part of the old parish remains as an ecclesiastical entity. The parish was not merged or realigned. It was simply closed and extinguished, and such Lithuanian parishioners as were acknowledged to be remaining by the Archdiocese were directed to services in two other dioceses, of Brooklyn and Newark.

Moreover, the power of the archbishop to dispose of church property is further circumscribed, as the defendants acknowledge, by RCL § 12 which provides that a religious corporation must obtain leave of a court before selling or mortgaging any of its real property. While RCL § 12(3) acknowledges that the trustees of a Roman Catholic church cannot do so without the consent of the archbishop, nevertheless once that consent is given, the transaction is still subject to judicial review. Thus, as stated above, the

fact that any act or proceeding by the trustees requires the archbishop's consent does not mean that only his consent is required for such act or proceeding.

In my opinion, the most troubling facet of the defendants' argument is their assertion that the RCL, by incorporating Canon Law, recognizes that the archbishop of a diocese has the sole, exclusive ultimate authority over the disposition of properties belonging to the individual parishes. In placing such weighty reliance on Canon Law the defendants ensure that this dispute cannot be resolved without this Court following the guidelines of the Court of Appeals in this area, and looking at the relevant canons within a secular context. See Episcopal Diocese of Rochester, 11 NY3d at 349, 870 N.Y.S.2d at 817. In my view, we need not resolve the merits of this dispute by analyzing the canons; thus the following serves only the purpose of illuminating the inconsistencies in the defendants' argument.

First, it should be noted that, in general, the Roman Catholic Church in the United States has been less than consistent in the use of its canons. Depending on what interpretation inures to its benefit, ownership, and therefore custody and control of real property, either belongs to the parishes or to the diocese. See Jonathan C, Lipson, When Churches Fail: The Diocesan Debtors Dilemma, 79 S. Cal. L. Rev.

363, 385 (2006) (the dioceses in current bankruptcy cases arising out of damages claimed by victims of sexual abuse "have all argued that parish property is not diocesan property and should therefore not be part of bankruptcy estates).[5]

Most notably in Spokane, Washington, the diocese invoked Canon 1256 which provides that "the ownership of goods belongs to that juridic person which has acquired them legitimately." [6] Hence, the diocese argued that it had no interest in the property since a parish and a diocese are legally distinct juridic persons. Id., at 385-386 citing Committee of Tort Litigatants v. Catholic Diocese of Spokane, 329 B.R. 304, 318-320 (Bankr. E.D. Wash. 2005). The court found the argument prohibited by res judicata since approximately eight years earlier, the diocese had argued it owned the parish property that it sought to demolish. Id., at 319, citing Munns v. Martin, 131 Wash.2d 192, 930 P.2d 318 (1997).

In the instant case, the penchant for picking and choosing canons is also evident. The defendants cite Canon 515(2) which

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[5] In those dioceses of Spokane, Portland, and Tuscon, the bishop holds legal title to parish properties in a corporate form known as "corporations sole." In those dioceses, the hierarchy has argued in these cases that corporations sole hold the legal title but only in trust for the parishes. 79 S. Cal. L.Rev. at 385.

[6] Parishes and diocese are public juridic persons according to Canon Law. See John P. Beal, New Commentary on the Code of Canon Law, p. 171, Paulist Press (2000).

states that a bishop has exclusive control over altering and suppressing parishes, and with which the plaintiffs do not argue; they also cite Canon 1254 which states that, "the Catholic Church by innate right is able to acquire, retain, administer, and alienate temporal goods independently from civil power." However, there is no reference to Canon 1256 which, as detailed above, deals with ownership of goods accruing to those entities that legitimately acquire them such as the religious corporation of the Church of Our Lady of Vilna. Nor is there any reference to Canon 1267 which states that "offerings given by the faithful for a specific purpose may be used only for that purpose." See Nicholas P. Cafardi, The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis, 29 Seton Hall Legis. J. 361, 371 (2005).

Most significantly, the defendants do not cite to, or explain, Canon 123 although it, along with Canon 515(2), is referenced in the Archbishop's decree of suppression of the parish of "Our Lady of Vilnius." Specifically, in the decree of suppression, the Archbishop stated, in relevant part: "[a]fter serious consideration of the intention or will of donors and benefactors . . . in accord with Canon 123, allocation of the goods and obligations of this parish will first provide for necessary pastoral care of its former parishioners and then, whatever remains, will belong to the Archdiocese of New York."

First, scrutinizing the canon in purely secular terms, this conflicts with the defendants' assertion on appeal that "the [r]ecord is devoid of any evidence that the church property was, or is, to be diverted away from the church corporation and to any other uses." Clearly, the Archbishop's intention is to divert some of the property to the archdiocese. Second, it appears that this particular canon dovetails somewhat with the requirement of RCL § 5 that authorization is required when the property is administered for purposes other than the support and maintenance of the corporation.

Canon 123 states in pertinent part that when a parish is extinguished "the allocation of its goods . . . go[es] to the juridic person immediately superior,[7] always *without prejudice to the intention of the founders and donors*" (emphasis added). Indeed, as the editors of the New Commentary on the Code of Canon Law point out: "While in many cases such a disposition [to an immediately superior juridic person] would be unobjectionable . . . As in canons 121 and 122[8] and frequently throughout the code, so also in canon 123 the Church's commitment to faithful fulfillment of the intentions of founders and donors finds

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[7]According to Canon Law, a diocese would be a superior juridic person to a parish in that diocese. See New Commentary on the Code of Canon Law, p. 171.

[8]These two canons deal with the division and consolidation of juridic persons. See Id.

expression." New Commentary on the Code of Canon Law, pp 168-172.

The idea that an archdiocese or diocese cannot simply alienate the property of a parish where property has been accrued through the efforts of parishioners is explained succinctly in the law review article by author Cafardi, in which he writes: "Parishes are not plums for the diocesan bishop to pick." The Availability of Parish Assets for Diocesan Debts, 29 Seton Hall Legis. J. at 368.

> "The assets of a parish were contributed by the parishioners to serve that parish community, and not to serve the diocese. There were fund drives to build the parish church. There were fund drives to build the parish school, the rectory . . . Gifts to the parish were solicited so that the parish community had the means available to them to work out their salvation. And when a bishop tells those people that he is closing Parish X and they need to work out their salvation at Parish Y, then those means need to follow them to Parish Y." Id., at 372.

The defendants appear to tacitly acknowledge the idea that former parishioners have some property right in the goods of the former parish by stating that, "the [r]ecord demonstrates that [d]efendants . . . took pains to carefully preserve the ecclesiastical and sacred items and even transferred certain goods to nearby parishes to allow former parishioners convenient access to same." At the very least, a meeting at which the will and intentions of the donors in the former parish are enunciated to the archdiocese does not appear, in secular terms, to conflict

with the "the discipline, rules, and usages" (RCL § 5) of the Roman Catholic Church. Nor is it a challenge to the hierarchical nature of the Roman Catholic Church or intrusion on its internal governance and administration in derogation of Canon Law. For all the foregoing reasons, therefore, I would reverse the court's order, and grant the preliminary injunction.

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

ENTERED: JUNE 29, 2010

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

2774 New Image Construction, Inc., Index 304557/08
Plaintiff-Appellant,

-against-

TDR Enterprises Incorporated, et al.,
Defendants-Respondents.

Manmohan K. Bakshi, Manhasset, for appellant.

Robert L. Reda, Suffern, for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 24, 2009, which, insofar as appealed from, denied plaintiff's motion for summary judgment on its claim for payment for construction services performed, unanimously modified, on the law, the motion granted as against defendants TDR Enterprises Incorporated and Renee Green, and as so modified, affirmed, with costs. The Clerk is directed to enter judgment in favor of plaintiff against TDR and Green in the sum of $200,000 together with interest from September 1, 2006, costs and disbursements.

Plaintiff, a contractor, brought this action to recover money due for the build out of a restaurant pursuant to a contract entered into by TDR and Green. In support of its motion, plaintiff submitted two notices to admit the genuineness of documents and a notice to admit purported facts. Although served with the notices to admit, defendants did not respond to

any of them. Among the documents covered by the first two notices to admit was a June 2006 construction agreement executed by plaintiff, and by Green, individually and on behalf of TDR. The agreement provided for the payment of $200,000 for plaintiff's work. Payments were to be made in five equal installments of $40,000 beginning on the signing of the contract. The agreement set forth in detail the scope of the work, and required that any changes to the agreement be in writing.

Other documents covered by the notices to admit reflected a loan to defendants by PNC Bank, for the payment of plaintiff's fee, among other things. These documents show defendants' representation to the bank that plaintiff had completed its work, a requirement for the disbursement of the loan funds. The documents also included cancelled checks made payable to plaintiff that were apparently endorsed and cashed by defendants instead. Defendants are deemed to have admitted the genuineness of the said documents because they did not timely respond to plaintiff's notice (*see* CPLR 3123; *Kowalski v Knox*, 293 AD2d 892 [2002]). Hence, plaintiff's prima facie entitlement to judgment as a matter of law is established. We note, however, that plaintiff's third notice to admit was improper, since it impermissibly "compell[ed] admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324 [2004]).

Since defendants are deemed to have admitted the genuineness of the construction agreement, their attempts to disaffirm it are unavailing. We also reject defendants' claim that they terminated the contract due to plaintiff's failure to diligently complete the work. Defendants do not claim to have served plaintiff with a 14-day notice to cure and written notice of termination which were contractual prerequisites to termination. Defendants' purported termination of the contract was, therefore, ineffective (*see e.g. MCK Bldg. Assoc. v St. Lawrence Univ.*, 301 AD2d 726, 728 [2003], *lv dismissed* 99 NY2d 651 [2003]). The court properly denied the motion for summary judgment as against defendant Terrance Davis as it has not been shown that he dealt with plaintiff in an individual capacity (*see Kibler v Gilliard Constr., Inc.*, 53 AD3d 1040, 1042 [2008]).

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

ENTERED: JUNE 29, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2800 Cosmos, Queens Ltd., Index 106469/08
Plaintiff-Respondent,

-against-

Matthias Saechang Im Agency, et al.,
Defendants-Appellants.

The Sullivan Law Group, LLP, New York (Suzanne M. Saia of counsel), for appellants.

DeLuca & Forster, Cranford, NJ (Daniel Louis Grossman of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 23, 2009, which upon reargument, adhered to its prior order, entered August 18, 2009, denying defendants' motion for summary judgment dismissing the complaint, unanimously reversed on the law, without costs, defendants' motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

On July 7, 2007, plaintiff, a store selling jewelry, clothing and other merchandise, was robbed. Prior to May 2006, plaintiff was insured for losses of business and personal property up to $1,240,000. Sometime prior to May 2006, plaintiff's principal (Lee) asked the defendant Matthias Saechang Im (Im), an insurance broker, employed by defendant Matthias Saechang Im Agency, if he could obtain the same "apples to apples" insurance coverage plaintiff currently had from another

company. Lee provided Im with documents evincing plaintiff's existing coverage and Im obtained a policy for plaintiff from LIG Insurance. Both Im and Lee were under the impression that the policy procured by Matthias covered losses arising from the theft of jewelry.

A year later the LIG policy automatically renewed for the period of May 2007 through May 2008, and after the renewal, Im informed Lee that plaintiff's policy did not include any coverage for losses arising from the theft of jewelry or that the coverage for such a loss was only a maximum of $2,500. Lee asked Im to obtain coverage from LIG for robbery-related jewelry losses in excess of $1 million but Im told Lee that at best, LIG would only provide $200,000 for robbery-related losses. Giving Lee two alternatives, Im suggested that plaintiff obtain jeweler's block insurance from another company, which would provide plaintiff with the requisite coverage for robbery-related jewelry losses, and sent Lee an application form to procure the same. Alternatively, Im told Lee that he could procure robbery-related jewelry coverage from LIG in the amount of $200,000 and sent Lee a letter for that purpose that Lee was to execute and return. Lee, aware that he had little to no robbery-related coverage, received the letter for procurement of additional insurance from LIG one to two months prior to the robbery but failed to execute and return it until nearly 5 p.m on the date of the robbery.

Moreover, averring that he did not want to incur additional expense and that it would take months to procure jeweler's block insurance, Lee never returned the application, despite having received it a month prior to the robbery. LIG ultimately paid plaintiff $100,000 for the losses incurred in the robbery. Inasmuch as that amount did not fully cover plaintiff's losses, it then brought this action against the defendants for breach of contract and negligence.

Insurance agents and brokers have a common-law duty to obtain the coverage requested by a client within a reasonable time after the request is made or if unable to procure the requested coverage, to promptly notify the client (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157 [2006]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 867 [2009]; *Verbert v Garcia*, 63 AD3d 1149, 1149 [2009]; *Baseball Office of Commr. v Marsh & Mclennan, Inc.*, 295 AD2d 73, 79-80 [2002]). In executing the insurance brokerage transaction, an agent or broker must exercise due care; thus, when an insurance policy does not cover a loss for which the broker was contracted to obtain coverage, the party who engaged the broker is entitled to recover damages (*Bruckmann, Rosser, Sherrill & Co., L.P.* at 866).

Here, Im obtained substantially inferior coverage, never apprising Lee of his inability to obtain the coverage requested

until a year later, and only after the policy renewed for another year. Thus, Im breached the duty owed to plaintiff. Contrary to defendants' assertion, the fact that a year later Im informed Lee that LIG would not provide the coverage does not negate defendants' negligence, since by that time Im's failure to obtain the coverage requested or to otherwise promptly notify had subjected plaintiff to improper coverage for the previous and coming year.

However, it is clear that defendants' negligence was not the proximate cause of plaintiff's damages and, accordingly, they are entitled to summary judgment. Evidence establishing that a defendant's negligence was the proximate cause of the harm alleged is essential to proving liability (*Sheehan v City of New York*, 40 NY2d 496, 501 [1976]); without it a defendant can not be held liable (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 220 [2005], *lv denied* 6 NY3d 708 [2006]; *Lynn v Lynn*, 216 AD2d 194, 195 [1995]). Additionally, it is well settled that when the intervening act of another "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980])

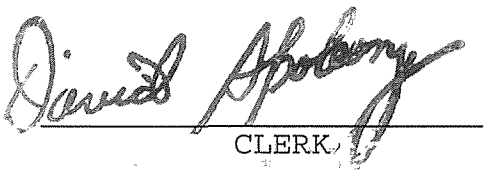
between defendant's action and the harm or act alleged (*see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]; *Sheehan* at 503; *Lee* at 220).

The record evidence demonstrates that in an effort to rectify his failure, Im gave Lee two viable options, at least one of which would have completely covered plaintiff for the losses incurred. Lee, having in his possession the documents necessary to procure additional coverage and fully aware that, as it stood, he at best had minimal theft related insurance coverage, waited at least a month before taking any action. Thus, it was Lee's own inaction, which constituted a superseding act, which caused him to be inadequately insured on the date of plaintiff's loss. Defendants' negligence was thus not the proximate cause of plaintiff's damages and they are entitled to summary judgment (*see Thompson & Bailey, LLC v Whitmore Group, Ltd.*, 34 AD3d 1001, 1003 [2006], *lv denied* 8 NY3d 807 [2007] [cancellation of insurance policy was not due to any negligence on part of insurance broker but rather to plaintiff's own failure to act]; *Resource v National Cas Co.*, 219 AD2d 627, 628 [1995] [plaintiffs' damages were not proximately caused by broker's

failure to procure adequate insurance but rather by their independent decision to settle a claim which would have been covered by the policy]).

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

ENTERED: JUNE 29, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3117 The People of the State of New York, Ind. 95065/05
Respondent,

-against-

Daniel Gomez,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Lawrence H. Bernstein, J.), rendered on or about April 27, 2007, 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 29, 2010

CLERK

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

3150 The People of the State of New York, Respondent, Ind. 3959/01 5330/01

-against-

David Lance Paulin, Defendant-Appellant.

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

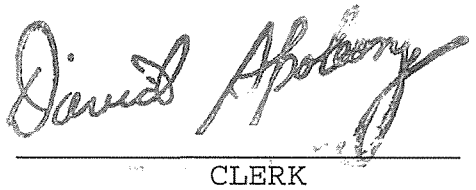
Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

Order, Supreme Court, Bronx County (John P. Collins, J.), entered November 12, 2009, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant is not eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), in that he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Pratts*, __AD3d__ [2010], Appeal No. 3014).

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

ENTERED: JUNE 29, 2010



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

3152 In re Prince A.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 23, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), and placed him on probation for a period of 18 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 court properly permitted the eight-year-old victim to give sworn testimony, since his voir dire responses established that he sufficiently understood the difference between truth and falsity, the nature of a promise to tell the truth, and the

wrongfulness and consequences of lying (*see People v Nisoff*, 36 NY2d 560, 565-566 [1975]; *People v Cordero*, 257 AD2d 372 [1999], lv denied 93 NY2d 968 [1999]). The record does not support appellant's assertion that the voir dire consisted primarily of leading questions.

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

ENTERED: JUNE 29, 2010

CLERK

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

3153 The People of the State of New York, Ind. 3757/05
Respondent,

-against-

Richard Hope,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Olivia Sohmer 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 (Bonnie Wittner, J.), rendered on or about September 22, 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 29, 2010

CLERK

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

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

3154-
3154A Parker & Waichman,
Plaintiff-Respondent,

Index 605388/01
591271/04

-against-

Paul J. Napoli, et al.,
Defendants-Appellants.

[And Another Action]

Godosky & Gentile, P.C., New York (Anthony P. Gentile of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 22, 2009, which, in an action for breach of contract and an accounting arising out of a dispute between law firms over referral fees, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 11, 2009, unanimously dismissed, without costs, as superceded by the appeal from the September 22, 2009 order.

The motion court properly found that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, warranting the denial of the motion regardless of the sufficiency of plaintiff's opposing papers (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Defendants submitted an attorney's affirmation stating that plaintiff failed to comply

with the mandates of the Rules of the Appellate Division, First Department (22 NYCRR) § 603.7(a) (requiring the timely filing of retainer statements with the Office of Court Administration) and DR 2-107 of the Code of Professional Responsibility (22 NYCRR 1200.12) (prohibiting fee-sharing among attorneys not associated in the same firm, unless the client consents to employment of the other lawyer after full disclosure), and thus, was not entitled to collect any referral fees from defendants. Defendants offered no evidence to support their claim of non-compliance.

Furthermore, defendants' claim that there were no timely filed retainer statements or communications with clients concerning the fee-splitting arrangement was refuted by plaintiff's submission of extensive documentation in opposition to defendants' motion. Whether the documentation produced satisfies Court Rules and the Code of Professional Responsibility raises issues of fact which, in any event, preclude the granting of summary judgment in favor of defendants (*see Fishkin v Taras*, 54 AD3d 260 [2008]).

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

ENTERED: JUNE 29, 2010

CLERK

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

3155 Andrew T., Index 310049/07
Plaintiff-Respondent,

-against-

Yana T.,
Defendant-Appellant.

The Barbara Law Firm, Garden City (Judith A. Ackerman of counsel), for appellant.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about December 24, 2009, which, to the extent appealed from, as limited by the brief, granted plaintiff former husband's motion to the extent of ordering genetic marker testing be performed on defendant and her child, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for further proceedings consistent herewith.

The parties were granted an uncontested divorce on the grounds of constructive abandonment, based on the plaintiff's sworn statement that defendant refused to have sexual relations with him for a period of one year prior to commencement of the divorce action. Just over a year after the divorce judgment was entered, plaintiff brought the instant application seeking to establish his paternity of defendant's child, alleging that

he was unaware that she was pregnant when he commenced the divorce proceeding and that she had given birth some time during their separation. Plaintiff claimed he did not know the child's date of birth and made no affirmative allegations contradicting the affidavit he submitted in support of the divorce petition. Defendant opposed what she characterized as plaintiff's effort to undermine the divorce judgment and establish paternity, stating that she has remarried and established a happy home for the child with her second husband.

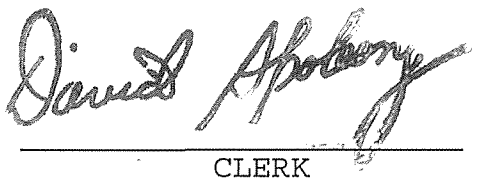
We conclude that the order was granted prematurely, based on an inadequate record and without representation of the child's interests.

In all cases involving the issue of paternity, the "paramount concern" is the child's best interests, and an order directing genetic testing therefore should not be entered prior to a hearing on the child's best interests (*see Matter of Lovely M. [Michael McL.Tracey M.]*, 70 AD3d 516, 516 [2010]), at which

the child should be represented by a legal guardian (*see Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2006]; *Michaella M.M.*, 98 AD2d at 466; *see also* FCA § 542[b]; § 418[a]).

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

ENTERED: JUNE 29, 2010



CLERK

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

3159 In re Carlos G.,

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

Bernadette M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioners-Respondents.

- - - - -

Episcopal Social Services,
Non-party Respondent.

_____

Stacy E. Charland, The Bronx Defenders, Bronx (Kara Finck of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for ACS, respondent.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for Episcopal Social Services, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John Newbery of counsel), Law Guardian.

_____

Appeal from decision of Family Court, Bronx County (Jennifer S. Burtt, Referee), dated November 9, 2009, which directed petitioner to determine whether the child's putative adoptive parents desired to maintain an open or a closed adoption, in order to assist the court in determining whether visitation with respondent mother was in the child's best interests, unanimously dismissed, without costs, as taken from a nonappealable paper.

A "decision" is not an appealable order under CPLR 5512(a) (*see Rodriguez v Chapman-Perry*, 63 AD3d 645 [2009]). Moreover, respondent is not an aggrieved party because no determination was

made concerning visitation, since the resolution of her motion on that point was contingent on future events.

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

ENTERED: JUNE 29, 2010

CLERK

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

3160 The People of the State of New York, Respondent,

-against-

Francis Harrison, Defendant-Appellant.

Ind. 597/72

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

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

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about February 20, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). Defendant's point score was well above the threshold for a level three offender, and the fact that he was 60 years old at the time of the adjudication did not warrant a downward departure, especially in light of his violent criminal behavior, his prior history of sexual

misconduct, his unsatisfactory record while incarcerated, and his recent parole violation.

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

ENTERED: JUNE 29, 2010

CLERK

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

3161 David Merin, et al., Index 117261/08
Plaintiffs-Appellants,

-against-

Precinct Developers LLC, et al.,
Defendants,

Bernd H. Allen, et al.,
Defendants-Respondents.

Danzig Fishman & Decea, White Plains (Thomas B. Decea of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered August 19, 2009, which, to the extent appealed from, granted the motion of defendant attorney Allen and his law firm to dismiss the complaint against them, unanimously affirmed, with costs.

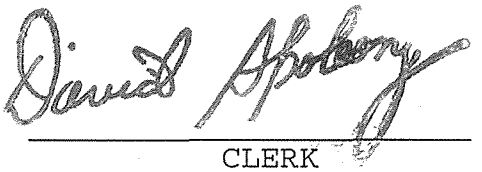
The cause of action for common law fraud alleges material omissions, disclosure of which is mandated by the Martin Act (General Business Law art 23-A), but for which there is no private right of action (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). Defective conditions that -- according to the complaint -- were not disclosed to plaintiffs prior to purchase were plainly required to be disclosed under the Attorney General's implementing regulations (*see* 13 NYCRR 20.7).

The cause of action for deceptive acts and practices (General Business Law § 349) was properly dismissed since it stemmed from a private contractual dispute between the parties without ramification for the public at large (*see Green Harbour Homeowners' Assn. v G.H. Dev. & Constr.*, 307 AD2d 465, 468-469 [2003], *lv dismissed* 100 NY2d 640 [2003]). To the extent the offering can be construed as directed at the public, the § 349 claim is preempted by the Martin Act (*see 511 W. 232nd St. Owners Corp. v Jennifer Realty Co.*, 285 AD2 244, 248 [2001]).

The cause of action for unjust enrichment is precluded by the existence of a valid agreement (*see Paragon Leasing, Inc. v Mezei*, 8 AD3d 54, 55 [2004]; *Jim Longo Inc. v Rutigliano*, 294 AD2d 541 [2002], *lv denied* 2 NY3d 701 [2004]).

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

ENTERED: JUNE 29, 2010



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

3162-
3163
M-2588 In re Marc Jaleel G.,

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

Marc E.G.,
Respondent-Appellant,

Catholic Guardian Society Center
and Home Bureau,
Petitioner-Respondent.

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

Magovern & Sclafani, New York, (Marion C. Perry of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about April 28, 2009, which concluded respondent's consent was not required for the adoption of his son, and committed custody and guardianship of the child to petitioner and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Because respondent did not maintain "substantial and continuous or repeated contact with the child" and failed to provide support for him while in foster care (Domestic Relations Law § 111[1][d]), his consent to placement for adoption was not required (*Matter of Aaron P.*, 61 AD3d 448 [2009]). His repeated

incarceration did not absolve him of responsibility for support and maintaining regular communication (*Matter of Sharissa G.*, 51 AD3d 1019, 1020 [2008]). Nor was he excused from paying financial support because the agency had not instructed him to do so. The unexcused failure to contribute such support for most of his son's life is fatal to respondent's claim that his consent to an adoption is required (*see Aaron P.*, 61 AD3d 448 [2009]).

Respondent spent about half of his son's first eight years in jail, and did not maintain regular contact with him for much of that period. Although contact increased substantially after his release from prison in August 2006, these intermittent periods of contact do not amount to the regular efforts at communication contemplated by § 111 (*see Aaron P.*, 61 AD3d at 448; *Matter of Jonathan Logan P.*, 309 AD2d 576 [2003]).

Respondent's contention that he was entitled to treatment as a "consent father" because the agency had directed him to engage in parenting skills classes and other services as a prerequisite to obtaining custody is unavailing, as the agency was not required to proceed under one theory as opposed to another. Even if the agency had petitioned to terminate parental rights on the ground of permanent neglect, it would not have been precluded from withdrawing that claim and proceeding on the alternative theory that respondent was a "notice father" (*Matter of Dominique P.*, 14 AD3d 319 [2005]). The agency in fact did proceed against

respondent on the theory he was a notice father. The court's best interests determination was supported by a preponderance of the evidence (*see Matter of Chandel B.*, 58 AD3d 547, 548 [2009]).

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

M-2588 - *In re Marc Jaleel G.*

Motion to strike brief and for other related relief denied.

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

ENTERED: JUNE 29, 2010

CLERK

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

3167N
M-2384 Jeffrey P. Horowitz, Index 350421/06
Plaintiff-Appellant,

-against-

Helen Speransky,
Defendant-Respondent.

Jeffrey Fleischmann, Brooklyn, for appellant.

Moses Preston & Ziegelman, LLP, New York (Robert M. Preston of counsel), for respondent.

Judgment, Supreme Court, New York County (Marilyn B. Dershowitz, Special Referee), entered June 15, 2009, to the extent appealed from as limited by the briefs, awarding counsel fees to defendant in the amount of $25,000, unanimously affirmed, without costs.

The limited fee award was a provident exercise of discretion, in that it was based on documentation, submitted to the court by defendant, of legal services rendered (*cf. Barson v Barson*, 32 AD3d 872 [2006]).

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

M-2384 *Horowitz v Speransky*

Motion to strike supplemental appendix granted.

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

ENTERED: JUNE 29, 2010

CLERK

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

3168 The People of the State of New York, Ind. 3442/06
Respondent,

-against-

Robert Smith,
Defendant-Appellant.

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

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

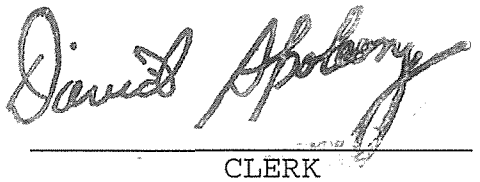
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 22, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

We do not find the police testimony to be implausible or materially inconsistent.

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

ENTERED: JUNE 29, 2010



CLERK

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

3169-
3169A Index 603635/07

Musical Electronics, Ltd.,
Plaintiff-Respondent,

-against-

US Electronics, Inc.,
Defendant-Appellant.

Michael C. Marcus, Long Beach, for appellant.

Bushell, Sovak, Ozer & Gulmi, LLP, New York (Christopher J. Sovak of counsel), for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 25, 2009, awarding plaintiff the aggregate amount of $773,695.97, unanimously affirmed, without costs. Appeal from order, same court and Judicial Hearing Officer, entered May 28, 2009, which, inter alia, granted plaintiff's motion for summary judgment on its claim for an account stated and dismissed defendant's counterclaim for breach of contract, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a Chinese manufacturer of portable consumer audio products, agreed to supply defendant, pursuant to an April 2004 purchase order, with 35,000 units of a "boom box" for sale in the United States by October 22, 2004. The motion court properly interpreted that agreement, together with a December 2004 addendum, as unambiguously modifying the original purchase order

by contemplating production of an upgraded model, with a new schedule for the delivery of the modified units, although leaving the date of delivery of the last 24,970 units to be decided at a later time (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

Plaintiff delivered the first 10,030 units on schedule and, from January 2005 through June 2006, repeatedly requested shipping instructions from defendant for the remaining 24,970 units. Plaintiff then e-mailed a debit note to defendant in December 2006, which stated an amount due to plaintiff totaling $628,879.44. Defendant did not respond to the debit note, nor did it respond to plaintiff's counsel's October 18, 2007 demand letter stating that the debit note was never objected to and constituted a valid and enforceable account stated. It was not until March 2008, in its answer and counterclaim in this action, that defendant denied the existence of an account stated and claimed that plaintiff had breached the original April 2004 purchase order by failing to deliver the units by October 22, 2004.

Plaintiff established that defendant had retained the debit note for over 15 months without comment or objection, which is sufficient to create an account stated (*see Rodkinson v Haecker*, 248 NY 480, 485 [1928]; *Risk Mgt. Planning Group, Inc. v Cabrini Med. Ctr.*, 63 AD3d 421 [2009]; *Morrison Cohen Singer & Weinstein,*

LLP v Waters, 13 AD3d 51 [2004]). The fact that defendant did not receive the final 24,970 units does not change this result, because this failure was due to defendant's own non-performance (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]).

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 29, 2010

CLERK

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

3182 Laura Matthews, Index 104690/07
Plaintiff-Appellant,

-against-

Vlad Restoration Ltd., et al.,
Defendants-Respondents.

Kurzman Karelsen & Frank, LLP, New York (Charles Palella of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 21, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, on her cell phone while hurrying across a scaffold to catch a bus, tripped on a lower horizontal brace and suffered injury. Defendants met their prima facie burden by showing the scaffold was open and obvious as a matter of law, and not inherently dangerous (*Burke v Canyon Rd. Rest.*, 60 AD3d 558 [2009]; *see also Connor v Taylor Rental Ctr.*, 278 AD2d 270 [2000]; *Plessias v Scalia Home for Funerals*, 271 AD2d 423 [2000]). Photographs taken by plaintiff after the accident depict two bright blue horizontal bars, clearly presenting a barrier to passersby. In opposition, plaintiff failed to raise an issue of fact. Her expert's affidavit failed to show inherent

danger; the unsubstantiated claim that the scaffold did not comply with industry custom and practice does not create an issue of fact (*see Jones v City of New York*, 32 AD3d 706 [2006]).

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

ENTERED: JUNE 29, 2010

CLERK

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

3184 Index 114674/08
M-2961 Andrew B. Ostroy, etc., et al., 591152/08
Plaintiffs,

-against-

Six Square LLC, et al.,
Defendants.

- - - - -

Bradford General Contractors Co., Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Diego Pillco,
Third-Party Defendant-Respondent.

White Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for appellants.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 16, 2009, which denied third-party plaintiffs' motion for a default judgment against third-party defendant, unanimously reversed, on the law, without costs, and the motion granted.

The motion court erroneously denied the motion for a default judgment on the grounds that service to the incarcerated third-party defendant was not proper. It is well established that where service is proper and a plaintiff makes out the facts of its entitlement to judgment, a plaintiff is entitled to a default judgment when defendant fails to appear (*see* CPLR 3215). The application for default must be supported by either an affidavit

of a person with knowledge, or a verified complaint (*see Wolf v 3540 Rochambeau Assoc.*, 234 AD2d 6 [1996]).

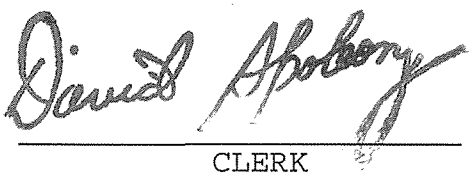
Here, the record shows that third-party defendant was personally served with a verified copy of the summons and complaint on June 19, 2009 at Elmira Correctional Facility and has failed to answer. Furthermore, contrary to the motion court's finding, the motion was not premature and plaintiffs in the main action will not be prejudiced by the default judgment.

M-2961 - Ostroy, etc. v Six Square LLC, et al.

Motion seeking leave to supplement the record and other related relief denied.

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

ENTERED: JUNE 29, 2010



CLERK

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

3185-
3185A Index 114856/06

DRK, LLC, et al.,
Plaintiffs-Respondents,

-against-

The Burlington Insurance Company,
Defendant-Appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Matthew C. Ferlazzo and James M. Adrian of counsel), for appellant.

Zisholtz & Zisholtz, LLP, Mineola (Robert Vadnais of counsel),for respondents.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered August 7, 2009, which, in a declaratory judgment action involving defendant insurer's obligation to defend and indemnify plaintiffs in an underlying action for personal injury, granted defendant's motion for summary judgment only with respect to the plaintiff that was the underlying plaintiff's employer and also the subtenant of the accident site, and, insofar as appealed from, denied defendant's motion with respect to the remaining plaintiffs, namely, the owner and main tenant of the accident site and the latter's managing member, and order, same court and Justice, entered December 22, 2009, which granted plaintiffs' motion for summary judgment in favor of the remaining plaintiffs, unanimously reversed, on the law, without costs, defendant's motion granted in full, plaintiffs' motion denied as academic, and it is declared that defendant has no obligation to defend or

indemnify any of the plaintiffs herein in the underlying action. The Clerk is directed to enter a judgment so declaring.

The "Exclusion-Cross Liability" endorsement states that the subject insurance does not apply to any actual or alleged bodily injury to an employee of "any insured." This Court has held that such language unambiguously excludes coverage even where the injured party was an employee of another insured under the policy (*see Tardy v Morgan Guar. Trust Co. of N.Y.*, 213 AD2d 296 [1995]; *Consolidated Edison Co. of N.Y. v United Coastal Ins. Co.*, 216 AD2d 137 [1995], *lv denied* 87 NY2d 808 [1996]). Neither the general "Separation of Insureds" provision contained in the policy, nor the separation of insureds doctrine (*see Greaves v Public Serv. Mut. Ins. Co.* 5 NY2d 120, 124-125 [1959], explaining *Morgan v Greater N.Y. Taxpayers Mut. Ins. Assn.*, 305 NY 243, 247-248 [1953]), renders this exclusion ambiguous. The Separation of Insureds provision primarily highlights the named insured's separate rights and duties, as well as makes clear that the limits of the policy are to be shared by all of the insureds, i.e, that they are not each able to exhaust the limits of coverage but must share that limit equally; it does not negate bargained-for exclusions, or otherwise expand, or limit, coverage (*see American Wrecking Corp. v Burlington Ins. Co.*, 400 NJ Super 276, 284, 946 A2d 1084, 1089 [NJ Super Ct, App Div 2008]).

In any event, the Cross Liability exclusion here clearly

states, in bold and capital letters: "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY,**" and therefore would modify the Separation of Insureds provision to the extent the two clauses were in conflict. Plaintiffs' reading of the Cross Liability exclusion, however, would impermissibly modify it to change "any insured" to "the insured" or to "the insured employer," or other such limiting language that simply is not in the policy (*see Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49 [1985], *affd* 66 NY2d 1020 [1985]; *RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 437 [2009]). Furthermore, the Separation of Insureds provision is a general provision, while the Cross Liability exclusion is specific, and therefore the latter would control to the extent there is a conflict (*see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46-47 [1956]; *see e.g. Greenwich Ins. Co. v Volunteers of Am.-Greater N.Y., Inc.*, 62 AD3d 557 [2009]).

We have examined plaintiffs' remaining arguments and find them to be unavailing.

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

ENTERED: JUNE 29, 2010

CLERK

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

3186-
3187 In re Thomas S.,
Petitioner-Respondent,

-against-

Letisha S.,
Respondent-Appellant.

Robert A. Laureano, Bronx, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Heather L. Kalachman of counsel), Law Guardian for Monae S.

Jay A. Maller, New York, Law Guardian for Re'Shaun S. and Shayvon S.

Order, Family Court, Bronx County (Marilyn L. Zarrello, Referee), entered on or about October 18, 2007, which, after a hearing, granted a final order of custody to petitioner father, with visitation to respondent mother, unanimously affirmed, without costs.

There is no basis for disturbing the court's finding that while both parties were fit to act as custodial parents on most counts, the children would benefit from returning to petitioner, who had provided them a loving, stable and nurturing environment (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). The record supports the findings that he demonstrated an ability to recognize the children's needs, while respondent failed to consider the impact of refusing to return the children to their father in 2005, lacked an adequate parenting plan, and had an

inconsistent work schedule that exacerbated the children's emotional and academic problems. The court properly considered the benefits of keeping the siblings united and the lack of any stated preferences of the children at the time of the order.

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

ENTERED: JUNE 29, 2010

CLERK

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

3191-
3192 Index 102795/06

Tammy Lawlor, Esq., et al.,
Plaintiffs-Appellants,

-against-

Lenox Hill Hospital,
Defendant-Respondent.

Howard M. File, P.C., Staten Island (Martin Rubenstein of counsel), for appellants.

McAloon & Friedman, P.C., New York (Laura R. Shapiro of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered May 14, 2009, in favor of defendant dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 20, 2009, which granted defendant's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Kevin Herlihy received treatment from defendant Lenox Hill Hospital on three occasions for alcohol-related injuries and conditions. A month after his last hospitalization at Lenox Hill, Herlihy had an alcohol-related seizure which caused him to fall and sustain permanent brain damage. In this medical malpractice action, plaintiffs allege that defendant departed from good and accepted medical practice by failing to, among

other things, psychiatrically evaluate Herlihy during his three hospitalizations and by failing to involuntarily commit him for further treatment. Defendant moved for summary judgment and the IAS court granted the motion. We affirm.

Plaintiffs never argued below that the affirmations of defendant's experts failed to establish prima facie entitlement to summary judgment and we decline to consider the issue (*see Vasquez v Reluzco*, 28 AD3d 365, 366 [2006]). Were we to consider it, we would find that defendant met its burden of establishing that there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326 [1986]).

The IAS court properly determined that plaintiffs' expert failed to raise an issue of fact. First, alcoholism is not considered a mental illness under the Mental Hygiene Law and a person cannot be involuntarily confined under that statute solely for treatment of alcoholism (*see* Mental Hygiene Law §§ 9.27, 9.39; *see also Matter of Michael S.*, 166 Misc 2d 875 [Sup Ct, Westchester County 1995]). In addition, even if Lenox Hill failed to properly examine or treat Herlihy on each occasion he was in the hospital, it is speculative to conclude that these alleged departures proximately caused Herlihy's fall and

resulting brain damage in June 2004 (*see generally Nieves v City of New York*, 91 AD2d 938 [1983]).

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

ENTERED: JUNE 29, 2010

CLERK

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

3195N Invesco Institutional (N.A.), Inc., Index 650154/07
Plaintiff-Respondent,

-against-

Deutsche Investment Management Americas, Inc.,
Defendant-Appellant,

Randy G. Paas, et al.,
Defendants.

Baker & Hostetler LLP, New York (John Siegal of counsel), for appellant.

Alston & Bird LLP, New York (John F. Cambria of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 2, 2009, which, after a hearing, granted plaintiff's motion for a preliminary injunction as to that portion of the action asserting a claim for misappropriation of trade secrets in connection with certain software tools, unanimously affirmed, with costs.

Plaintiff met its burden for the grant of a preliminary injunction by demonstrating (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities in its favor (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Based upon the submissions and hearing testimony, particularly from plaintiff's expert witnesses, the court properly found that plaintiff had a protectable trade secret in the proprietary

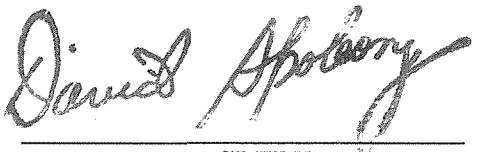
nature of its Q-Tech, Alpha Sources and PIT software and database structure (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]).

Although irreparable injury cannot be presumed (*see Faiveley Transport Malmo AB v Wabtec Corp.*, 559 F3d 110, 118 [2d Cir 2009]), it may be established "where there is a danger that, unless enjoined, a misappropriator of trade secrets will disseminate those secrets to a wider audience or otherwise irreparably impair the value of those secrets" (*id.*). Here, the court properly determined that plaintiff demonstrated that, without a preliminary injunction barring appellant from the continued use of its trade secrets, plaintiff "would likely sustain a loss of business impossible, or very difficult, to quantify" (*Willis of N. Y. v DeFelice*, 299 AD2d 240, 242 [2002]).

We have considered appellant's remaining arguments, including that the balance of the equities tipped in its favor, and find them unavailing.

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

ENTERED: JUNE 29, 2010



CLERK

CORRECTED ORDER - AUGUST 3, 2010

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1220 Yenem Corp., Index 116156/07
Plaintiff-Appellant, 590343/08
590743/08

-against-

281 Broadway Holdings, et al.,
Defendants-Respondents.

[And Other Actions]
- - - - - -

1221 Randall Co., LLC, Index 100928/08
Plaintiff-Respondent, 590928/08

-against-

281 Broadway Holdings LLC, et al.,
Defendants-Appellants,

John Doe, et al.,
Defendants.
- - - - - -

281 Broadway Holdings LLC, et al.,
Third-party Plaintiffs-Appellants,

-against-

Hunter Atlantic, Inc.,
Third-party Defendant-Respondent,

Geotechnical Services Corp., et al.,
Third-party Defendants.

_____

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

Shafer Glazer, LLP, New York (David A. Glazer of counsel), for 281 Broadway Holdings LLC and The John Buck Company, respondents/appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Hunter Atlantic, Inc., respondent.

Weg & Myers, P.C., New York (Dennis T. D'Antonio of counsel), for Randall Co., LLC, respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 18, 2008, affirmed, without costs. Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 29, 2009, reversed, on the law, without costs, to deny plaintiff's motion and grant defendants leave to amend their answer to assert counterclaims against plaintiff.

Opinion by Tom, J.P. All concur except Catterson and Freedman, JJ. who dissent in an Opinion by Catterson, J.

Order filed.

CORRECTED OPINION - AUGUST 3, 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom,, J.P.
John T. Buckley
James M. Catterson
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

1220-1221
Index 116156/07 - 590343/08
100982/08 - 590928/08

_____x

Yenem Corp.,
Plaintiff-Appellant,

-against-

281 Broadway Holdings, et al.,
Defendants-Respondents.

[And Other Actions]
- - - - - -

Randall Co., LLC,
Plaintiff-Respondent,

-against-

281 Broadway Holdings, et al.,
Defendants-Appellants,

John Doe, et al.,
Defendants.
- - - - - -

281 Broadway Holdings LLC, et al.,
Third-party Plaintiffs-Appellants,

-against-

Hunter Atlantic, Inc.,
Third-party Defendant-Respondent,

Geotechnical Services Corp., et al.,
Third-party Defendants.
_____x

Plaintiff Yenem Corp. appeals from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 18, 2008, which, to the extent appealed from, denied its motion for summary judgment on the issue of liability. Defendants/third-party plaintiffs 281 Broadway Holdings LLC and The John Buck Co. appeal from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 29, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff Randall Co. LLC's motion for summary judgment on the issue of liability and denied their cross motion for, inter alia, leave to amend their answer.

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

Shafer Glazer, LLP, New York (David A. Glazer and Mika M. Mooney of counsel), for 281 Broadway Holdings LLC and The John Buck Company, respondents/appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn and Alice Spitz of counsel), for Hunter Atlantic, Inc., respondent.

Weg & Myers, P.C., New York (Dennis T. D'Antonio and Joshua L. Mallin of counsel), for Randall Co., LLC, respondent.

TOM, J.P.

This appeal presents the narrow issue of whether a municipal ordinance imposes absolute liability for its violation so as to warrant summary judgment in favor of plaintiffs, the owner and tenant of the subject premises, for damage resulting from defendants' excavation on the adjacent property. The controversy is governed by this Court's decision in *Coronet Props. Co. v L/M Second Ave.* (166 AD2d 242 [1990]), which is wholly dispositive. There is evidence, in the form of engineers' affidavits and reports, that the subject building was in poor structural condition prior to the commencement of the excavation work (including a south wall out of plumb by four inches and large cracks in the south and west walls), that defendants took necessary measures to protect the foundation and that the building had been shored and temporarily braced. The record thus presents issues of fact concerning whether defendants' activities were the cause of the damages alleged and whether defendants exercised the requisite degree of care in performing the work.

Defendants undertook excavation on property adjoining a 136-year-old building located at 287 Broadway. Plaintiff Randall Co. LLC is the owner of the building, and plaintiff Yenem Corp. operated a pizzeria on the premises. Plaintiffs assert that defendants' excavation work undermined the foundation, causing

the building to lean by approximately nine inches. As a consequence, the Department of Buildings issued a vacate order that remains in effect. Yenem commenced an action for economic loss against defendant 281 Broadway Holdings LLC, the owner and developer of the adjacent property, its parent, defendant John Buck Company, and Hunter-Atlantic, Inc., the excavator for the project. Shortly thereafter, Randall commenced its own action against 281 Broadway and John Buck for damages allegedly caused by the excavation.

It is undisputed that the work was at all times subject to the requirements of Administrative Code of the City of New York § 27-1031(b)(1) (now Administrative Code § 28-3309.4), which imposes liability on an owner and contractor for damage to adjacent structures caused by major excavation. The municipal ordinance provides:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property."

In their respective motions for summary judgment, plaintiffs

sought to obviate the need to determine any factual issues concerning the cause of the damage to the building and the adequacy of precautions taken by defendants to protect the structure. Plaintiffs invoked case law holding that the Administrative Code "imposes absolute liability upon any one who causes an excavation to be made more than 10 feet below the curb level without taking adequate preliminary precautions to protect 'adjoining' structures" (*Victor A. Harder Realty & Constr. Co. v City of New York*, 64 NYS2d 310, 318 [1946] [imposing liability after trial]). In the *Yenem* action, Supreme Court (Carol Edmead, J.), in a decision issued from the bench, denied Yenem's motion for partial summary judgment on the issue of liability, noting that a violation of "[A]dministrative [C]ode Section 27-1031, and other sections like that in the [A]dministrative [C]ode, constitute some evidence of negligence only . . . it doesn't result in a finding of liability and a resulting summary judgment, it just doesn't go that far."

In support of its motion for partial summary judgment on the issue of liability, Randall submitted an engineer's affidavit attesting that the building was stable prior to the commencement of excavation and that after the work began the structure tilted dangerously to the south despite internal and external bracing installed by defendants. Defendants opposed the motion and,

inter alia, sought leave to amend their answer to add counterclaims against Randall. As pertinent to this appeal, Supreme Court (Charles E. Ramos, J.) reached the opposite conclusion with respect to absolute liability under Administrative Code Section 27-1031(b)(1), summarily awarding judgment as to liability to Randall and denying defendants leave to amend the answer.

Plaintiffs take the position that because the governing Administrative Code provision was originally enacted as an 1855 state law imposing absolute liability (*see Dorrity v Rapp*, 72 NY 307, 310-311 [1878]), it should continue to be construed as imposing a duty and liability that are absolute, despite being relegated to a municipal ordinance since 1899, when the state statute was repealed and its terms incorporated into the Administrative Code. Plaintiffs' view is inconsistent with appellate authority governing both the power of a municipality to impose tort liability and the nature of the liability imposed by Administrative Code section 27-1031(b)(1).

The general principle is stated in *Elliott v City of New York* (95 NY2d 730, 734 [2001] [internal citations omitted]): "As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance

constitutes only evidence of negligence." In *Elliott*, the plaintiff argued that because the Administrative Code had been recodified by the New York State Legislature, the controlling provision should be regarded as a state statute and its violation as negligence per se. However, the Court of Appeals stated that in deciding whether such treatment is appropriate, the origin of the provision should be considered (*id.* at 733). It concluded that recodification by the Legislature did not provide Administrative Code provisions with the force of state law (*id.* at 735), stating that, "for tort purposes, even a specific duty provision in the Administrative Code must be treated as any other local enactment if its status is that of a local law" (*id.* at 736). The Court then proceeded, in dictum, to "acknowledge that certain sections of the Administrative Code have their origin in State law and, as such, they *might* be entitled to statutory treatment in tort cases" (citing *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 n 3 [1987] [emphasis added]).

It should be noted that *Elliott* dealt with the obverse proposition to the one advanced by plaintiffs on this appeal. *Elliott* holds only that a municipal ordinance does not gain the force of state law merely because it is included in a municipal code enacted by the Legislature. So much is clear from the expressed concern that "characterizing the vast multitude of

ordinances that have been adopted by New York City as State statutes would result in considerable fragmentation and uncertainty in the application of the common law of our State" (*id* at 736).

The matter at bar presents the question of whether a provision originally enacted as a state statute retains its status as such even though the Legislature has repealed the statute and simultaneously incorporated the provision into a municipal code. The *Elliott* Court emphasized that the critical distinction between state and local law is that a state statute can only be changed by the Legislature, whereas a state administrative code or local ordinance can be modified by a state commissioner or a local government (*id.* at 734; *see e.g. Major v Waverly & Ogden*, 7 NY2d 332, 336 [1960] [state building code]). The *Elliott* Court regarded violation of the Administrative Code provision before it as only evidence of negligence, not negligence per se, reasoning that "since the City retains the authority to amend or repeal its Administrative Code provisions . . . without the need of State legislative action, we decline to transform the status of this provision from that of a local enactment to a State statute" (*Elliott* at 736).

To recapitulate, while the *Elliott* Court acknowledged the potential for statutory treatment of those Administrative Code

provisions having their origin in state law, the Court expressly declined to accord such status to the provision before it. One salient feature of a state law, said the Court, is that once it is enacted by the Legislature, it "cannot be changed or varied according to the whim or caprice of any officer, board or individual" (*id.* at 734 [internal quotation marks omitted]). Because the City can — and has — amended the Administrative Code provision governing excavation work, it is an equally unsuitable candidate for elevation to the status of a state statute imposing per se negligence or absolute liability.

The example of a local ordinance that was accorded treatment similar to a state statute cited by the *Elliott* Court was *Guzman* (69 NY2d at 565 n 3). There, the Court of Appeals applied case law developed under state law (Multiple Dwelling Law § 78) to the duty imposed on a landowner under the Administrative Code to safely maintain a building and its facilities (*id.* at 565-566). *Guzman* holds that, having reserved a right to reenter the premises to make inspection and repairs, an out-of-possession owner is liable for injuries resulting from a breach of general and specific safety provisions of the Administrative Code under the authority of *Tkach v Montefiore Hosp. for Chronic Diseases* (289 NY 387 [1943]), and *Worth Distribs. v Latham* (59 NY2d 231 [1983]), both of which construe the state Multiple Dwelling Law

§ 78. Significantly, *Guzman* is not a case that purports to subject an owner to absolute liability; rather, it adheres to general tort principles, finding constructive notice as a result of the reserved right of reentry and predicating liability on breach of the duty to maintain the premises in safe condition (*id.* at 566-567). Moreover, since the duty of an owner to safely maintain premises is imposed in the City of New York by both a state statute (*see e.g. Pekelnaya v Allyn*, 25 AD3d 111, 117 [2005]) and a municipal ordinance (*see e.g. Wolf v 2539 Realty Assoc.*, 161 AD2d 11, 14 [1990]), it was altogether logical to extend precedent developed under the state law to a violation involving a parallel provision contained in the Administrative Code.

As the preceding discussion illustrates, plaintiffs have cited no authority binding on this Court holding that Administrative Code section 27-1031(b)(1) or its successor (Administrative Code § 28-3309.4) imposes per se negligence or absolute liability on a party that undertakes excavation work covered by the ordinance. Shortly after the Court of Appeals issued its ruling in *Elliott*, this Court concluded that a violation of the Administrative Code is simply evidence of negligence, "with the exception of those Code provisions the content of which was approved or adopted by the Legislature"

(*Huerta v New York City Tr. Auth.*, 290 AD2d 33, 41 [2001], *appeal dismissed* 98 NY2d 643 [2002]). As we noted in *Huerta,* the Court of Appeals' decision in *Elliott* does not identify what Administrative Code provisions meet this criterion (*id.* n 5), and the only Court of Appeals case cited by plaintiffs that accords statutory treatment to an ordinance is *Guzman*, and then only for the limited purpose of applying precedent established under state law to the equivalent provision in the Administrative Code.

The controlling precedent in this Department is *Coronet Props. Co. v L/M Second Ave.* (166 AD2d 242 [1990], *supra*). While acknowledging several cases purporting to impose absolute liability under Administrative Code § 27-1031(b)(1) upon both the property owner and the contractor (citing *Harder*, 64 NYS2d at 318; *Levine v City of New York*, 249 App Div 625 [1936] [lateral support, deprivation of which results in absolute liability, not governed by City Charter]; *Palermo v Bridge Duffield Corp.*, 154 NYS2d 288 [1956], *affd* 3 AD2d 863 [1957] [motion to set aside jury verdict denied]), we noted that "in these and other cases relied upon by plaintiffs, liability was determined after trial upon findings that defendants had failed to take adequate precautions to protect adjoining structures and that defendants' activities were the proximate cause of the damage" (*id.* at 243). We then denied the plaintiffs' motion for partial summary

judgment on the issue of liability, holding that "[t]hese factual issues, together with evidence of the poor condition of the allegedly damaged buildings and of other possible causes of the damage, preclude summary disposition of this matter" (*id.*).

In the matter before us, neither Randall nor Yenem established that defendants violated Administrative Code § 27-1031(b)(1), that defendants' actions were the proximate cause of the damage to the building or that the precautions taken by defendants in connection with the excavation were inadequate. The affidavits of defendants' expert structural engineer, Brad Keiffer, and the report of the GACE engineering firm not only detailed numerous steps taken to ensure adequate protection of the building foundation during excavation, but also enumerated possible defects in the building that might have caused or contributed to its becoming unsound. Among other things, the engineers opined that the building was in poor condition prior to commencement of the excavation work and that various factors could have contributed to the damages, including, the structure was already out of plumb approximately four inches to the south, there were preexisting cracks in the south and west walls, parapets were out of plumb with cracks and open mortar joints, the building lacked a lateral support system, soil stresses were higher than typically allowable as a result of a back-filled

sub-cellar, and the original foundations required remediation.

In sum, this Court perceives no reason to depart from the precedent established by *Coronet Props. Co.*, which is indistinguishable from the matter at bar. Plaintiffs have not demonstrated the existence of compelling circumstances so as to warrant departure from the doctrine of stare decisis (see *Eastern Consol. Props. v Adelaide Realty Corp.*, 95 NY2d 785 [2000]; *see also Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]; *Cenven, Inc. v Bethlehem Steel Corp.*, 41 NY2d 842, 843 [1977]). In *Coronet*, as here, the damaged building was in poor condition prior to excavation, and factual questions were raised concerning whether the defendants' activities were the proximate cause of the plaintiffs' loss and whether the defendants breached their statutory duty to take adequate precautions to protect adjoining structures (*see* 166 AD2d at 243). The imposition of absolute liability and summary disposition are precluded where a trier of fact might find that defendants undertook all necessary precautions to shore and brace the adjoining building, the excavation work was performed without negligence and damages were solely attributable to the building's dilapidated condition and the excessive forces exerted upon its foundation due to earlier backfilling.

Defendants' proposed amended answer asserting affirmative

defenses and counterclaims against Randall is apparently meritorious and will neither prejudice nor surprise that plaintiff (*see Lettieri v Allen*, 59 AD3d 202 [2009]).

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 18, 2008, which, to the extent appealed from, denied plaintiff Yenem Corporation's motion for summary judgment on the issue of liability, should be affirmed, without costs. The order of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 29, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff Randall Co. LLC's motion for summary judgment on the issue of liability and denied the cross motion of defendants 281 Broadway Holdings and The John Buck Co. for, inter alia, leave to amend their answer, should be reversed, on the law, without costs, to deny plaintiff's motion and grant defendants leave to amend their answer to assert counterclaims against plaintiff.

All concur except Catterson and Freedman, JJ.
who dissent in an Opinion by Catterson, J.:

CATTERSON, J. (dissenting)

I must respectfully dissent because the provision at issue, though now part of the Administrative Code, had its origin in State law, therefore absolute liability may be imposed if a plaintiff can prove that violation of the provision was the proximate cause of injuries. Moreover, in this case, affidavits submitted by the defendants constitute written admissions that they violated the provision by failing to protect the adjoining structure during excavation operations. This failure proximately caused the structure to list more than three inches resulting in a New York City Department of Buildings' (hereinafter referred to as "DOB") order to vacate. Therefore, summary judgment on liability should be granted to plaintiff Yenem, and should be affirmed as to plaintiff Randall LLC.

287 Broadway (hereinafter referred to as "the building") is a 136-year old landmark cast-iron and masonry building located on the southwest corner of the intersection of Reade Street and Broadway. The building is owned by plaintiff, Randall Company LLC. Until the DOB ordered the building to be vacated in November 2007, it contained four residential and three commercial units. One of the commercial units was a pizza parlor owned by plaintiff, Yenem Corp.

In 2006, defendant The John Buck Company (hereinafter

referred to as "John Buck"), through its subsidiary, 281 Broadway Holdings LLC, purchased and began developing an L-shaped 20-story commercial and residential complex connecting the now-vacant properties adjacent to the south and west sides of Randall's building. The excavator on the project was Hunter-Atlantic, Inc. (hereinafter referred to as "Hunter").

While excavating the property next to the building, at a depth of more than 10 feet, movement and undermining of the building occurred when Hunter began underpinning the south west corner. The movement was allegedly caused by the undermining of the existing footing and a loss of soil under the footing of the building. As a result of the movement and undermining, the DOB issued a vacate order on November 29, 2007. The reason given was that the building was leaning approximately nine inches out of plumb with structural cracks and was deemed too dangerous to occupy. The DOB ordered temporary shoring installed to prevent the total collapse of the building or any further listing.

Yenem's pizza business was established at the site at a cost of approximately $700,000 and opened prior to the vacate order. Yenem installed new kitchen equipment and heating and air conditioning. Yenem had a favorable lease, and commenced its action against 281 Broadway, John Buck and Hunter for economic losses, alleging negligence and absolute liability for the

structural damage resulting in the destruction of Yenem's business. Yenem states that the vacate order remains in effect to this day.

Yenem moved for summary judgment as to liability, asserting that the defendants were strictly liable under Administrative Code of the City of New York § 27-1031(b)(1) when the performance of excavation of more than 10 feet below curb level affects the adjacent building. Yenem further argued that there was no defense to the undermining of the building, and that the only issue was the amount of damages and the percentage of liability to be determined among defendants and third-party defendants which "will involve extensive litigation at to indemnification and subrogation," and that Yenem is entitled to its damages without delay.

281 Broadway and John Buck opposed, arguing that Yenem did not meet its burden in demonstrating liability as material issues of fact existed regarding the adequacy of the excavation precautions, that the building was in poor condition prior to excavation, and that discovery had not been completed. In addition, they cross-moved for leave to amend their answer to assert additional affirmative defenses and cross claims against Hunter and for summary judgment on their claims against Hunter.

By order entered September 18, 2008, in accordance with the

oral argument transcript, the court (Edmead, J.) denied the motion and cross motion for summary judgment, and granted the cross motion for leave to assert additional affirmative defenses and cross claims against Hunter. Although Justice Edmead recognized that the excavation activities caused the damage to the building and that Yenem was faultless, the court denied Yenem's summary judgment motion, holding that a violation of Administrative Code § 27-1031(b) does not result in absolute liability but is "some evidence of negligence." Furthermore, the court held that a jury must determine the proximate cause of the damages.

In the meantime, Randall commenced its own action against 281 Broadway and John Buck, alleging that the excavation by defendants of the adjacent property, "which had provided lateral support to [the building's] foundation, undermined that foundation causing the building to tilt dangerously to the south." Randall set forth two causes of action, first for absolute liability under Administrative Code § 27-1031(b)(1) and a second alleging general negligence. Randall moved for partial summary judgment on the basis of absolute liability. In support, Randall submitted an engineer's affidavit stating that the building was stable before the excavation, that the damage causing the DOB vacate order was caused by the excavation, and

that the building was still moving despite the installation by defendants of internal and external shoring and bracing.

The defendants opposed and cross-moved for both summary judgment in their third-party action against Hunter as the excavator, and for leave to amend their answer to assert affirmative defenses and counterclaims against Randall, and cross claims against Hunter. In their opposition, the defendants argued that there existed issues of fact as to liability, prematurity and proximate cause. In particular, the defendants denied any failure to preserve and protect the building, contending that it was in disrepair prior to construction, and that there were various factors which may have caused the building to become unsound, including, inter alia, its poor condition, cracks in the south and west walls, parapets out of plumb, and a lack of a lateral support system required by the current Building Code.

The defendants also raised the issue of the Zoning Lot Development and Easement Agreement (hereinafter referred to as "ZLDA"), a contract between Randall and defendants, which contained covenants allegedly at issue here which defendants claim Randall breached.

By order entered January 29, 2009, the court (Ramos, J.) granted Randall's motion for partial summary judgment on

liability, denied defendants' cross motion for summary judgment with leave to renew and denied defendants' cross motion in all other respects. The court held that Administrative Code § 27-1031(b) imposed absolute liability upon defendants in the matter and that the ZLDA was inapplicable. This Court stayed the damages trial and related discovery.

On its appeal, Yenem argues that Justice Edmead erred in denying its motion for summary judgment on the issues of defendants' absolute liability under the Administrative Code; that defendants are liable under common-law negligence; and that any unresolved question of percentage of negligence as between the various defendants and third-party defendants does not defeat Yenem's right to summary judgment as to liability.

On their appeal, the defendants 281 Broadway and John Buck argue that Justice Ramos erred in imposing absolute liability on them under Administrative Code § 27-1031 since absolute liability cannot be imposed under an administrative code; that the former statute upon which section 27-1031 was based does not fall into the category of statutes imposing absolute liability; that Randall failed to establish a violation of section 27-1031; that such liability is only imposed after a determination of proximate cause and after trial; that the cross motion to amend the answer should have been granted; that should this Court determine that

liability was appropriate, Randall's request for $250,000 representing lost rents should not be awarded as it was unsubstantiated; and that the court incorrectly determined that the ZELDA agreement was inapplicable.

For the reasons set forth below, I believe that plaintiff Yenem should have been granted summary judgment on liability. For the same reasons, I disagree with the defendants and would affirm Justice Ramos's order in Randall v. 281 Broadway.

The provision at issue is Administrative Code § 27-1031(b)(1), which, in pertinent part, states:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level..."[1]

At the outset, I reject the defendants' argument that absolute liability cannot be applied to a provision of the

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[1]Administrative Code § 27-1031 was amended effective July 1, 2008. The new equivalent provision, found in the New York City Construction Code, Title 28, ch. 33, § 3309.4 ("Excavation or filling operations affecting adjoining property"), contains equivalent language except that the 10 foot depth requirement of the former provision has been removed. The new code also requires that no excavation work to a depth of 5 to 10 feet within 10 feet of an adjacent building or excavation over 10 feet anywhere on the site shall commence until the excavator documents the existing condition of all adjacent buildings in a pre-construction survey.

Administrative Code. The defendants contend that the Court of Appeals has held that a violation of an administrative code or any local ordinance cannot result in a finding of absolute liability but is rather only "some evidence of negligence." For this proposition the defendants rely on Elliot v. City of New York (95 N.Y.2d 730, 724 N.Y.S.2d 397, 747 N.E.2d 760 (2001)) in which the Court held that "[as a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence." 95 N.Y.2d at 734, 724 N.Y.S.2d at 399, (internal citations omitted). They further point to the Court's reiteration that the "elevation of a violation of an ordinance or administrative rule or regulation to a negligence per se standard would 'substantially recast' the common law of the State." 95 N.Y.2d at 734, 724 N.Y.S.2d at 399, quoting Major v. Waverly & Ogden, 7 N.Y.2d 332, 335, 197 N.Y.S.2d 165, 168, 165 N.E.2d 181, 183 (1960).

Im my opinion, the defendants have misread Elliott (see Huerta v. New York City Tr. Auth., 290 A.D.2d 33, 735 N.Y.S.2d 5 (1st Dept. 2001), appeal dismissed, 98 N.Y.2d 643, 744 N.Y.S.2d 758, 771 N.E.2d 831 (2002); see also Smulczeski v. City Ctr. of Music & Drama, 3 N.Y.2d 498, 169 N.Y.S.2d 1, 146 N.E.2d 769

(1957)) which, in any event, deals with non-excavation Building Code violations. The Elliott Court clearly acknowledged that there are some violations of the Administrative Code that may constitute negligence per se and even impose absolute liability. Indeed, the Elliott Court provided a guideline as to how to identify such violations. The Court clearly stated that "[i]n analyzing whether a violation of [an] Administrative Code section should be viewed as negligence per se or some evidence of negligence, *we consider the origin of [the] provision*." 95 N.Y.2d at 733, 724 N.Y.S.2d at 398 (emphasis added).

In further clarification, the Court held that "certain sections of the Administrative Code have their origin in State Law and, as such they might be entitled to statutory treatment in tort cases." 95 N.Y.2d at 736, 724 N.Y.S.2d at 400-401 (internal citations omitted). In other words, the Court acknowledged that absolute liability could be imposed upon the violation of an Administrative Code provision that had started life as a statute enacted by the Legislature. This fits the provision at issue to the proverbial tee.

In 1855, the Legislature enacted section 1 of chapter 6 of the Laws of the State of New York and changed the common law regulating adjoining lands and excavation to protect adjoining structures as well as the land in New York County and Brooklyn.

Chapter 6 was subsequently re-enacted pursuant to the Consolidation Act, chapter 410, section 474 of the Laws of 1882 but the wording of the statute remained essentially the same. In pertinent part, it stated:

> "Whenever excavations hereafter commenced for building or other purposes on any lot or piece of land in the city and county of New York and the city of Brooklyn, shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made [...] shall at all times from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced."

The Court of Appeals interpreted the statute as imposing absolute liability. In 1878, the Court held as follows: "[t]he primary object of the statute [is] to cast upon the party ... the risk of injury resulting therefrom to the wall of an adjoining owner and the burden of protecting it. The liability imposed *is not made to depend upon the degree of care*... [*T*]*he duty and liability which the statute imposes is absolute and unqualified.*" Dared v. Rapp, 72 N.Y. 307, 311 (1878) (emphasis added).

The statute remained in effect until the enactment of the Building Code of New York City in 1899 whereupon section 22 of the New York City Building Code replaced section 474 to govern the area of law regarding excavations and adjoining properties.

Subsequently, the Building Code was incorporated into the New York City Administrative Code and the provision at issue became section C26-385.0. It stated as follows:

> "Whenever an excavation is carried to a depth more than ten feet below the curb, *the person who causes such excavation to be made shall, if afforded the license necessary to enter the adjoining premises, at all times and at his own expense, preserve and protect from injury any structure*, the safety of which may be affected by such part of the excavation as extends more than ten feet below the curb, and such person shall support the adjoining structure by proper foundations . . ."

Finally, the provision became section 27-1031(b)(1) of the Administrative Code, and stated (common phrases to both the foregoing and following provisions are italicized):

> "When an excavation is carried to a depth more than ten feet below the legally established curb level *the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures*, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level *provided such person is afforded a license to enter and inspect the adjoining buildings and property*. Administrative Code § 27-1031(b)(1).

It is evident, therefore, that neither the wording nor the import of the statute was materially or substantively altered as the provision became incorporated into first, the Building Code, and subsequently the Administrative Code of New York City.

Indeed, nothing could be clearer upon a comparison of the text of each subsequent enactment than that the current Code provision originated as a statute enacted by the Legislature.

Moreover, for almost 150 years the imposition of absolute liability has remained constant whether the provision was in the form of a statute, or as a section of the Building Code or the Administrative Code. For example, in 1909, the Second Department held that the "[Building] Code has the same force and effect as a statute" and found that plaintiff had established a case "within the provisions of a statute which imposed duties and liabilities absolute and unqualified and in no manner dependent upon the degree of care exercised by the defendant in the conduct of his building operations." Post v. Kerwin, 133 App. Div. 405-406, 117 N.Y.S. 761, 762-763 (2d Dept. 1909). The Court held "statutory liability cannot be avoided by showing that in the work the defendant exercised due care and was free from negligence." 133 App. Div. at 406, 117 N.Y.S. at 763.

In 1911, the court in Bloomingdale v. Duffy (71 Misc. 136, 127 N.Y.S. 1080 (1911)), interpreted section 22 of the Building Code as providing for absolute and unqualified liability regardless of the degree of care used. In that case, the Appellate Term, First Department, looking at the intent of the Legislature observed that, "this section of the [Building [C]ode

has the effect of a statute and is based upon section 474 of the Consolidation Act of 1882." 71 Misc. at 138, 127 N.Y.S. at 1082.

In Victor A. Harder Realty & Constr. Co. v. City of New York (64 N.Y.S.2d 310 (1946)), the court found that section C26-385.0 of the Administrative Code was a derivation of the statute and imposed absolute liability. In that case, the court, while deeming the work and excavation operations to conform to the "highest engineering standards" and "despite the absence of negligence" found the defendants strictly liable under the Administrative Code for failing to support plaintiff's adjoining structures. Id., at 316, 320.

In Coronet Props. Co. v. L/M Second Ave. (166 A.D.2d 242, 243, 560 N.Y.S.2d 444, 445 (1st Dept. 1990)), this Court, while largely misinterpreting precedent as detailed below, nevertheless correctly relied on Harder to recognize that section 27-1031(b)(1) imposes absolute liability upon both the property owner and contractor performing excavation of more than 10 feet which causes damage to the adjacent property.

Given the foregoing, I would reject the defendants' attempts to turn the simple phrase "origin in State Law" on its head. In a tortuous – and, indeed, tortured – analysis of Elliott and Guzman v. Haven Plaza Hous. Dev. Fund Co. (69 N.Y.2d 559, 516 N.Y.S.2d 451, 509 N.E.2d 51 (1987)), an earlier decision cited in

Elliott, the defendants argue that "origin in State law" means that there must be a concurrent version of the code provision in State law. This is an erroneous conclusion.

The Elliott Court relied on Guzman only for a footnote that reads in pertinent part: "The Administrative Code is a codification and restatement of applicable statutes and laws, general, special and local." Guzman, 69 N.Y.2d at 565, 516 N.Y.S.2d at 453 (internal quotation marks and citation omitted). In Elliott, the Court clarified the footnote by noting that the re-codification of the Administrative Code in the early 1980's "shall not be construed as validating, ratifying or conforming any provision of the pre-existing Administrative Code to State Law ." 95 N.Y.2d at 735, 724 N.Y.S.2d at 399 (internal quotation marks and citation omitted). However, the Court added:

> "[e]ven the original 1937 codification of the Administrative Code made clear that it was not meant to transmogrify local law provisions into statutes. In its statement of legislative intent, the Legislature declared: 'Insofar as such act revises, consolidates, codifies, continues or restates the provisions of any statutes, local laws or ordinances, applicable to the city of New York ... *such provisions shall be deemed unchanged in substance and effect*...'" Elliot, 95 N.Y.2d at 735 n2, 724 N.Y.S.2d at 400, quoting former Administrative Code § 1151-1.0 (emphasis supplied).

In other words, codification did not elevate any provision preexisting *in the Code* into a statute, as for example the provision at issue in Elliott (requirement of protective guards

for bleachers). Conversely, it did not reduce a former statute to a mere local law with regard to its tort implications. Elliott, 95 N.Y.2d at 736, 724 N.Y.S.2d at 400.

Equally hapless is the defendants' argument that the Legislature repealed the statute when it was incorporated into the Building Code because the Legislature found it unnecessary to have both state and local laws pertaining to excavations; and it chose to have these matters governed by local entities, thus eliminating the imposition of absolute liability. Given that the statute was location specific from the beginning, it is neither clear or evident that the Legislature intended to eliminate absolute liability by turning over the administration of what was already a local law to a local entity.

I also reject the defendants' argument that, in any event, the 1855 statute was not "of the type" that imposes absolute liability. Considering the crystal-clear analysis of that statute by the Court of Appeals in Dared as detailed above, the defendants' argument merits only one conclusion and that is, that either they are not aware of, or they have chosen to ignore the seminal case on the subject.

Furthermore, in my opinion, Justice Ramos properly granted partial summary judgment to plaintiff Randall on liability and Justice Edmead erred in denying summary judgment to plaintiff

Yenem.

As threshold matters, the defendants are incorrect in their assertion that since Yenem is a tenant, not an adjoining landowner, it is not protected by the provision. See Gordon v. Automobile Club of Am., 101 Misc. 724, 167 N.Y.S. 585 (Sup. Ct. N.Y. County 1916), aff'd, 180 App. Div. 927, 167 N.Y.S. 588 (1st Dept. 1917) (anyone having special interest in the property is entitled to sue for damages); see also Bergen v. Morton Amusement Co., Inc., 178 App. Div. 400, 165 N.Y.S. 348 (4th Dept. 1917).

Likewise, I am unpersuaded by the defendants' argument that other than the named defendants/owners, 281 Broadway and John Buck, and the excavator Hunter, there are other parties (named as third-party defendants in Yenem), whose actions must be considered in ascertaining proximate cause. The defendants allude here to other parties who allegedly failed to ascertain certain critical conditions relevant to an excavation operation. Whatever the allegations, even if proved true, they cannot exculpate the defendants/owners. Well-settled law holds that the owner of the property upon which the excavation is being conducted is liable whether it is the owner actually making the excavation or whether another party is involved. See Rosenstock v. Laue, 140 App. Div. 467, 470, 125 N.Y.S. 361, 363 (1st Dept. 1910) ("[t]he words 'the person or persons causing such

excavation to be made' apply to the owner of the property who employs a third person to make such excavation"); see also Coronet Props. v. L/M Second Avenue Inc., 166 A.D.2d at 243, 560 N.Y.S.2d at 445; Kimberly-Clark Corp v. Power Auth. of State of N.Y., 35 A.D.2d 330, 316 N.Y.S.2d 68 (4th Dept. 1970); Palermo v. Bridge Duffield Corp., 3 A.D.2d 863, 161 N.Y.S.2d 755 (2d Dept. 1957).

More significantly, I disagree with the defendants' assertion that this Court's decision in Coronet forecloses the possibility of granting summary judgment on liability. In Coronet, plaintiff moved for partial summary judgment under Administrative Code § 27-1031 for property damage allegedly sustained during defendants' excavation work. This Court affirmed the trial court's denial of the plaintiff's motion for partial summary judgment because of the existence of issues of fact regarding the adequacy of precautions taken, evidence of the poor condition of the allegedly damaged building and of other possible causes of the damage, and failure to demonstrate that the excavation was the proximate cause of the property damage. 166 A.D.2d at 243; 560 N.Y.S.2d at 445. Thus, the defendants argue that Coronet stands for the proposition that liability may only be determined after trial on a finding that defendants failed to take adequate precautions and that their excavation

operations were the proximate cause of the damage.

It is, of course, well settled that absolute liability may be imposed only after defendants' activities are found to be the proximate cause. Victor A. Harder Realty & Constr. Co. v. City of New York, 64 N.Y.S.2d at 320. To the extent that factual issues in Coronet raised serious doubt as to the cause of the damage to the building, then our decision in Coronet is entirely distinguishable from this case. To the extent that in Coronet we determined that the adequacy of precautions and the condition of an adjoining structure are relevant factors in determining liability, we erred in our analysis of precedent and such holding should be disregarded.

As the plaintiff Randall asserts, the appellate briefs filed in Coronet make clear, as the decision unfortunately does not, that an explosion occurred "contemporaneously" with the excavation operation. This raised an issue of fact as to whether the excavation was a factor at all in the damages to the building, and so precluded summary judgment. However, contrary to the defendants' argument, Coronet by no means mandates that a finding on proximate cause must be a posttrial conclusion.

As plaintiffs correctly assert, pursuant to CPLR 3212, affidavits and written admissions are sufficient proof on which summary judgment may be granted. Here, both Randall and Yenem

established, to the extent required for summary judgment, that the defendants violated section 27-1031 by not preserving and protecting the building, and that defendants' actions were the proximate cause of the damage to the building.

It is undisputed and uncontradicted that the excavation operations were undertaken at defendants' premises, by the defendants, and were dug to a depth of more than 10 feet below curb level. Nor is it disputed, in any way, that defendants were engaged in excavation operations at the time the DOB ordered plaintiff Randall and plaintiff Yenem along with others to vacate the adjoining building.

On the contrary, the defendants admitted in affidavits that excavation caused the building to lean. The defendant 281 Broadway Holdings' managing member, Greg Merdinger, stated in an affidavit in February 2008, in pertinent part:

> "In May 2007 prior to the time that 281 began foundation work, ... a survey of the Building indicated that the south wall was then out of plumb approximately 4" to the south. Throughout 2007, as work on the foundation of the new construction proceeded, 287 Broadway tilted roughly an additional 3.5" southward. The [DOB] was made aware and began monitoring the movement of the Building starting in May 2007.
>
> "On or about November 20, 2007, 281 notified [p]laintiff of 287 Broadway's movement. We also informed the owners of the Building that we would be implementing a temporary bracing scheme, and eventually a permanent plan, both subject to the approval of the DOB.

> "On December 18, 2007, the DOB ordered that the four residential and three commercial tenants of 287 Broadway vacate the building."

Further, in April 2008, the defendants' engineers, Goldstein Associates, issued a report which, inter alia, stated: "Our report concludes that the foundation of the south wall of 287 Broadway was undermined during excavation." An affirmation filed by the same engineers in support of the defendants' cross motion for summary judgment acknowledged that the engineers had determined that

> "the movement and undermining of [plaintiff's building] occurred when the foundation contractor (Hunter-Atlantic) began underpinning the south-west corner... The movement of the building during excavation was caused by settlement due to undermining of the existing footings and loss of soil under the footing."

Hence, the defendants not only admit that the excavation caused damage but that, while the building was being monitored, they failed to follow through on assurances to shore it, so that the DOB ultimately had to issue the vacate order. Regardless of the defendants' allegations that the building was already out of plumb, that there were preexisting cracks in the south and west walls, and that the building lacked a lateral support system, the inescapable fact is that no DOB vacate order was issued until the defendants, on their own admission, caused the building to list

further.

In any event, allegations that the building was in poor condition are irrelevant, and hence do not constitute a material issue of fact. The Coronet decision was the first time that the condition of an adjoining building was injected into a decision on absolute liability arising out of the provision at issue, but there is no precedent to support its inclusion in such fashion.

The provision at issue applies to adjoining structures not adjoining structures that are in perfect condition, or adjoining structures that are new or without cracks. Moreover, the requirement in the provision that the excavator, once he/she is afforded a license to enter, inspect the adjoining buildings and property strongly suggests that it is the responsibility of the one causing the excavation to acquaint himself/herself with the possible risks involved in any particular project.

In my opinion, it is self-evident that the "poor condition" of a building cannot be evaluated as a contributing factor in such cases, otherwise the oldest buildings in New York would get the shortest shrift from excavators knowing that the more faults in a building, the less precautions need be taken. Indeed, the Dorrity Court enunciated precisely this view when it observed that, the intent of the statute was to make owners aware of the "risk of injury" to adjoining structures, and of "the burden of

protecting" them. Dorrity, 72 N.Y. at 311. In effect, the Court's warning was that the worse the condition of a building, the greater the burden on the excavator to protect it.

Similarly incorrect and without precedent was the conclusion in Coronet that absolute liability may be imposed only after trial and determination that a defendant failed to take "adequate" precautions.[2] Simply put, this Court misread Harder Realty, the oft-cited Supreme Court decision in which that court conducted a thorough analysis of the precautions taken by the defendants. However, that particular analysis was undertaken in the context of ascertaining liability on a negligence theory. Harder Realty, 64 N.Y.S.2d at 316. Further, underscoring the fact that an assessment of the "adequacy of precautions" is not required for the provision at issue is that the Harder Court found that the excavators in that case had "performed a careful, workmanlike job in the excavation" and that "not even the plaintiff's witnesses or experts found fault with the quality or technical proficiency of the work." Id. Yet, despite the

[2] Small surprise that subsequent decisions have parroted the "adequate" language of Coronet without explaining what is meant by adequate. See Cohen v. Lesbian & Gay Community Servs. Ctr., Inc., 20 A.D.3d 309, 799 N.Y.S.2d 190 (1st Dept. 2005); Nestor v Congregation Beit Yaakov, 2007 N.Y. Slip. Op. 33296 [u] (Sup. Ct. N.Y. County 2007); and 430 Owners Corp v. King Sha Group, Inc., 2007 N.Y. Slip. Op. 33675[u] (Sup. Ct. N.Y. County 2007).

superlative precautions taken, the Harder court imposed absolute liability because "during the period of excavation the building had a lateral movement south of more than one inch" and the court found that the defendants' activities were the proximate cause of the movement. Harder, at 315.

Indeed, the plain language of the Code provision does not allow for any affirmative defense of reasonable precautions or adequate precautions taken. The language states that an excavator "shall, at all times and at his or her own expense, preserve and protect" adjoining structures. The unequivocal wording does not convey any suggestion that best efforts or reasonable efforts to protect and preserve will allow a defendant to evade absolute liability.

Finally, in Randall, defendants also cross-moved for leave to amend their answer to assert additional affirmative defenses and counterclaims against Randall and assert cross claims against Hunter as the excavator. Randall opposed the cross motion on the grounds that the proposed amendments lacked merit. The court denied the cross motion and further held that defendants could implead Hunter as a third-party defendant. Defendants subsequently did so. Thus, only the denial of leave to assert counterclaims against Randall remains on appeal.

CPLR 3025(b) provides that:

> "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Leave to amend should be granted, absent prejudice or surprise, where the proposed amendment is meritorious. See Lettieri v. Allen, 59 A.D.3d 202, 873 N.Y.S.2d 39 (1st Dept. 2009); Matter of Salon Ignazia, Inc., 34 A.D.3d 821, 826 N.Y.S.2d 129 (2d Dept. 2006).

281 Broadway and John Buck seek to amend the answer to assert claims relating to the ZLDA, a development and easement agreement entered into between the parties on March 2, 2006 for the purpose of the use of air rights. Among the claims defendants seek to raise are breach of contract allegations, particularly that Randall breached certain covenants under the ZLDA (for example, not taking any action adversely affecting the ability to develop the proposed construction, and not appearing in opposition to the developer in any action brought before certain boards or agencies) by seeking a TRO and an injunction. The court denied the leave on the grounds that the ZLDA was not applicable to this action.

In my opinion, Justice Ramos ruled correctly since the plaintiff brought an action for a preliminary injunction to

protect its building from further damage. As the plaintiff asserts, nothing in ZLDA agreement requires plaintiff to idly stand by and watch its building collapse.

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

ENTERED: JUNE 29, 2010

CLERK