SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 11, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

617 In re Wonder Works Construction Corp., Index 114834/06
Petitioner-Appellant,

-against-

R.C. Dolner, Inc.,
Respondent-Respondent,

217 Mulberry Street Company, LLC, et al.,
Respondents.

Tunstead & Schechter, Jericho (Jeremy Kalina of counsel), for appellant.

Wasserman Grubin & Rogers, LLP, New York (Andrew K. Lipetz of counsel), for respondent.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered September 12, 2008, denying a permanent stay of arbitration of a claim against petitioner subcontractor by respondent general contractor R.C. Dolner, Inc., dismissing the proceeding and directing subcontractor and general contractor to proceed to arbitration, unanimously reversed, on the law, with costs, the petition granted and the arbitration permanently stayed.

After respondent owner 217 Mulberry Street Company, LLC filed a notice of claim on general contractor seeking to arbitrate a claim for damages resulting from alleged deficiencies in the construction performed pursuant to the terms of the prime contract between owner and general contractor, general contractor demanded that subcontractor join in the arbitration. The subcontract contains no arbitration provision but states that "[w]ith respect to the Work, [subcontractor] agrees to be bound by every term and provision of the Contract documents," a term that includes the prime contract between general contractor and owner to which subcontractor is not a party. The contract between general contractor and subcontractor also requires subcontractor "to assume toward [general contractor] all of the duties that [general contractor] has assumed towards [owner] with respect to [subcontractor's] Work." It further recites that general contractor is vested with "each and every right and remedy" against subcontractor as owner has against general contractor under the prime contract.

The prime contract broadly provides for arbitration of any disputes arising out of or related to the contract. In addition, another provision of the prime contract states in pertinent part as follows:

> "No arbitration shall include, by consolidation or joinder, parties other than the Owner [Mulberry] and the Contractor [Dolner]. The owner may, at its sole option, consent to the joinder of a subcontractor . . . as a person substantially involved in a common question of fact or law whose presence is required in order to afford complete relief."

The "Owner Required Clauses" of the prime contract provide in pertinent part as follows:

> "Owner Contractor Arbitration: Subcontractor shall be bound by any arbitration award between Owner [Mulberry] and Contractor [Dolner]. Contractor, at its sole election, may permit Subcontractor and/or its representative to participate in such arbitration . . . Such arbitration will be final whether Subcontractor participates therein or is notified thereof."

"An alternative dispute resolution agreement, like an arbitration agreement, must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 171 [1989] [internal quotation marks and ellipsis omitted]). If an agreement to arbitrate is incorporated by reference the reference "must clearly show such an intent" (*General Ry. Signal Corp. v Comstock & Co.*, 254 AD2d 759 [1998][internal quotation marks omitted], *lv dismissed in part and denied in part* 93 NY2d 881 [1999]; *see also Matter of Waldron [Goddess]*, 61 NY2d 181, 185 [1984] ["the threshold for clarity of agreement to arbitrate is

greater than with respect to other contractual terms"] [internal quotation marks omitted]).

We note that "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [2001]). Thus, in *Mater of Saturn Constr. Co. v Landes & Gyr Powers* (238 AD2d 428 [1997]), the subcontract did not contain an arbitration provision but the subcontractor agreed both to be bound to the contractor by the terms of the latter's contract with the owner and "to assume to the [contractor] all the obligations and responsibilities that the [contractor] by [the prime contract] assumes to the [owner]" (*id.* at 428). Although the prime contract required the contractor and owner to arbitrate any disputes, Supreme Court granted the subcontractor's petition to stay the arbitration demanded by the contractor. Affirming, a panel of the Second Department reasoned that "[i]n the absence of an *express and specific* agreement to arbitrate, the petitioner did not waive its right to ordinary judicial process" (*id.* at 429 [emphasis added]).

The prime contract here expressly states that "[n]o

arbitration shall include, by consolidation as joinder or in any manner, parties other than the Owner and the Contractor." Although the next sentence purports to give the Owner the exclusive right "to consent to the joinder of a subcontractor," another provision of the contract provides that the general contractor has the exclusive right to "permit subcontractor to participate" in the arbitration, creating an apparent inconsistency. The language granting general contractor every right and remedy as against subcontractor that it has against owner does not constitute an express and specific agreement to arbitrate. To be sure, a provision in the prime contract states that "subcontractor shall be bound by any arbitration award between Owner and Contractor." But this provision does not by its terms reflect an express and specific agreement by subcontractor to arbitrate disputes with general contractor. Although general contractor's arguments are not without support in the contract documents, the agreement to arbitrate for which it contends nonetheless "depend[s] upon implication or subtlety" (*Crimmins Contr. Co.*, 74 NY2d at 171, *supra*). Our determination that the subcontract does not contain an arbitration agreement between subcontractor and contractor is fortified in our view by the proposition necessarily entailed by contractor's reading of the subcontract: subcontractor agreed to be bound by an

arbitration proceeding at which it had no right to be represented and about which it had no right to be notified.

As there is no agreement to arbitrate between subcontractor and contractor, subcontractor's failure to move in a timely fashion to stay arbitration in accordance with CPLR 7503(c) is of no moment (*Matter of Matusassu [Continental Cas. Co.]*, 56 NY2d 264 [1982]).

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

ENTERED: MAY 11, 2010

CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1917-
1917A

In re Commissioner of Social Services,
on behalf of Maudlyn V. R.,
Petitioner-Respondent,

-against-

Paul C.,
Respondent-Appellant.

Barry Elisofon, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Order, Family Court, New York County (Jody Adams, J.), entered on or about March 30, 2007, which, in a child support proceeding brought by the Commissioner of Social Services as assignee of the child's mother, denied in part respondent father's objections to a December 2006 support order directing him to pay child support, and order, same court and Judge, entered on or about August 19, 2008, which denied all of the father's objections to (a) a November 2007 order denying his motion for summary judgment to dismiss this proceeding on the ground of judicial estoppel, and (b) a January 2008 child support order directing him to pay child support without a deviation from the Child Support Standards Act (CSSA) guidelines, affirmed, without costs.

The father's various arguments based on the mother's alleged

fraudulent receipt of public assistance benefits lack merit. The doctrine of judicial estoppel does not apply to bar the proceeding because, although the Commissioner, after commencing this proceeding, did inconsistently refer the mother's case to the District Attorney for a possible welfare fraud prosecution, the District Attorney's decision not to prosecute was not a prior judgment, or indeed any kind of decision, in the Commissioner's favor vindicating a prior position that the mother had committed welfare fraud (*see Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349, 350-351 [2005]).

Nor should the case have been removed from Family Court to Supreme Court so as to allow the father to raise the issue of the mother's alleged fraud. The proceeding was properly brought in Family Court pursuant to Family Court Act § 571 (*see generally Matter of Commissioner of Social Servs. v Segarra*, 78 NY2d 220, 224 [1991]), and, as Family Court pointed out, the father's remedies for the mother's alleged ineligibility for public assistance are administrative, not judicial.

The father's objection to the Support Magistrate's quashing of his so-ordered subpoena for the Commissioner's public assistance records was properly denied because the father failed to demonstrate his entitlement to the confidential records sought

therein under a specific regulatory exception (*see D & Z Holding Corp. v City of N.Y. Dept. of Fin.*, 179 AD2d 796, 798 [1992], *lv denied* 79 NY2d 758 [1992]). The failure to give the father the required eight days' notice of the motion to quash was harmless, and, as Family Court also noted, the record indicates that the father neither objected to the Commissioner's affirmation in support of the motion nor requested an adjournment to respond to the motion.

Finally, the Commissioner's alleged failure to contact the Department's Inspector General's Office about the mother's alleged fraud cannot be deemed frivolous within the meaning of 22 NYCRR § 130-1.1(c) since the Commissioner referred the alleged fraud to the District Attorney's Office and the District Attorney decided not to pursue the matter.

The mother's sworn testimony confirming the statements of the Commissioner's attorney was sufficient to meet the Commissioner's burden of proving that the mother is a recipient of public assistance (*cf. Matter of Eason v Eason*, 86 AD2d 666 [1982] [recipient of public assistance did not testify as to her needs or those of her children]).

The Support Magistrate properly concluded that the father was not entitled to an automatic deviation from the CSSA guidelines simply because of the parties' equal sharing of

custody. Indeed, '[s]hared custody arrangements do not alter the scope and methodology of the CSSA" (*Bast v Rossoff*, 91 NY2d 723, 732 [1998]). The father failed to preserve his argument that the Support Magistrate, in balancing his resources, improperly used a self-support reserve for an individual, rather than a support reserve for a family of two, and we decline to review it.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

Because I believe that respondent-appellant father was deprived of his due process right to present evidence concerning the mother's financial means, and because I believe, at a minimum, that the amount of child support should be adjusted to reflect the fact that the parties have a split custody arrangement, I dissent.

In this proceeding, the Commissioner of Social Services, as assignee of the non-party mother, seeks child support from appellant father for the couple's two children, claiming that the mother's active welfare case constitutes a "change in circumstances" mandating revision of the parties' previously negotiated agreement, pursuant to which the mother and father waived the right to child support from each other. It was not claimed that there had been a change in the financial circumstances of the mother, other than the fact of the opening of a welfare case. Because the father was denied the opportunity to obtain any discovery concerning the mother's welfare case, it could not be verified that there had, in fact, been a change in circumstances in the mother's finances so as to warrant a modification of the parties' support decree.

Appellant father asserted that the mother had committed and continues to commit welfare fraud. The Commissioner, acting on

information provided by appellant, referred the matter to its fraud investigation unit and ultimately to the District Attorney's Office, which declined to prosecute.

Appellant's principal claim on appeal is that he was deprived of due process by the Family Court, which denied him the opportunity to contest the issue of whether the mother was lawfully on welfare. The Family Court, inter alia, precluded appellant father's attorney from cross-examining the mother regarding her entitlement to welfare, granted the Commissioner's oral application to quash a subpoena seeking production of records relating to the mother's welfare application for in camera inspection, and found that the Commissioner had established a prima facie case merely by submission of documents showing that the mother had an active welfare case.

Although the Family Court found that the father's only recourse was to challenge the mother's entitlement to welfare in an article 78 proceeding, on appeal petitioner frankly admits that appellant father had no standing to bring such a proceeding.

I would hold that under the circumstances of this case, appellant father was entitled, at a minimum, to cross-examine the mother and to present evidence in support of his affirmative defenses. The failure to do so was a violation of procedural due process, particularly since appellant father has no standing to

challenge the mother's eligibility for welfare in an article 78 proceeding. DSS, as assignee of the mother, stands in her shoes and has failed to show a change in circumstance warranting modification of the parties' child support obligations. I would accordingly modify to the extent of remanding the matter to Supreme Court for a framed issue hearing.

The mother and father were divorced in Supreme Court, Kings County, in March 2003. Pursuant to a stipulation, incorporated in their judgment for divorce, the parties agreed to a 50/50 sharing of physical custody of their two daughters. The parties represented that they had been advised of the provisions of the Child Support Standards Act, and each agreed that they would deviate from that standard and waive any right pursuant to the guidelines. The stipulation, entered on the record, provided that "[t]he deviation is based on the fact that the parties are sharing expenses and sharing the custodial time with the children," and that as a result, "neither party shall be paying child support to the other party."

The parties agreed to retain his or her own separate property, and to waive any rights as to the other's property. The parties exchanged net worth statements and relied on the representations therein with respect to finances. Each party acknowledged that he or she had been made aware of the factors

affecting income and property, including the present and future earning capacity of each party, and the ability of each party to be self-supporting. Each party released and discharged the other from any and all claims, including present and future claims for alimony and maintenance, and each specifically acknowledged that he or she was self-supporting. The net worth affidavit submitted by the mother in connection with the proceeding indicated that she was a sculptor, self-employed, with a gross income of $15,000, assets in the amount of $2,000 and liabilities in the amount of approximately $31,000.

In October 2002, the mother requested permission to relocate to Lower Manhattan, where she had been accepted into an artists' community.[1] The mother subsequently (and apparently in defiance of the parties' stipulation) moved to Manhattan and commenced a custody proceeding in the Family Court, New York County. On or about August 2, 2004, the mother applied for welfare.

By petition dated August 2, 2004, petitioner Commissioner, as assignee of the mother, sought an order directing appellant father to pay support for the subject children. On or about October 12, 2004, appellant father filed a verified answer

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[1]The court was "disturbed" by the fact that the mother had evidently been on a waiting list for subsidized housing for ten years, but had neglected to mention this fact to the court during the proceedings.

alleging, inter alia, that the mother had committed a fraud upon the Commissioner and had obtained public assistance benefits for herself and the children by concealing assets and income which would otherwise have disqualified her from receipt of public assistance. Appellant father attached the affidavit of net worth submitted by the mother in connection with the divorce proceeding, which showed, inter alia, that the mother had $2,000 in a bank account in England; that she had various items of art sculpture in storage, for which she owed unpaid storage charges of $11,000; that she paid $395 per month for rental of an art studio; that she received $300 per month from a friend, and that the friend had paid the mother's legal fees in connection with the custody proceedings.

By letter dated January 4, 2005, appellant's attorney advised the Commissioner of his belief, based on the various statements in the mother's affidavit of net worth, that the mother had engaged in and continued to engage in welfare fraud. The Commissioner referred the matter to its bureau of fraud investigation, and in turn to the New York County District Attorney's Office. The District Attorney ultimately declined to prosecute for fear that the case could not be proven beyond a reasonable doubt.

A hearing was held before the Support Magistrate over the

course of several dates. At the beginning of the hearing, appellant father's attorney stated that it was his intention to cross-examine the mother regarding the defenses interposed in his answer. He stated that it was his understanding that the mother was to be produced by the Commissioner, and, accordingly, that he had not subpoenaed the mother himself. Appellant's counsel complained that the mother's absence was "irreparably harmful to the presentation of [his] case," and asked that the case be dismissed.

Counsel for DSS argued that whether the children were lawfully on public assistance was "not an issue that c[ould] be dealt with by [the Family] Court."

The Support Magistrate found that under the circumstances of the case, DSS was not required to produce the mother. The Support Magistrate stated:

> If you don't subpoena her and she - if you subpoena her and she's not here, well then the Court will certainly take negative inferences due to the fact that the witness was subpoenaed and is not here. But if you don't subpoena her and they choose not to produce her on their prima facie case, they have enough evidence - they have enough between the case law and an active public assistance case to stop right there . . .

The Support Magistrate proceeded, over appellant father's objections, to enter a temporary order of support. Before

adjourning on that date, the Support Magistrate advised the parties:

> [W]hen we sit down on the next Hearing date, the witnesses need to be produced to establish your prima facie case in whatever way that is done - okay. Mr. Elisofon, you're gonna take over from there. You're absolutely right. You can't cross-examine a printout, but the Commissioner will present its case the way it chooses to. So if you want witnesses, then you get them here. If you don't have witnesses and you want to make an argument as to the case that as presented and whether or not it establishes such a prima face case, whether or not it's sufficient under the law, whether or not it should be dismissed after they've made their case, then of course you will make the appropriate motion at that time.

On or about March 1, 2006, appellant father subpoenaed the public assistance application of the mother for in camera inspection. The Commissioner's oral application to quash the subpoena was granted over appellant's objection. The Support Magistrate ruled that she did not have jurisdiction to determine the mother's eligibility for welfare and what the mother may or may not have divulged to the Commissioner regarding her sources of income.

At the next hearing date, May 15, 2006, appellant's counsel argued that the Commissioner should have removed the proceeding to the Supreme Court, and that by failing to do so his client had been deprived due process of law. Appellant's counsel argued

that the issue of welfare fraud was in any event properly before the Support Magistrate since the Commissioner was required to prove, as part of his prima facie case, that the mother was lawfully on welfare. Appellant argued that if the mother, as the recipient of welfare, had no right to child support, then the Commissioner, as her assignee, could have no superior right. Appellant's counsel asked that the matter be dismissed, or, in the alternative, removed to the Supreme Court.

On the Commissioner's case-in-chief, the mother briefly testified regarding her household budget. When appellant's attorney indicated that he wished to cross-examine the witness, the mother requested an attorney. The Support Magistrate adjourned the hearing so the mother could obtain counsel. Prior to adjourning, counsel for the Commissioner asked for an order of proof from appellant's counsel, complaining that he could not think of "any possible basis for witnesses except in trying to put together a claim of fraud," which he claimed was "not the jurisdiction of the [Family C]ourt." Appellant's counsel complained that he had a due process right to inquire as to whether the mother was lawfully on welfare. The Support Magistrate declined to make any rulings prior to hearing the testimony of appellant's witnesses.

At the next hearing date, September 19, 2006, appellant's

counsel argued once again that he was entitled to cross-examine the mother regarding her entitlement to public assistance. Appellant's counsel noted that he had given the name and number of the ADA handling the matter to opposing counsel, but that opposing counsel had declined to contact the District Attorney's office. Counsel for the Commissioner agreed that he had not contacted the ADA, but maintained that he was under no obligation to do so.

The Support Magistrate rejected appellant's arguments that the Commissioner had not met his burden, finding that "the threshold is met when the [welfare] case is active," and stating that if appellant maintained that there had been welfare fraud, it "was up to the Commissioner . . . to prosecute in a forum that is not Family Court." Appellant's counsel maintained that the Commissioner should have removed the matter to Supreme Court, but admitted that he had not sought to remove the matter himself because his client was of "limited means."

In summation, appellant father argued that notwithstanding the fact that the Family Court was a court of limited jurisdiction, the Commissioner, as assignee of the mother, was nonetheless required to make a prima facie case for support in conformity with due process of law. Appellant father argued that the Commissioner failed to elicit any testimony regarding an

unanticipated change in circumstance, noting that any cross-examination of the mother as to her alleged reduction in income/assets had been precluded. Appellant father also contended that the Commissioner should be estopped from prosecuting him given the fact that the Commissioner had contended, while prosecuting him as the mother's assignee, that DSS was the victim of the mother's welfare fraud. In the alternative, appellant requested a 50% deviation from the CSSA guidelines.

The Support Magistrate rejected these arguments and ordered appellant father, as the noncustodial party, to pay $572 biweekly (with the mother paying $12.00 bi-weekly), without any deviation from the CSSA. The Support Magistrate found, inter alia, that the mother had demonstrated a sufficient change of circumstance to warrant the relief granted in that there had been an active assignment of support rights to DSS pursuant to Section 111 of the Social Services Law for the two subject children. The Support Magistrate found that appellant father's equitable arguments were "misplaced." The Support Magistrate noted that the Family Court was a court of "limited jurisdiction" and could not order the termination of benefits to a recipient of public assistance. The Support Magistrate further noted that the records of the Commissioner were confidential documents the use

or disclosure of which was restricted under Social Services Law § 136. The Support Magistrate stated that appellant's "avenue of recourse is through the administrative process or an article 78 proceeding in Supreme Court," not before the Family Court.

Appellant father's objections to the order were granted in part and denied in part by order of the Family Court dated March 30, 2007. Insofar as relevant herein, the Family Court denied appellant's first through fourth objections. The Family Court observed, first, that the Commissioner was not bound by the parents' agreement not to seek child support from one another, noting that in this case "the operative event was the children becoming a public charge." The court denied the second objection, reasoning that pursuant to Sections 131-32, 134 and 157-58 of the Social Services Law and the regulations promulgated thereunder, NYCRR 351.8 and 351.20, the responsibility and authority for determining eligibility for public assistance rested solely with DSS, and that the DSS fraud unit was the appropriate body with whom to address the allegations of fraud by the assignor. The court noted that appellant had a remedy, specifically, an article 78 proceeding. The third objection, regarding the granting of the oral motion to quash the subpoena of DSS's records, was denied as harmless error, since appellant father had no right to the confidential material he had sought to

subpoena. The Family Court granted the fourth objection to the extent of remanding the matter for further proceedings and a detailed analysis of the split custody issue and its effect, if any, on the order of child support pursuant to the principles set forth in *Bast v Rossoff* (91 NY2d 723 [1998]).

By letter dated June 28, 2007, the District Attorney's Office confirmed that the matter had been referred by the Commissioner for criminal prosecution, but that the district attorney's office had declined to prosecute because it did not believe the case could be proven beyond a reasonable doubt. In July 2007, appellant father moved for summary judgment dismissing the support proceedings on the basis of collateral and/or judicial estoppel. Appellant father contended that DSS had taken an inconsistent position in seeking child support pursuant to an assignment from the mother while at the same time representing to the New York County District Attorney's Office that the mother and the children were not lawfully on public assistance.

By order dated November 5, 2007, the Support Magistrate denied the motion. At a further hearing, on November 19, 2007, the mother testified, inter alia, that there had been no change in the 50/50 parenting arrangement approved by the Family Court judge in 2005. By order dated January 14, 2008, the Support Magistrate set support retroactive for the past years and $307

per week in the future, with no deviation from the CSSA. The Support Magistrate also recalculated accrued arrears from which the Support Collection Unit would credit payments made. In calculating income available to respondent father, the Support Magistrate used the self support reserve for an individual, even though the parties had a 50/50 parenting arrangement. Appellant's objections to the order were denied by order of the Family Court dated August 19, 2008. His appeals from both orders were subsequently consolidated.

I agree with the majority that the Commissioner's pursuit of a fraud investigation against the mother, at the same time it was seeking support, as the mother's assignee, from appellant father, does not operate as a judicial estoppel. The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior legal proceeding and who secured a judgment or ruling in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. DSS merely forwarded its file to the District Attorney, who in turn declined to prosecute the mother for welfare fraud. This decision was not made in the context of a legal proceeding and was not a "ruling" in any sense, vindicating a prior position that the mother had committed welfare fraud (*see Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349, 350-51 [2005]).

I believe, however, that the cumulative effect of the Family Court's rulings - precluding appellant from cross-examining the mother regarding her means and eligibility for welfare, denying him access to petitioner's records concerning the mother's welfare file, and disallowing him from presenting any evidence whatsoever on the issues raised by his second affirmative defense, was to deny appellant any meaningful opportunity to present his defense and deprive him of procedural due process. As the Court of Appeals has stated, "The commonsense principle at the heart of the due process guarantees in the United States and New York Constitutions is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation" (*People v David W.*, 95 NY2d 130, 136 [2000]). Whether there has been a due process violation requires analysis of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail (*see Matthews v Eldridge*, 424 US 319, 334-35 [1976]).

Appellant father has a substantial interest at stake. Pursuant to the parties' stipulation, mother and father represented that they were self-supporting and each agreed to waive support, including child support, from the other. Yet now, when it appears that nothing in the financial circumstances of the mother (as reflected in her affidavit of net worth) has changed, the Support Magistrate calculated, and the Family Court approved, support pursuant to the CSSA, with no deviation, at $307 per week, plus arrears, owed to the Commissioner as assignee of the mother.

The next consideration is whether the procedures in place sufficiently prevent the risk of an erroneous deprivation of appellant father's interest. The Commissioner notes that he did consider appellant's claims in referring the matter to its fraud investigation unit and subsequently to the District Attorney's Office. Yet appellant persuasively argues that he was not afforded a meaningful opportunity to contest this determination, since he had no ability to challenge the mother's eligibility for welfare in any proceeding, including an administrative proceeding, where he would have had access to the pertinent records and the ability to cross-examine witnesses.

Under the third prong of the analysis, the government certainly has an interest in ensuring the finality of its

determinations regarding eligibility for public assistance; however, it is significant that appellant father, by the Commissioner's own admission, had no standing to challenge that determination in an article 78 proceeding, the usual means for challenging agency determinations. Having been denied this opportunity, it was disingenuous for the Commissioner and the Support Magistrate to suggest that appellant father had a remedy in an article 78 proceeding, when, in fact, he had none.

Allowing the father to present evidence concerning the mother's eligibility for welfare and whether, indeed, there has been a change in circumstance so as to warrant modification of the child support order, is in harmony with precedent, which dictates that in determining the appropriate amount of child support, there should be "an evaluation of the means and responsibilities" of [both parents]"[2] (*see Tessler v Siegel*, 59

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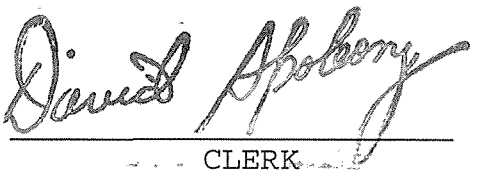
[2]*Walker v Buscaglia*, 71 AD2d 315 [1979], relied upon by DSS, is not to the contrary. In *Walker*, it was held that Family Court judges exceeded their jurisdiction by authorizing the Commissioner to terminate public assistance grants to welfare recipients. The Fourth Department reasoned that it was the responsibility of the Commissioner, not the Family Court, when possessed of information that public assistance was no longer needed by a recipient, to give the appropriate notice of intent to terminate payments, give notice of the right to a hearing, grant a fair hearing when requested, and to make the final determination to terminate benefits. In this case, however, respondent merely requests the opportunity to present evidence regarding the mother's means so that child support may be calculated in accordance with the CSSA.

AD2d 846, 847 [1977]; *Matter of Commissioner of Social Servs. v McDonald*, 245 AD2d 506, 506-07 [1997] ["Although the respondent mother was receiving public assistance, that fact did not conclusively establish her inability to pay child support"]; *Rockland County Dept. of Social Servs. v Brust*, 102 Misc 2d 411, 414 [Fam Ct Rockland County 1979] ["a parent should not be free to avoid all financial obligation to his or her child by simply letting that child become a public charge"] [citation and internal quotation marks omitted]).

I also believe that the Family Court improperly concluded that appellant was not entitled to a deviation from the CSSA guidelines where, inter alia, the evidence showed that the parties had a 50/50 parenting arrangement and the Support Magistrate, in performing the relevant income calculations for appellant, improperly used the self-support reserve for an individual.

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

ENTERED: MAY 11, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2055 John P. Bostany, Index 602627/08
Plaintiff-Respondent,

-against-

Trump Organization LLC, et al.,
Defendants-Appellants.

Finkelstein Newman Ferrara LLP, New York (Glenn H. Spiegel of counsel), for appellants.

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 28, 2009, which, inter alia, denied defendants' motion to dismiss the entire complaint as against defendant Trump Organization and all but count XIII of the complaint as against defendant 40 Wall Street, unanimously modified, on the law, counts I, II and IV dismissed as against both defendants, and otherwise affirmed, with costs.

"[W]here, as here, the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope . . . are questions of fact" (*see Fogel v Hertz, Intl.*, 141 AD2d 375, 376 [1988] [internal quotation marks and citations omitted]). The record shows, inter alia, that the premises was called "The Trump Building," that plaintiff was induced to sign

the lease by an executive vice-president of defendant Trump Organization, that the lease was signed by Donald Trump (albeit on behalf of 40 Wall), at defendants' executive offices in Trump Tower on 5th Avenue, that employees of defendant Trump Organization dealt directly with plaintiff and contractors regarding issues affecting the premises, such as repairs and maintenance, and that the executive vice-president with whom plaintiff dealt authorized dispossess proceedings on Trump Organization letterhead. "If it is found that there exists an apparent or ostensible agency" between Trump Organization and 40 Wall, "this may serve as a basis for vicarious liability" on the part of Trump Organization (*id.*, citing *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). It certainly may be found, on this record, that the acts of the putative principal, Trump Organization, constitute a "holding out" to plaintiff and the public which would estop Trump Organization from disclaiming responsibility for the agent's torts (*see Fogel v Hertz*, 141 AD2d 375 [1988], *supra*). Thus, dismissal of all claims against Trump, as defendant Trump advocates on appeal, is not warranted. However, since Trump's liability is predicated on a theory of apparent or ostensible agency, it is entitled to the benefit of the settlement agreements entered into by plaintiff and defendant 40 Wall, to the extent such agreements serve as a bar to

plaintiff's claims.

Since plaintiff alleges he was fraudulently induced to sign the October 6, 2004 lease based on conduct occurring prior to July 5, 2005, the cause of action for fraud (count I) against both defendants should have been dismissed as barred by the July 5, 2005 settlement agreement.

The third (unjust enrichment), fifth (breach of lease), sixth (restitution), seventh (partial constructive eviction), eighth (partial actual eviction), ninth (breach of covenant of quiet enjoyment), tenth (loss of business), eleventh (negligence for mold), twelfth (indemnification) and fourteenth (declaratory judgment) causes of action against both defendants are barred under the settlement agreements to the extent they seek damages relating to incidents occurring prior to July 5, 2005, or relating to plaintiff's purported inability to use any portion of the subject premises prior to the settlement agreement of April 2, 2007. The claims are not barred to the extent plaintiff seeks damages broader than a mere loss of space (such as for damages to computers, important papers, etc.) occurring after July 5, 2005, or for damages relating to plaintiff's inability to use any portion of the subject premises after April 2, 2007.

Defendants established their entitlement to dismissal of the claim for negligent misrepresentation (count IV) since defendants

were nonprofessionals who negotiated an arm's length commercial contract with plaintiff and had no special relationship with him (*Parisi v Metroflag Polo, LLC*, 51 AD3d 424 [2008]). Defendants also established entitlement to summary dismissal of the claim for breach of implied duty of good faith and fair dealing (count II) on the ground of redundancy. Such a claim cannot be maintained where, as here, the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1995]).

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

ENTERED: MAY 11, 2010

CLERK

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

2207&
M-2470 Alberto Xique, Index 6629/06
Plaintiff-Respondent,

-against-

Rosario Picone, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 7, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 28, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Motion seeking leave to supplement the record on appeal denied as academic.

ENTERED: MAY 11, 2010

CLERK

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

2217 Eric T. Martin, Index 111805/05
Plaintiff-Appellant,

-against-

The Triborough Bridge and Tunnel Authority,
Defendant-Respondent,

The City of New York,
Defendant.

Goldberg & Allen, LLP, New York (Jay K. Goldberg of counsel), for appellant.

Steve S. Efron, New York, for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 10, 2009, upon a jury verdict in favor of Triborough Bridge and Tunnel Authority (TBTA), the only remaining defendant in this action, affirmed, without costs.

The trial court properly exercised its discretion in denying plaintiff's application to preclude TBTA from introducing the expert testimony of a professional engineer as to the cause of the accident. Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion (*Nathel v Nathel*, 55 AD3d 434 [2008]). Here, contrary to plaintiff's contention, the delay of the expert disclosure was

not a result of mere failure to prepare. Defense counsel explained that he was retained as trial counsel shortly before the trial, and that although he had contacted the expert soon thereafter, the expert needed additional time to do research to form an opinion as to the cause of the accident. Furthermore, the expert disclosure was made about a week after the expert was retained. Under these circumstances, we cannot conclude that the delayed expert disclosure was willful (*see McDermott v Alvey, Inc.*, 198 AD2d 95 [1993]).

Nor can we conclude that the delayed disclosure was prejudicial. To overcome any prejudice that may have resulted from allowing the expert to testify, the trial court gave plaintiff the opportunity to voir dire the expert to avoid any surprises during cross-examination. Although plaintiff accepted the opportunity to do so, he now contends that such a remedy did not adequately cure the prejudice because he did not have sufficient time to prepare for a cross-examination or obtain other evidence to challenge the expert's testimony. He also contends that the trial court rushed him by reminding him that the jury was waiting while he was questioning the expert. However, counsel never asked for an adjournment or additional time to prepare challenges to the expert's testimony, or to retain his own expert, and nothing in the record shows that the

court interfered with or cut short counsel's voir dire of the expert in any way. Additionally, his cross-examination brought out testimony that was favorable to plaintiff on certain material issues.

In any event, even if the trial court did improvidently exercise its discretion in permitting the expert to testify, any error was harmless. Plaintiff argues that the testimony left the jury with an unchallenged expert opinion that his own negligence caused the accident. However, the jury's verdict was based on its finding of lack of negligence on TBTA's part, and the jury never reached the issue of plaintiff's own negligence (*see Gilbert v Luvin*, 286 AD2d 600 [2001]).

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

Because I believe that the trial court abused its discretion in denying plaintiff's application to preclude the testimony of defendant's professional engineer, I respectfully dissent.

Plaintiff herein was traveling on the Triborough Bridge when his Ford Explorer overheated. An employee of defendant Triborough Bridge and Tunnel Authority, John Georges, pushed plaintiff' car across the bridge with his wrecker. It is undisputed that plaintiff had his car in neutral and his key in the off position when Georges began pushing him. It is also undisputed that placing a car in neutral disables the power steering and brakes, though it does not preclude manual steering and braking of the vehicle. Finally, it is undisputed that the span across which plaintiff was being pushed crested at its midpoint, and then declined as one traveled towards the Queens side of the bridge.

Georges gave plaintiff four or five pushes towards the midpoint of that bridge. At that point, Georges gave plaintiff one final push, and plaintiff's vehicle acquired momentum due to the decline of the roadway. Plaintiff attempted to apply the brakes, but testified that the brakes would not respond, and felt "really hard." As plaintiff neared the Hoyt Avenue exit, the road declined more precipitously. Plaintiff testified that the

vehicle "lurched forward" and he collided with the back of a tractor trailer. He ascribed this lurch to "gravity because [he] was going down the slope." Plaintiff testified that his vehicle was traveling approximately 25-30 miles when he crested over the bridge, accelerating to approximately 40 miles per hour at the time of impact. Plaintiff testified that at no point did he turn the engine on to restore the power steering and brakes. John Georges, the operator of the wrecker, similarly testified that as plaintiff crested over the bridge his vehicle acquired speed. Georges observed the brake lights on plaintiff's vehicle. As plaintiff approached the exit, Georges observed plaintiff's vehicle "wiggle," or swerve, as he attempted to avoid the tractor trailer. Georges testified that he "thought" plaintiff had restarted his vehicle. However, plaintiff's vehicle was in the "off" position when Georges arrived at the accident scene moments after impact.

During the course of discovery, plaintiff demanded, pursuant to CPLR 3101(d)(1)(i), discovery of any expert witness defendant intended to call at trial. The court also issued an order requiring the parties to "supply expert witness disclosure pursuant to CPLR." While defendant provided notice that it would offer the testimony of medical experts, at no time prior to trial did defendant indicate that it would offer the testimony of an

expert engineer as to the cause of the accident.

Trial commenced on March 25, 2009. Plaintiff testified on his case-in-chief, but did not present any expert engineering testimony. After plaintiff rested, defendant served notice of its intent to present the testimony of expert engineer Dr. Bruce Gambardella. Dr. Gambardella, according to the expert disclosure, was expected to render an opinion regarding "the mechanics of injury and cause of the occurrence," including collision speed, vehicle performance parameters, and the capacity of the vehicle's braking system to "retard the vehicle on the subject grade and even stop the vehicle . . . with moderate effort." This notice was apparently attached to the back of defendant's requests to charge the jury, which had been served on plaintiff on March 27, 2009, a Friday.

When the parties next appeared in court, on Monday, plaintiff's counsel registered an objection to the late disclosure. When the court inquired as to the reason for the late notice, defense counsel replied that the witness had just been hired and that he thought the witness' testimony would "help the jury." Counsel stated, "I thought it would be a very positive thing . . . if we had someone who knew about brakes, who was a specialist in brakes, . . . I would like the Court and the jury to know how does a 1994 Ford Explorer travel in neutral with

the engine off on that decline and what would cause the vehicle . . . to lurch forward, speed up." Over plaintiff's objection, the court ruled that it would allow the engineer to testify.

On April 1, 2009, plaintiff renewed his motion to preclude the expert testimony of the engineer. Plaintiff's counsel complained that "this is the classic trial by ambush on the part of defense counsel." Counsel further asserted that the expert's testimony regarding how the accident occurred was "speculative at best," and that the prejudicial impact of the testimony outweighed its probative value.

The court adhered to its ruling that Gambardella would be allowed to testify, but stated that any such testimony would be strictly limited to what was contained in his expert disclosure. Plaintiff's counsel asserted that Gambardella had performed his vehicle tests under conditions which differed significantly from those of the instant case. The court asked counsel whether he wanted an opportunity to question the expert about his investigation before the jury came in. Counsel stated he preferred that the witness's testimony be precluded. The court stated that in light of its ruling, and to "overcome whatever prejudice there may be, obviously you are at a disadvantage because going into cross-examination you don't know the answer to all the questions you want to ask," it would permit plaintiff the

opportunity to question the witness outside the presence of the jury "so you are not surprised by what he says during his testimony."

Counsel replied "I guess I will have to take that opportunity." However, shortly after examination commenced, defense counsel objected to what he perceived as plaintiff's counsel's attempts to impeach the witness. The court chastised plaintiff's counsel that "[t]he purpose here is not to impeach the witness, but really to get some information." The court stated that if counsel wanted that opportunity, the court was "happy to provide [it]," then noted "we do have a jury waiting." Plaintiff's counsel concluded his examination shortly afterward. His renewed objection to the expert testimony was overruled.

On direct, Gambardella testified, inter alia, that he evaluated the "power off" braking performance in an "exemplar vehicle" by disconnecting the power brake unit from the engine, plugging the line, and removing the check valve. On a brake test, the vehicle could be stopped "briskly" by use of one foot (340-60 pounds of force) and almost entirely if both feet were applied (500 pounds of force). Based on his calculations, he estimated that the maximum speed of plaintiff's vehicle at the

time of impact was less than 23 miles per hour.[1] Defense counsel posited to Gambardella that an employee of defendant had testified that he saw plaintiff's vehicle "lurch forward." Defense counsel asked Gambardella what would cause plaintiff's vehicle to behave in such a way. Gambardella answered "[u]se of the engine, engine and transmission. That's the thing that would cause the vehicle to rapidly lunge forward. You have to restart the engine, put the vehicle in gear and step on the gas pedal. That will cause it to lurch forward. There is no other mechanism." Counsel asked whether Gambardella had an opinion with a reasonable degree of engineering certainty that plaintiff had restarted the vehicle. Gambardella responded:

> Assuming what you asked me to assume, that the vehicle lurches forward, takes off, the only thing that can cause that vehicle to quote unquote take off and accelerate briskly is the engine.

Counsel asked Gambardella if he had an opinion with a reasonable degree of certainty as to how the accident had occurred. Gambardella responded:

> We have an engine restart followed by pedal confusion . . . The plaintiff is stepping on the wrong pedal.

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[1]Gambardella testified that the coasting speed starting from the crest of the bridge coasting down to the Hoyt Avenue exit, without any braking, was well in excess of 40 miles per hour.

However, he could not specify the speed of plaintiff's vehicle at the time plaintiff allegedly turned the engine on and depressed the accelerator instead of the brake. Gambardella conceded that he performed his tests on the bridge in a 2006 pickup and not in a 1994 Ford Explorer, the vehicle driven by plaintiff. He also conceded that the pickup was not being pushed at the time the tests were performed and that the pickup was in fact driven to the point where the hill crested. At no time during the test was the power steering on the truck disabled. Gambardella conceded that the exemplar vehicle had not overheated, as had plaintiff's vehicle. Gambardella had no data on the tire inflation or the weight of plaintiff's vehicle, but maintained that his calculations were nonetheless correct.

It is beyond dispute that defendant failed to comply with CPLR 3101(d)(1)(i), which provides that "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial." Where a party retains an expert an insufficient period of time before the commencement of trial to give sufficient notice - here, defendant gave notice of Gambardella *in the middle of trial, after plaintiff had rested* - he or she must show "good cause" for the late disclosure.

In my opinion, defendant failed to show "good cause" for the

belated disclosure (*see Germe v City of New York*, 211 AD2d 480 [1995]; *Hudson v Manhattan & Bronx Surface Tr. Operating Auth.*, 188 AD2d 355 [1992]). Defendant's purported excuse for the late disclosure - that counsel had recently been engaged, and that he thought the testimony would be "helpful" for the jury - was entirely insufficient.

More problematic, the belated disclosure was highly prejudicial to plaintiff on causation, the ultimate issue of the case. Plaintiff had no opportunity to effectively prepare for Gambardella's cross-examination, or to rebut the testimony by engaging his own expert. This was classic "trial by ambush." As indicated, Gambardella's testimony was flawed and his conclusions suspect. There were considerable discrepancies in the conditions under which Gambardella performed his tests on the "exemplar" vehicle and the actual conditions at the time of the accident, discrepancies the import of which were not known because plaintiff had no opportunity to sufficiently prepare for Gambardella's testimony or to refute it. If apprised of Gambardella's testimony sufficiently in advance of trial, plaintiff would have been aware of Gambardella's conclusions - including his speculative one that plaintiff had suffered from "pedal confusion" - and could have hired his own expert to undermine the conclusions of Gambardella's testing. Instead, the

jury heard extensive, highly technical testimony, the conclusion of which - based on speculative hypotheticals - was that plaintiff had caused his accident by restarting his vehicle and mistakenly stepping on the accelerator. This version of the facts was highly dubious, particularly in light of the undisputed testimony that plaintiff's vehicle picked up speed after the roadway crested and as it approached the Hoyt Avenue exit, where the road declined precipitously. Plaintiff attributed this "lurch" to the effects of gravity, and Georges' testimony regarding the accident is not inconsistent. Georges speculated that plaintiff had restarted his vehicle as he approached the exit, but Georges also testified that plaintiff "wiggled," consistent with having difficulty with the manual steering, and also testified that when he reached plaintiff shortly thereafter, the vehicle was in the "off" position. In sum, the expert's testimony gave imprimatur to a dubious rendition of the facts and no doubt was determinative of the case.

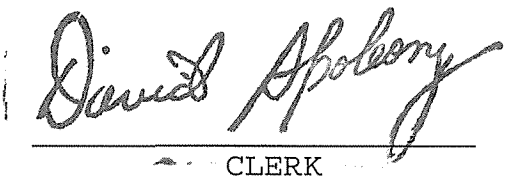
The defense waited until after the close of plaintiff's case to apprise the court of its intention to call Gamberdella to the stand. Although plaintiff's counsel was given an opportunity to voir dire the expert, his examination was rushed and repeatedly objected to by defense counsel, and the court was certain to remind plaintiff's counsel that the jury was waiting. This brief

questioning could not, in any event, overcome the overwhelmingly prejudicial effect of this last-minute expert testimony on causation, the dispositive factor of the case.

The jury returned a verdict in defendant's favor based on its finding that defendant was not negligent. To say that the belated expert disclosure did not prejudice plaintiff's case is to ignore reality and to endorse the gamesmanship engaged in by defense counsel. The trial court should have granted plaintiff's motion to preclude the testimony. At a minimum, the court should have offered plaintiff an adjournment and directed defendant to bear the cost of any rebuttal witness, as in *St. Hilaire v White* (305 AD2d 209 [2003]).

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

ENTERED: MAY 11, 2010



CLERK

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

2267 Networks USA, LLC, Index 601619/08
Plaintiff-Respondent,

-against-

HSBC Bank USA, N.A.,
Defendant-Appellant.

Phillips Lytle LLP, Buffalo (Paul K. Stecker of counsel), for appellant.

Balestriere Fariello, New York (John G. Balestriere of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 14, 2009, which, to the extent appealed from, denied defendant's motion to dismiss the sixth, seventh and eighth causes of action, unanimously affirmed, with costs.

Accepting the facts alleged in the complaint as true and according plaintiff the benefit of every possible inference therefrom (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that the complaint sufficiently alleges an express and specific agreement between plaintiff import/export intermediary and defendant bank with respect to the transfer or assignment of a letter of credit to permit a factfinder reasonably to infer that

defendant "expressly consented" (Uniform Customs and Practice for Documentary Credits [UCP] 500, Art. 48[c], issued by the International Chamber of Commerce, now UCP 600, Art. 38[a]) to the essential terms and conditions of the contemplated transfer of the letter of credit to a particular transferee (*see Joseph Martin, Jr. Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Hecht v Helmsley-Spear, Inc.*, 65 AD3d 951 [2009]; *cf. Bank Negara Indonesia 1946 v Lariza [Singapore] Pte. Ltd.*, [1988], 1 A.C. 583, 599 [P.C. 1987] [appeal from Singapore] [abstract available at 1988 WL 624642] [under corresponding provision of 1974 revision of UCP, bank's "consent (to transfer of letter of credit) cannot be given in blanket form in advance, so as to apply to any request for transfer which may subsequently be made"]). Accordingly, the complaint states a cause of action for breach of contract.

The complaint sufficiently alleges a "clear and unambiguous promise" to sustain the cause of action for promissory estoppel (*see Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1997]).

The allegations that plaintiff paid defendant the fees in connection with the $176,000 standby letter of credit, in the belief that defendant had promised to transfer the letter of

credit, are sufficient to sustain the cause of action for unjust enrichment.

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

ENTERED: MAY 11, 2010

CLERK

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

2742 The People of the State of New York, Ind. 4394/05
Respondent,

-against-

Joanne Ballard,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Alicia Llosa Chang of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

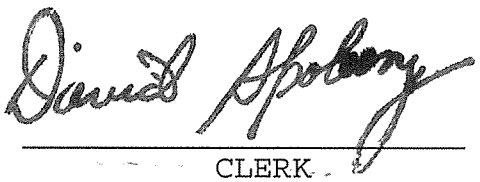
Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered September 19, 2007, convicting defendant, upon her plea of guilty, of assault in the second degree, and sentencing her a term of 3½ years, unanimously reversed, on the law, to the extent appealed from, the sentence vacated and the matter remanded for resentencing.

As the People concede, defendant should be resentenced because the court expressed reservations about the fairness of the negotiated sentence but stated, erroneously, that it lacked

any discretion to impose a more lenient sentence (*see People v Farrar*, 52 NY2d 302 [1981]). We decline defendant's alternative request for a reduced sentence.

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

ENTERED: MAY 11, 2010



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

2745-
2746-
2747-
2748 In Aria E.,

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

Daniel E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Adam M. Brown, Bronx, Law Guardian.

Amended order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 15, 2009, which, to the extent appealed from, upon a fact-finding of neglect against respondent father, ordered respondent to comply with the terms of an order of protection, to complete a batterer's program, to attend parenting skills classes, to be evaluated for a sex offender's program, and to submit to a full mental health evaluation, unanimously affirmed, without costs.

Respondent's challenge to the admission into evidence of the out-of-court statements made by the subject child's mother is

unpreserved for appellate review (*see Harris v Armstrong*, 64 NY2d 700 [1984]). Were we to review the issue, we would find that the court properly relied on the mother's handwritten statement to the police, which statement respondent offered into evidence and the mother authenticated, concerning ongoing criminal activity by respondent in the home he shared with the child. In any event, the mother's hearing testimony that respondent was actively engaged in criminal activity in the home was sufficient alone to establish by a preponderance of the evidence that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a consequence of respondent's failure "to exercise a minimum degree of care in providing the child with proper supervision and guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

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

ENTERED: MAY 11, 2010

CLERK

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

2750 In re Christopher E. Bienz, Index 113467/08
Petitioner-Appellant,

-against-

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

Jonathan Juliano, East Northport, for appellant.

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

Order (denominated a judgment), Supreme Court, New York County (Edward H. Lehner, J.), entered on or about July 14, 2009, which dismissed the petition brought pursuant to CPLR article 78 seeking to annul respondents' determination, dated June 9, 2008, terminating petitioner's probationary employment as a New York City police officer, unanimously affirmed, without costs.

The record establishes that when petitioner was terminated, he was on probationary status, and "[i]t is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional

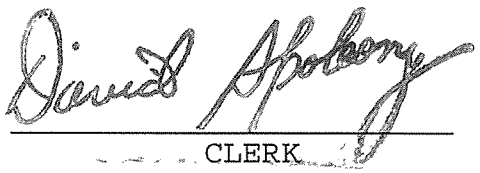
law" (*Matter of York v McGuire*, 63 NY2d 760, 761 [1984]; *see Matter of Garnes v Kelly*, 51 AD3d 538 [2008]). Here, petitioner provided no evidence of bad faith, as the allegations of animosity against him on the part of some police department personnel do not rise to the level of constitutionally impermissible conduct, or conduct in violation of any law or statute (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [2006]). Nor is there any indication of involvement by those personnel in respondents' determination.

The substandard performance history of petitioner provides a rational basis for respondents' determination (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]), particularly since petitioner was given ample opportunity to improve (*see Matter of Wilson v Bratton*, 266 AD2d 140, 142 [1999]. We further note that petitioner was terminated in lieu of facing formal Charges and Specifications of misconduct. With respect to this, petitioner only raises factual disputes that do not entitle him to a hearing, nor do they demonstrate bad faith on the part of respondents (*see Matter of Turner v Horn*, 69 AD3d 522 [2010]; *Matter of Bradford v New York City Dept. of Correction*, 56 AD3d 290 [2008], *lv denied* 12 NY3d 711 [2009]).

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

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

ENTERED: MAY 11, 2010



CLERK

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

2751 In re Cyril C. Lloyd, Index 105720/08
Petitioner-Appellant,

-against-

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

Seelig & Ungaro, LLP, New York (Philip Seelig of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondents.

Order, Supreme Court, New York County (James A. Yates, J.), entered February 4, 2009, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking, inter alia, to annul respondents' determination denying accident disability retirement benefits (ADR), unanimously affirmed, without costs.

The denial of the application for ADR was neither arbitrary and capricious nor an abuse of discretion. The Medical Board's finding that the alleged manipulation of petitioner by a chiropractor during a medical fraud investigation was not the proximate cause of his back injuries, was supported by credible evidence (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]), including

petitioner's own medical records, which showed that he had degenerative disc conditions in his back that dated prior to the chiropractic incident at issue. Furthermore, the argument that the incident with the chiropractor aggravated the preexisting condition was not supported by the evidence; petitioner's records demonstrated that he neither sought leave nor treatment until approximately three months after the incident (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997]).

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

ENTERED: MAY 11, 2010

David Spoberg

CLERK

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

2752 The People of the State of New York, SCI 146/08
Respondent,

-against-

Leon Neblett,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Michael Sonberg, J.), rendered on or about August 5, 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: MAY 11, 2010

CLERK

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

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

2754 Foremost Furniture Showroom, Inc., Index 106542/06
Plaintiff, 400880/06
107781/06
-against- 590822/06

830 West Company, et al.,
Defendants.
- - - - - -
Charter Oak Fire Insurance
Company, etc., et al.,
Plaintiffs-Appellants,

-against-

830 West Company, et al.,
Defendants-Respondents,

General Plumbing,
Defendant.

[And Other Actions]

Law Office of Andrea G. Sawyers, Melville (Scott W. Driver of counsel), for appellants.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered April 30, 2009, which, in a subrogation action brought by the insurers of tenants of a building owned and managed by defendants-respondents, insofar as appealed from, granted defendant management company's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

While the waiver of subrogation in each tenant's lease refers only to the "Owner," case law indicates that it applies to the management company as well (*see Insurance Co. of N. Am. v Borsdorff Servs.*, 225 AD2d 494 [1996]; *Pilsener Bottling Co. v Sunset Park Indus. Assoc.*, 201 AD2d 548 [1994]). Notably, the leases here were offered to the tenants through the management company and signed by management company as the owner's agent, and one of the tenants paid rent with checks made payable to the management company.

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

ENTERED: MAY 11, 2010

CLERK

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

2756 Celestina Agosto, Index 18408/06
Plaintiff-Respondent,

-against-

30th Place Holding, LLC, et al.,
Defendants,

A.R. Equipment, LLC,
Defendant-Appellant.

Russo, Keane & Toner, LLP, New York (John J. Komar of counsel), for appellant.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered June 3, 2009, which denied defendant-appellant's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter a judgment dismissing the complaint as against defendant A.R. Equipment, LLC.

Plaintiff claims she was injured when she tripped and fell on the lobby floor in the building where she worked. Six weeks before the accident, defendant building owner had retained

defendant-appellant (herein defendant) to remove the tiles from the lobby floor. Under the contract, defendant was required only to remove the tiles from the floor and was not responsible for refinishing the floor. In support of its motion for summary judgment, defendant showed that it completed the job in three days, its invoice was approved and paid by the building owner, it had no contractual obligation to return to the premises and never did, and that the building owner was in the process of having the floor replaced when plaintiff tripped on a still unfinished section. This sufficed to show, prima facie, that defendant owed no duty of care to plaintiff, and accordingly was entitled to summary judgment (*see Church v Callanan Indus.*, 99 NY2d 104, 110-112 [2002]). In opposition, plaintiff failed to adduce evidence tending to show that defendant failed to exercise due care in performing its contract with the building owner (*see id.* at 111; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-143 [2002]). While it appears that defendant, six weeks earlier, had exposed the concrete section of floor on which plaintiff fell, the creation of that allegedly dangerous condition was precisely what was called for in defendant's contract. Under the circumstances, defendant cannot be said to have created an unreasonable risk of

harm to plaintiff (*see Peluso v ERM*, 63 AD3d 1025 [2009]; *Wyant v Professional Furnishing & Equip., Inc.*, 31 AD3d 952 [2006]).

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

ENTERED: MAY 11, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Abdus-Salaam, JJ.

2757 Josephine Penn, et al., Index 105637/07
Plaintiffs-Appellants,

-against-

Amchem Products, et al.,
Defendants,

Kerr Corporation,
Defendant-Respondent.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), and Marin Goodman LLP, New York (Diane H. Miller of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 1, 2009, which granted defendant-respondent Kerr Corporation's posttrial motion insofar as it sought to set aside the verdict and have judgment entered in its favor as a matter of law, and sub silentio denied the motion, as academic, insofar as it alternatively sought a remittitur, unanimously reversed, on the law, without costs, the jury's verdict on liability reinstated as against Kerr, and the matter remanded for a new trial solely on the issue of damages for future pain and suffering and loss of consortium, unless plaintiffs stipulate to reduce the award for past pain and suffering from $3,650,000 to

$1,500,000, future pain and suffering from $10,900,000 to $2,000,000, and the award for loss of consortium from $1,670,000 to $260,000.

Contrary to the trial court's finding, the evidence, viewed in the light most favorable to the prevailing plaintiffs (*see Matter of New York City Asbestos Litig.*, 256 AD2d 250, 250 [1998], *lv denied* 93 NY2d 818 [1999], *cert denied sub nom. Worthington Corp. v Ronsini*, 529 US 1019 [2000]), was sufficient to permit the jury to rationally conclude that the asbestos-containing dental liners to which the injured plaintiff (Marvin Penn) was exposed were distributed by Kerr. Such conclusion could be drawn from the evidence that Penn's dental technician school gave him boxes containing dental liners used to make prosthetic teeth that had Kerr's name on them; that Penn followed a chart specifically made for Kerr's casting ring product when given a box with Kerr's name on it; that Kerr supplied asbestos-containing dental liners to dental technician schools at the time Penn was a student; and that Kerr often packaged its casting ring product with its dental liners. That Penn's description of the dental liners he used differed from the descriptions given by Kerr's representatives does not conclusively establish that Penn did not use Kerr's liners, and simply raised a credibility issue for the jury.

On the issue of causation, sufficient evidence was provided by Penn's testimony that visible dust emanated while working with the dental liners and by his expert's testimony that such dust must have contained enough asbestos to cause his mesothelioma (*see Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [2006]). On the issue of duty to warn, evidence that Kerr did not test or investigate the safety of its asbestos liners permitted the jury to conclude that Kerr failed to adequately warn Penn of a potential danger that it knew or should have known about (*see George v Celotex Corp.*, 914 F2d 26, 28 [1990]).

Kerr's argument that the verdict is inconsistent in holding it but not Celotex and Nicolet liable is unpreserved, since it was not raised until after the jury was discharged, and we decline to consider it (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]; *Gavitt v Citnalta Constr. Corp.*, 33 AD3d 406, 407 [2006]). We do note, however, that the jury need not have credited Kerr's representative's testimony that Celotex and Nicolet supplied Kerr with prepackaged asbestos liners and rolls. Kerr's argument that plaintiffs' counsel's remarks on summation were improper is also unpreserved, since Kerr failed to object during summation, ask for curative instructions, or seek a mistrial with regard to them, and we decline to consider it (*see Wilson v City of New York*, 65 AD3d 906, 908 [2009]). Were we to

consider it, we would find that while some remarks were improper, they were not so egregious as to warrant a new trial (*id.* at 909).

The damage awards deviate from what would be reasonable compensation to the extent indicated (CPLR 5501[c]).

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

ENTERED: MAY 11, 2010

CLERK

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

2758 Makeda Barnes-Joseph, Index 305176/08
Plaintiff-Appellant,

-against-

Remy K. Smith, et al.,
Defendants,

Universal Music Group, Inc., et al.,
Defendants-Respondents.

Lauren P. Raysor, New York, for appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for respondents.

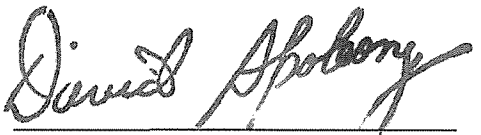
Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about April 6, 2009, which granted defendants-respondents' motion for summary judgment dismissing the complaint and cross claims against them, unanimously affirmed, without costs.

This matter arises from the shooting of plaintiff by defendant Remy K. Smith, a hip-hop artist whose persona has been described as violent and anti-social. Plaintiff alleges that defendants-respondents negligently created and promoted her violent persona for profit but failed to take precautions to prevent her from injuring plaintiff, a guest at Smith's birthday party. To the extent plaintiff's allegations support a claim for negligent hiring, defendants-respondents met their initial burden

on the motion by submitting affidavits and Smith's recording contract demonstrating that Smith was never an employee of theirs but was employed by an affiliated party that is not a named defendant here (*see Sheila C. v Povich*, 11 AD3d 120, 129 [2004]; *Acevedo v Audubon Mgt.*, 280 AD2d 91, 97 [2001]). Even if defendants-respondents and the affiliated party could be deemed a single entity, the release agreement demonstrates that any relationship between Smith and defendants-respondents would have been terminated nine months before the shooting incident. Plaintiff failed to submit evidence sufficient to raise a triable issue of fact as to Smith's relationship with defendants-respondents at the time of the shooting, and her contention that discovery would reveal issues of fact is based on "mere hope or conjecture" (*Waverly Corp. v City of New York*, 48 AD3d 261, 265 [2008]).

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

ENTERED: MAY 11, 2010



CLERK

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

2759 The People of the State of New York, Ind. 1109/07
Respondent,

-against-

Kaid Lewis,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Cravath, Swaine & Moore LLP, New York (Patrick Mair 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 (Renee A. White, J.), rendered December 18, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility.

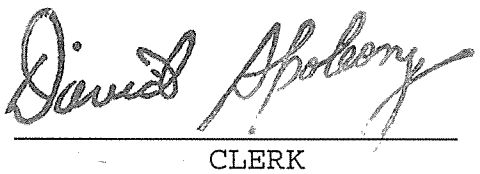
The court's *Sandoval* ruling, permitting the People to identify two of defendant's many convictions and precluding elicitation of the underlying facts of those convictions, balanced the appropriate factors and was a proper exercise of

discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). These drug-related crimes demonstrated defendant's willingness to place his interests above those of society and had a direct bearing on his veracity.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 11, 2010



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

2760-
2761 In re Lambrid Shepherd C., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Jeffrey S.,
Respondent-Appellant,

Cindy C.,
Respondent,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for Catholic Guardian Society and Home Bureau, respondent.

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

Orders, Family Court, New York County (Jody Adams, J.), entered on or about January 16, 2009, which, inter alia, determined that respondent-appellant was not a consent father as defined under Domestic Relations Law § 111(1)(d), and committed custody and guardianship of the subject children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent did not meet the parental responsibility criteria set forth in Domestic Relations Law

§ 111(1)(d) was supported by clear and convincing evidence, including that respondent failed to provide financial support for the children, and that he did not maintain regular contact and/or visit with them (*see Matter of Aaron P.*, 61 AD3d 448 [2009]). Respondent's 18-month incarceration while the children were in foster care did not excuse him of his obligations, and there is no evidence that he attempted to reach out to the agency for assistance in maintaining contact with the children (*see Matter of Sharissa G.*, 51 AD3d 1019, 1020 [2008]).

A preponderance of the evidence at the dispositional hearing supports the determination that it was in the best interests of the children to free them for adoption by their foster father, with whom they have lived for most of their lives and have developed a close relationship (*see Matter of Starlette P.*, 302 AD2d 299, 300 [2003]). Contrary to respondent's suggestion, placing the children with their paternal aunt would not have been in their best interests, since the record shows that while in foster care, the aunt visited with the children on only one occasion.

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

ENTERED: MAY 1[illegible] 2010

CLERK

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

2762 In re Rajiv Khurana, Index 104967/08
Petitioner-Appellant,

-against-

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

Chet Lukaszewski, Lake Success, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered October 31, 2008, which denied petitioner police officer's application to annul respondents' determination denying petitioner an accident disability pension, and dismissed the petition, unanimously affirmed, without costs.

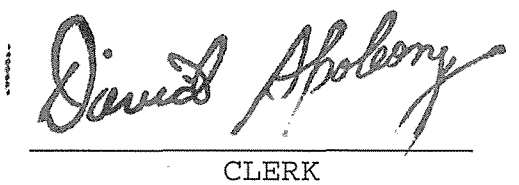
The Medical Board's finding that petitioner is not disabled for full duty is supported by "some credible evidence" (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]), including MRI results indicating mild abnormality in the supraspinatus, but no tear, and the absence of any objective findings, such as atrophy. Petitioner's case was considered by the Medical Board on four separate occasions. On each occasion, the Medical Board reviewed all the medical evidence submitted by petitioner, including the results

of MRIs, and conducted its own complete orthopedic examinations of the petitioner. Despite petitioner's continuing claim of limited range of motion in his left shoulder, the Medical Board found no evidence of a disabling condition. The Medical Board was entitled to rely upon its own physical examinations which provided credible evidence for its determination and, accordingly, was not bound by the contrary opinions of petitioner's experts (*see Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II*, 307 AD2d 129, 131 [2003], *lv denied* 100 NY2d 515 [2003]). The courts may not "substitute their own judgment for that of the Medical Board" (*Borenstein* at 761 [internal quotation marks and citations omitted]).

We have considered petitioner's other arguments, including that the Medical Board "did not adequately explain why it resolved conflicts in the medical evidence the way it did, and find them unavailing" (*see Schwartz v Kelly*, 36 AD3d 563, 564 [2007]).

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

ENTERED: MAY 11, 2010



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

2763 U.S. Electronics, Inc., Index 115867/08
Petitioner-Appellant,

-against-

Sirius Satellite Radio, Inc.,
Respondent-Respondent.

Michael C. Marcus, Long Beach, for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Michael S. Oberman of counsel), for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered July 7, 2009, confirming an arbitration award, unanimously affirmed, without costs.

In challenging the arbitration award, petitioner argues that the chairman of the arbitration panel improperly failed to disclose the relationship between his son, who is a congressman, and respondent. According to petitioner, after respondent and another company (XM Satellite Radio) announced their proposed merger agreement, the chairman's son publicly supported the move, but the chairman never disclosed the relationship. It is axiomatic, however, that judicial review of arbitration awards, whether under state law or the Federal Arbitration Act (9 USC § 9), is extremely limited, and such an award will be upheld when there is even colorable justification for the result, regardless

of errors of law or fact committed by the arbitrators (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], *cert dismissed* 548 US 940 [2006]). Therefore, the "showing required to avoid summary confirmation of an arbitration award is high," and a party moving to vacate the award has the burden of proof (*Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d 9, 12 [2d Cir 1997]).

Since the contract between the parties herein affected interstate commerce, the federal statute was controlling, and pursuant to 9 USCS § 10(a), an arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." It is thus "incumbent upon an arbitrator to disclose any relationship which raises even a suggestion of possible bias" (*Matter of Weinrott [Carp]*, 32 NY2d 190, 201 [1973]), although a party may waive its challenge to an arbitrator's purported bias (*see Douglas Elliman, LLC v Parker Madison Partners, Inc.*, 45 AD3d 252 [2007]) such as by not objecting when it learns of the alleged lack of partiality.

Irrespective of when petitioner learned of the congressman's support of the intended merger between Sirius and XM, the chairman should still have made full disclosure. But despite such nondisclosure, petitioner failed to meet its burden of proving by clear and convincing evidence that any impropriety or

misconduct of the arbitrator prejudiced its rights or the integrity of the arbitration process or award, since no proof was offered of actual bias or even the appearance of bias on the part of the chairman (*see Matter of McLaughlin, Pevin, Vogel Sec., Inc. v Ungar*, 46 AD3d 406 [2007]). Not only was there no indication of any relationship, business or personal, between the chairman and respondent, but it is difficult to perceive how petitioner's contractual dispute with respondent was impacted by the activities of the congressman on behalf of respondent's proposed merger with XM. Under these circumstances, the alleged undisclosed facts do not provide a basis for challenging the arbitration award (*see Matter of Wagner Stott Clearing Corp. [Celentano Sec. Corp.]*, 225 AD2d 367 [1996], *lv denied* 88 NY2d 813 [1996]).

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

ENTERED: MAY 11, 2010

David Spolonz

CLERK

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

2766 & [M-2119] The People of the State of New York, Respondent, Ind. 8007/98

-against-

David Snipes,
Defendant-Appellant.

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

Appeal from judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered November 28, 2008, as amended December 2, 2008, resentencing defendant to a term of 10 years, with 5 years' post-release supervision, unanimously dismissed as moot, in that Supreme Court has granted defendant's motion to set aside the resentence.

M-2119 Motion to dismiss appeal as moot granted.

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

ENTERED: MAY 11, 2010

CLERK

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

2767 124 Holdings, Inc., Index 118132/02
Plaintiff-Appellant, 600605/04

-against-

Spring Street Apartment Corp.,
Defendant-Respondent.

- - - - -

Spring Street Apartment Corp.,
Plaintiff-Respondent,

-against-

Sullivan Spring, LLC, et al.,
Defendants-Respondents.

Hartman & Craven LLP, New York (Edward L. Schiff of counsel), for appellant.

Penn Proefriedt Schwarzfeld & Schwartz, New York (Michael F. Schwartz of counsel), for Spring Street Apartment Corp., respondent.

Simon, Eisenberg & Baum, LLP, New York (Edward Paul Alper of counsel), for Sullivan Spring respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 23, 2008, which, insofar as appealed from, in an action seeking, inter alia, an accounting, denied plaintiff 124 Holdings, Inc.'s (124) motion for summary judgment, unanimously affirmed, without costs.

124 failed to establish its prima facie entitlement to judgment as a matter of law, as 124 did not demonstrate that defendant Spring Street Apartment Corp., a cooperative housing

corporation, engaged in the unequal treatment of 124 in violation of Business Corporation Law § 501(c). The record shows that Spring Street entered into a transaction with Sullivan Spring LLC to lease the rights to advertise on an exterior wall of the subject building. 124 failed to show that the funds received by Spring Street were distributed to certain shareholders not including 124, which held the same class of shares (*compare Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 246 [1997]). Furthermore, although Sullivan Spring was created by several individual shareholders who held positions on Spring Street's board of directors, 124 has failed to establish that the actions of the individual board members could be imputed to Spring Street or that they were acting within the scope of their positions on Spring Street's board when they created Sullivan Spring (*see Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191 [2d Dept 2009]).

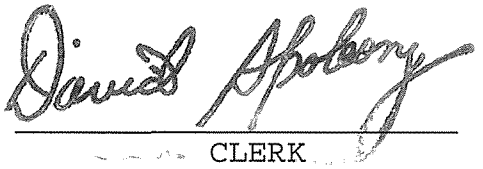
Nor was 124 entitled to summary judgment dismissing Spring Street's counterclaims, as the evidence in the record is insufficient to make a determination as to the viability of the counterclaims.

We have considered 124's remaining arguments, including that

Spring Street violated Business Corporation Law § 713 and that it breached the proprietary lease, and find them unavailing.

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

ENTERED: MAY 11, 2010



CLERK

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

2768 Ashley Realty Corp., Index 59411/08
Petitioner-Respondent,

-against-

Andrew Knight,
Respondent-Appellant,

Mary Newton, et al.,
Respondents.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for Ashley Realty Corp., respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered May 21, 2009, which reversed an order of the Civil Court, New York County (Oymin Chin, J.), dated May 29, 2008, granting the tenant's motion to dismiss the petition, and reinstated the petition, unanimously affirmed, without costs.

Petitioner-landlord commenced this summary holdover proceeding on the theory that the premises was not respondent-tenant's primary residence. Respondent failed to submit an answer, and upon his failure to appear in Civil Court on the return date of the petition, the matter was set down for an inquest. Prior to the inquest, respondent, instead of seeking to

vacate his default, moved to dismiss the petition, arguing that since the signature on the notice of non-renewal was illegible and the notice lacked printed information under the signature identifying the person who had signed it on behalf of the landlord, it was insufficient to terminate his tenancy.

Assuming that respondent could seek dismissal of the petition despite his failure to seek vacatur of the default, a notice of termination must, as a general rule, be signed by the landlord or, if the landlord's agent or attorney is named in the lease, the landlord's agent or attorney (*see Linroc Enters. v 1359 Broadway Assoc.*, 186 AD2d 95 [1992]; *Siegel v Kentucky Fried Chicken of Long Is.*, 108 AD2d 218, 220 [1985], *affd* 67 NY2d 792). However, where the tenant has had previous dealings with the attorney or other agent and knows that he or she has been granted authority by the landlord, a notice to terminate signed by that person can be valid even without proof of the relationship to the landlord (*see 54-55 St. Co. v Torres*, 171 Misc 2d 237, 238 [1997]).

The record is clear that respondent and/or his attorney have had extensive dealings with the building's registered managing agent, who not only purportedly signed the notice of non-renewal on behalf of the owner, but also petitioner's prior lease renewal. Given these circumstances, as well as the facts that

respondent did not deny that the subject premises is not his primary residence, or seek to vacate his default or ever contest the validity of the similar signature on his lease renewal, the Appellate Term properly reinstated the petition.

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

ENTERED: MAY 11, 2010

CLERK

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

2769 In re Roberto A.,

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

Altagracia A., etc.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

Bahn Herzfeld & Multer, New York (Richard L. Herzfeld of counsel), for appellant.

Quinlan & Fields, Hawthorne (Jeremiah Quinlan of counsel), for respondent.

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

Order, Family Court, Bronx County (Douglas Hoffman, J.), entered on or about July 1, 2009, which, upon a finding of mental illness, terminated respondent's parental rights to the subject child and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Unrebutted expert psychiatric testimony, together with medical and agency records, constitute clear and convincing evidence that respondent suffers from paranoid schizophrenia rendering her unable to properly and adequately care for her

special-needs child presently and for the foreseeable future (*see Matter of Genesis S.*, 70 AD3d 570 [2010]; *Matter of Loretta C.*, 32 AD3d 764 [2006]). In cases of termination of parental rights by reason of mental illness, there is no requirement that the agency show that it made diligent efforts to reunite the child with the parent (*Matter of Jon C.*, 305 AD2d 592, 593 [2003]; *Matter of Belinda S.*, 189 AD2d 679 [1993], *lv denied* 81 NY2d 706 [1993]).

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

ENTERED: MAY 11, 2010

CLERK

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

2770 Manuel Borbon, Index 6074/07
Plaintiff-Appellant,

-against-

Juan C. Pescoran, et al.,
Defendants-Appellants,

Marvarino's, Inc., et al.,
Defendants-Respondents,

Rose Trucking, Inc., et al.,
Defendants.

[And a Third-Party Action]

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Manuel Borbon appellant.

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of counsel), for respondents.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered June 23, 2009, which granted the motion of defendants Marvarino's, Cookies Childrens Togs, Sunshine Stores and John Doe (the "Marvarino defendants") for summary dismissal of the complaint, unanimously reversed on the law, without costs, the motion denied, and complaint reinstated.

This personal injury action arises from a motor vehicle accident in the Bronx in 2006. The vehicle in which plaintiff was a passenger drove up behind a Marvarino's box truck double-parked in the right-hand travel lane of Webster Avenue, in front

of a Cookies department store. When plaintiff's vehicle shifted lanes to the left, it came into contact with a tractor-trailer driven by defendant Pescoran. There was no contact between any vehicle and the Marvarino's truck.

An issue of fact exists as to whether the Marvarino's truck was illegally double-parked, which would constitute some evidence of negligence (*see Murray-Davis v Rapid Armored Corp.*, 300 AD2d 96 [2002]). But for the position of that truck, plaintiff's vehicle would not have had to make the lane change that purportedly precipitated the accident (*Ferrer v Harris*, 55 NY2d 285, 293 [1982]; *see also Naeris v New York Tel. Co.*, 6 AD2d 196 [1958], *affd* 5 NY2d 1009 [1959]). Furthermore, even if the Marvarino defendants were not the sole cause of the accident, they could still be found liable if they were a contributing cause (*see e.g. Commisso v Meeker*, 8 NY2d 109, 117 [1960]).

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

ENTERED: MAY 11, 2010

CLERK

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

2771 Lamont Banner, etc., et al., Index 108180/08
Plaintiffs-Appellants,

-against-

The New York City Housing Authority,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellants.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 27, 2009, which, inter alia, denied plaintiffs' motion to strike defendant's answer for noncompliance with disclosure orders, on condition that defendant produce an employee for deposition by a certain date, unanimously affirmed, without costs.

The drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery directives was willful, contumacious or the result of bad faith (*see Delgado v City of New York*, 47 AD3d 550 [2008]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]). "Even in cases where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their

merits" (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 90, 91 [1999]).

The record supports the motion court's finding that defendant demonstrated that it ultimately attempted to comply with its disclosure obligations and that its conduct "was not wilful or contumacious, but rather that it reflected delays which regrettably are typical of litigations with the Housing Authority in this Court." The refusal to strike defendant's answer was within the court's broad discretion in the supervision of disclosure (*Rosen v Corvalon*, 309 AD2d 723 [2003]).

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

ENTERED: MAY 11, 2010

CLERK

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

2772 The People of the State of New York, Respondent, Ind. 6261/07 1822/08

-against-

Earl Abraham, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on February 10, 2009, convicting defendant, after a jury trial, of burglary in the second degree (two counts), attempted burglary in the second degree and criminal trespass in the second degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 23 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence, including surveillance

videotapes, to establish the intent element of the burglary and attempted burglary charges.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 11, 2010

CLERK

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

2773-
2773A In re Jarrod G., Jr., and Another,

Children Under the Age
of Eighteen Years, etc.,

Irene Q.,
Respondent,

Jarrod G., Sr.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for Administration for Children's Services, respondent.

Lisa H. Blitman, New York, Law Guardian.

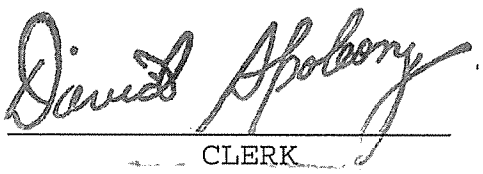
Orders, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about August 19, 2008, which, upon a fact-finding determination that respondent father neglected the subject children, inter alia, placed the children with their paternal grandmother until the completion of the next permanency hearing, unanimously reversed, on the law and facts, without costs, the finding of neglect as against the father vacated and the petition dismissed as against him.

The court improperly concluded that the father had neglected

his children based on his past mental illness and substance abuse. Even assuming the truth of these allegations, the evidence does not contain a link or causal connection between the basis for the petition and the circumstances that allegedly impaired the children or placed them in imminent danger of becoming impaired (*see Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [2010]; *Matter of Anastasia G.*, 52 AD3d 830 [2008]; Family Court Act § 1012[f][i][B]).

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

ENTERED: MAY 11, 2010



CLERK

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

2776 The People of the State of New York, Ind. 2404/06
Respondent,

-against-

Rodney McNeill,
Defendant-Appellant.

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

Rodney McNeill, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 29, 2008, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 19½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the attempted murder to 15 years, resulting in a new aggregate term of 15 years, and otherwise affirmed.

Defendant's challenge to the court's charge on prior inconsistent statements is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we

find that any deficiency in the charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Although the victim and defendant gave different versions of how the victim came to receive multiple gunshot wounds, the evidence, viewed as a whole, overwhelmingly supported the victim's account and contradicted defendant's.

Defendant's claims of prosecutorial misconduct in cross-examination and summation are also unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant argues that his counsel was ineffective for failing to object to allegedly improper aspects of the court's charge and the prosecutor's cross-examination. However, we conclude that counsel's failure to make these objections did not deprive defendant of a fair trial, affect the outcome of the

case, or cause defendant any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

The additional ineffective assistance arguments contained in defendant's pro se supplemental brief are unreviewable on the existing record. The remainder of the pro se claims are unpreserved, unreviewable, or otherwise procedurally barred.

Defendant's dismissal motion was properly denied as untimely.

We find the sentence excessive to the extent indicated.

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

ENTERED: MAY 11, 2010

CLERK

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

2778 Jhae Mook Chung, a/k/a Hae Mook Zhung, Index 115343/06
Plaintiff-Respondent,

-against-

Maxam Properties, LLC, et al.,
Defendants-Appellants.

Trokie Landau LLP, New York (James K. Landau of counsel), for appellants.

Stephen Latzman, New York, for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 5, 2009, which, after a non-jury trial, inter alia, declared that the property owned by plaintiff includes an easement across defendants' adjoining property, unanimously affirmed, with costs.

The trial court's finding that plaintiff had been granted an easement over defendants' adjoining property was supported by a fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1990]). Although the document containing the express easement was ambiguous, the court properly considered the surrounding circumstances showing that when plaintiff purchased his property, he was also granted the right, by the owner of the adjoining property, to pass through the adjoining property's hallway to access the apartments in the rear

portion of his property (*see Lewis v Young*, 92 NY2d 443, 449 [1998]; *Route 22 Assoc. v Cipes*, 204 AD2d 705 [1994]).

Alternatively, an implied easement exists over the defendants' adjoining property based upon plaintiff's pre-existing and necessary use of the entrance, lobby, hallway and rear stairs to access the apartments in the rear of his property (*see West End Props. Assn. of Camp Mineola, Inc. v Anderson*, 32 AD3d 928, 929 [2006]). Further, the evidence demonstrated that plaintiff acquired an easement by prescription in that portion of defendants' adjoining property. Plaintiff's continued use of defendants' hallway since 1987, as well as the presence during that time of mailboxes and doorbells in the lobby of the adjoining property which corresponded to plaintiff's apartments, established plaintiff's continuing, open and notorious use, adverse to the interests of the owners of the adjoining property (*see generally Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364 [2006]).

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

ENTERED: MAY 11, 2010

CLERK

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

2779 The People of the State of New York, Ind. 2957/01
Respondent,

-against-

Melvin Johnson,
Defendant-Appellant.

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

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 24, 2008, resentencing defendant to concurrent terms of 5 years, with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated and the original sentence without postrelease supervision reinstated.

Defendant is entitled to relief under *People v Williams* (__ NY3d __, 2010 NY Slip Op 1527 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of defendants who have been released after completing their terms of imprisonment.

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

ENTERED: MAY 11, 2010

CLERK

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

2780 Maro A. Goldstone, et al., Index 604235/07
Plaintiffs-Appellants,

-against-

Gracie Terrace Apartment Corporation,
Defendant-Respondent.

Duane Morris LLP, New York (Thomas R. Newman of counsel), for appellants.

Law Office of Charles X. Connick, PLLC, Mineola (Charles X. Connick of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered January 20, 2010, which denied plaintiffs' motion for partial summary judgment on the first, second, third, sixth, and eighth causes of action, unanimously modified, on the law, to grant summary judgment on the first cause of action declaring that plaintiff Goldstone "is entitled to a 100% abatement of her maintenance/rent from August 16, 2003 until [her unit] is restored to a habitable condition, and a credit for the rent or maintenance she paid for the period August 16-September 30, 2003," and otherwise affirmed, without costs.

The motion court properly denied plaintiffs' motion for partial summary judgment on their causes of action for breach of warranty of habitability (second), breach of the covenant of quiet enjoyment (third), eviction (sixth), and negligence under

the theory of res ipsa loquitur (eighth). The record presents triable issues of fact as to defendant cooperative's liability for causing the damage to plaintiffs' apartment and for failing to make the required repairs in a timely manner (*see e.g. Granirer v Bakery, Inc.*, 54 AD3d 269 [2008]; *Jackson v Westminster House Owners Inc.*, 24 AD3d 249 [2005], *lv denied* 7 NY3d 704 [2006]; *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]).

However, the evidence is clear that the apartment in its present condition cannot be safely inhabited, and thus, plaintiff Goldstone is entitled to a 100% abatement of her maintenance, as authorized by the proprietary lease (*see Granirer*, 54 AD3d 270). We reject the argument that plaintiffs' acceptance of advance payments from defendant's insurer, which they applied to their alternate living expenses, constituted an election of remedies which waived their entitlement to this abatement. There is no evidence of such an election, particularly since plaintiffs have agreed to deduct the amount of all such advance payments from their eventual recovery from that insurer (*see Prudential Oil Corp. v Phillips Petroleum Co.*, 418 F Supp 254, 257 [1975]; *cf. Frame v Horizons Wine & Cheese*, 95 AD2d 514, 519 [1983]).

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

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

ENTERED: MAY 11, 2010

CLERK

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

2781 James Post, Index 100008/08
Plaintiff-Appellant,

-against-

Todd Killian, et al.,
Defendants-Respondents.

John P. DeMaio, New York, for appellant.

Robert L. Gordon, Palisades, for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 3, 2009, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for a preliminary injunction against foreclosing upon or transferring shares in a cooperative apartment and taking possession of the apartment, and denied a request to consolidate with a pending Civil Court summary holdover proceeding, unanimously affirmed, with costs.

A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*see Nobu Next Door LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Here, plaintiff has failed to show a likelihood of success on the merits of his challenge to a termination of his proprietary lease and shares by the apartment

cooperative's board of directors, as he has not shown that the board acted in bad faith or outside the scope of its authority in a way that did not legitimately further the cooperative's corporate purpose (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 156 [2003]). Furthermore, based upon the evidence of record demonstrating plaintiff's misconduct while a resident of the cooperative, the balance of equities does not tip in his favor.

Plaintiff's request to consolidate this action with a holdover proceeding in Civil Court was rendered academic because that court had already granted relief in that proceeding.

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

ENTERED: MAY 11, 2010

CLERK

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

2782 In re Steven P. Rombom, Index 114616/08
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York,
Respondent.

Robert R. Race, Brooklyn, for petitioner.

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

Determination of respondent Police Department License Division, dated August 6, 2008, revoking petitioner's premises-residence handgun license and rifle/shotgun permit, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marcy S. Friedman, J.], entered May 5, 2009) dismissed, without costs.

The determination is supported by substantial evidence that petitioner lacks the good moral character to possess the subject license (*see* 38 RCNY 5-02[a]) and permit (*see* Administrative Code of City of NY § 10-303[a][2]). Such evidence consists of the record in a prior, 2005 proceeding that resulted in the revocation of petitioner's business-carry pistol license on a finding that he conspired with another individual to deceive the

License Division over a period of years about his business address (*see Matter of Fastag v Kerik*, 295 AD2d 114 [2002]). There was also substantial evidence that petitioner did not reside or have a principal place of business in New York City, as required to possess a premises-residence handgun license (38 RCNY 5-02[g]; *see Matter of Mahoney v Lewis*, 199 AD2d 734, 735 [3d Dept 1993]). Such evidence consists of petitioner's failure to produce any gas, electricity or telephone bills for his alleged Brooklyn residence, his use of a Brooklyn P.O. box as the address on his tax returns and on his recently acquired New York State non-driver's ID, and his maintenance of a Texas driver's license since 1984. No basis exists to disturb the Hearing Officer's findings of credibility (*see Sewell v City of New York*, 182 AD2d 469, 473 [1992], *lv denied* 80 NY2d 756 [1992]).

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

ENTERED: MAY 11, 2010

CLERK

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

2783N Robert M. Morgenthau, District Attorney of New York County,
Plaintiff-Respondent,

-against-

Riad Khalil, etc.,
Defendant-Appellant.

Index 401883/09

Weinstein & Mazurek PLLC, New York (Andrew J. Weinstein of counsel), for appellant.

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

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 8, 2010, which, in a forfeiture action under CPLR article 13-A, inter alia, granted plaintiff's motion for a preliminary injunction and order of attachment, unanimously affirmed, without costs.

A documented, comprehensive, and detailed case against defendant is presented by the underlying 185-count indictment charging defendant with falsifying business records in the first degree (Penal Law § 175.10), a class E felony, and failure to properly file currency transaction reports (Banking Law § 372[7]), a class A misdemeanor under Banking Law § 373(4), the complaint in this action, and the affidavit of the supervising investigator submitted in support of plaintiff's motion for

provisional remedies. More particularly, it appears that defendant, conspiring or acting in concert with two other individuals, engaged in an illegal check cashing scheme and circumvented federal and state banking laws by structuring numerous check cashing transactions and falsifying business records to make it appear that the checks were cashed in several different locations when they were in fact all cashed in a single location that was owned and operated by defendant's alleged coconspirators.

Defendant argues that because the underlying indictment does not allege, and the People cannot prove, that he acted with intent to defraud a particular person or business entity -- as opposed to the government or the public at large -- out of money, property, or something of pecuniary value, plaintiff fails to demonstrate the requisite substantial likelihood of securing a conviction for falsifying business records in the first degree (*see Morgenthau v Citisource, Inc.*, 68 NY2d 211, 222 [1986]). We do not view the meaning of "intent to defraud" in Penal Law § 175.10 to be so limited (*see People v Ramirez*, 168 AD2d 908, 909 [1990], *lv denied* 77 NY2d 965 [1991]; *People v Elliassen*, 20 Misc 3d 1143[A], 2008 NY Slip Op 51841, *2-3 [2008]). We also reject defendant's argument that because Banking Law §§ 372(7) and 373(4) -- the alleged violations of which form the predicate

"[]other crime" supporting the charge of first-degree falsifying of business records -- create strict liability for the failure to file currency transaction reports without a showing of any intent or awareness of wrongdoing, they violate due process on their face. A strict liability criminal statute is not per se unconstitutional (*see People v Persce*, 204 NY 397, 401-402 [1912]), and, should mental culpability be required in order to conform Banking Law §§ 372(7) and 373(4) to the requirements of due process, an appropriate scienter requirement can be read into them (*see* Penal Law § 15.15[2]; *see e.g. People v Wood*, 58 AD3d 242, 252-253 [2008], *lv denied* 12 NY3d 823 [2009], citing, inter alia, *People v Finkelstein*, 9 NY2d 342, 344-345 [1961]).

Defendant also argues that plaintiff has failed to demonstrate that the proceeds sought to be forfeited -- i.e., the total face value of the checks he is alleged to have illegally structured and caused to have falsely reported -- are the proceeds of a felony subject to forfeiture. According to defendant, because the money from the checks was obtained before the alleged falsification of the business records, they were not obtained through the commission of the charged felony. CPLR 1311(1)(a), however, specifically permits forfeiture actions for criminal activity arising from a common scheme or plan of which a felony conviction is a part. As defendant is charged with

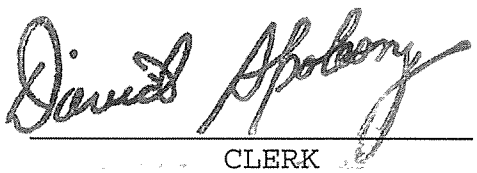
engaging in an unlawful check cashing scheme that included the commission of the uncharged crimes of unlicensed cashing of checks on behalf of customers and the charged misdemeanor crimes of failing to file currency transaction reports for those checks, in addition to the commission of 121 felony crimes of falsifying business records with respect to those checks, the total face value of the checks involved in that scheme is arguably the fruit of the broader criminal scheme, and therefore may constitute forfeitable proceeds (*see Dillon v Farrell*, 230 AD2d 818, 819 [1996]).

We have considered and rejected defendant's other arguments, including that the $1.35 million sought will, if plaintiff succeeds, at least in part amount to an unconstitutional "excessive fine" in violation of the Eighth Amendment and a double recovery prohibited by CPLR 1311(8). The motion court correctly held that these challenges, which are based on the fact that defendant's coconspirators have already forfeited $250,000 in proceeds in connection with their guilty pleas, are premature and cannot be resolved on this record (*cf. United States v*

Talebnejad, 460 F3d 563, 573 [4th Cir 2006], *cert denied* 549 US 1234 [2007], citing *United States v Covey*, 232 F3d 641, 646 [8th Cir 2000], *cert denied* 534 US 814 [2001]).

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

ENTERED: MAY 11, 2010



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MAY 11 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Eugene Nardelli
Leland G. DeGrasse
Helen E. Freedman, JJ.

1104
Index 112371/06

x

In re Victoria Hicks,
Petitioner-Respondent,

-against-

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

x

Respondent appeals from a judgment of the Supreme Court, New York County (Donna Mills, J.), entered April 5, 2007, which granted the petition challenging the determination of respondent New York State Division of Housing and Community Renewal, dated July 5, 2006, establishing petitioner's maximum collectible rent.

Gary R. Connor, New York (Aida P. Reyes of counsel), for appellant.

Victoria Hicks, respondent pro se.

TOM, J.P.

In this article 78 proceeding, Supreme Court determined that the four-year statute of limitations under CPLR 213-a applies to a rent overcharge proceeding brought by a rent-controlled tenant, and held that respondent DHCR impermissibly examined the rental history of the premises covering more than four years prior to the filing of tenant's rent overcharge complaint. We conclude that CPLR 213-a does not apply to rent-controlled apartments or to administrative proceedings before DHCR. Furthermore, DHCR's determination had a rational basis, was not arbitrary or capricious or an abuse of discretion, and did not include an error of law. The agency ruling should have been confirmed.

On September 13, 2004, petitioner, a rent-controlled tenant, filed a rent overcharge complaint with DHCR asserting that her $739.15 monthly rent exceeded the maximum collectible rent for the apartment. In support of her complaint, she argued that the landlord's failure to serve her with notice of increased heating fuel costs for the years 2002 through 2005 precluded the owners from adjusting her rent to reflect fuel cost increases for those years. The owners responded that they had not collected a fuel surcharge since 1992, rendering notice of heating fuel costs immaterial. They further submitted a rent calculation chart to justify the amount tenant was being charged. Petitioner, in

reply, urged DHCR to "review all fuel cost adjustment increases and the RA-33.10 [Fuel Cost Adjustment] Reports after 1980 to ensure a current rent amount that is accurate under the law."

Based on the documentary evidence, the Rent Administrator determined that there was no merit to petitioner's assertions concerning the lack of notice of fuel cost adjustments. However, from an examination of the rental history of the premises, he concluded that the monthly rent for the apartment should be reduced to $688.34. The owners then filed a timely Petition for Administrative Review (PAR) asserting that the rent reduction was based on an incorrect calculation. In support of their application, the owners submitted copies of various DHCR rent records, including orders setting the maximum base rent (MBR).

In April 2006, respondent issued an order that granted, in part, the owners' PAR. The order noted that several final rent orders had been overlooked in calculating the MBR. When the orders affecting the biennial periods commencing with 1988 through 1993 and 1998-1999 were included in the calculation, the monthly rent was determined to be $852.97.

Petitioner in this article 78 proceeding argued that the administrative determination was in violation of lawful procedure, erroneous on the law, arbitrary, capricious and an abuse of discretion (CPLR 7803[3]) because DHCR had examined the

rental history of the premises dating back to April 1, 1978, transgressing the limitations contained in the Rent Regulation Reform Act of 1997 (RRRA, L 1997, ch 116). That legislation, petitioner maintained, bars "examination of the rental history of a housing accommodation for more than four years prior to the filing of an overcharge complaint." She further argued that the proceedings before DHCR were subject to the limitations of CPLR 213-a which, she contended, were amended by the RRRA to include a "four-year restriction for examination of the rental history of a housing accommodation."

Supreme Court agreed and granted the petition, vacating DHCR's determination and remanding the matter for further administrative proceedings. While acknowledging that "a two year statute of limitations applies to recovery of overcharges," the court construed this petition as "not seeking to recover an overcharge. Rather, she is seeking a review in the nature of declaratory relief." The court concluded that

> the four-year statute of limitations in CPLR 213-a applies to proceedings before the DHCR pertaining to rent controlled housing accommodations and that respondent's failure to limit its review of the rental history of the subject apartment to the period of four years prior to the filing of the overcharge complaint was arbitrary and capricious and an abuse of discretion.

DHCR contends on appeal that no statute, regulation or policy prohibits the agency from examining the rental history of rent-controlled apartments without regard to limitations as to time. In addition, it argues that its calculation of the MBR is rationally based on both the law and the record.

It is well recognized that DHCR has a broad mandate to administer the rent regulatory system (see *Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 165 [1993]), and courts regularly defer to its interpretation and application of the laws it is responsible for administering, so long as its interpretation is not irrational (*Matter of Gaines v New York State Div. Of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]). We agree with DHCR's interpretation of CPLR 213-a that it does not apply to housing accommodations subject to the rent control law. The statute provides:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

While CPLR 213-a applies to "residential rent overcharge"

and does not make a distinction between rent-stabilized and rent-controlled apartments, the legislative history makes clear that it applies only to rent-stabilized dwellings. The four-year statute of limitations was introduced in 1984, in the Emergency Tenant Protection Act (ETPA) amendments,[1] with the simultaneous enactment of CPLR 213-a (L 1983, ch 403, § 35) and the predecessor to what is now Rent Stabilization Law (N.Y. City Admin Code) § 26-516(a)(2) (former Code § YY51-6.0.5[a][2], L 1983, ch 403, § 14). Significantly, none of the rent-control statutes of limitations under the New York City Rent and Eviction Regulations applicable to rent-control-related actions were amended by this legislation.[2]

In 1997, the Legislature enacted RRRA in part to clarify the limitations period contained in the Rent Stabilization Law. Simultaneous amendments were made to CPLR 213-a (L 1997, ch 116,

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[1] Commonly referred to in the courts as the Omnibus Housing Act of 1983 (OHA; see *Elwick Ltd. V Howard*, 111 AD2d 73 [1985], *affd* 65 NY2d 1006 [1985]).

[2] The right of a rent-controlled tenant to bring an action on a rent overcharge and the time within which the action must be commenced is provided by the governing regulatory statute and restricted by a two-year statute of limitations (N.Y. City Rent and Rehabilitation Law [Admin Code] § 26-413[d][2][a]).

§ 34) and the Rent Stabilization Law § 26-516(a)[3] (ch 116, § 33). Both the amended CPLR 213-a and the RRRA reflect a clear legislative intent to curb the judicial practice of reviewing the rental history of an apartment prior to the four-year limitations period (see L 1997, ch 116, § 32). Again, there were no changes made to the Rent Control statutes of limitations.

The Rent Control Law and the Rent Stabilization Law were enacted as separate and distinct systems to address different problems in the housing market, even though each was primarily directed at ameliorating the effects of the shortage of housing accommodations (see *8200 Realty Corp. v Lindsay*, 27 NY2d 124 [1970], *appeal dismissed* 400 US 962 [1970]; *Matter of Chessin v* New York City Conciliation & Appeals Bd., 100 AD2d 297 [1984]). The procedures enacted under the two systems of rent regulation do not allow for indiscriminate interchange. Therefore, neither the OHA nor any subsequent amendment to the Rent Stabilization Law can be deemed to amend the Rent Control Law by implication.

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[3] § 26-516(a) provides, inter alia:

> Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

Had the Legislature intended the four-year limitations period to extend to rent-controlled dwellings, it would have been a simple matter to do so, such as it did with enactment of "luxury decontrol," which specifically included application for both systems of regulation (see L 1997, ch 116, § 7-11). As the Court of Appeals has observed, "[T]he failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]). Here, the failure of the Legislature to incorporate CPLR 213-a into the Rent Control Law was a clear indication that it was not intended to apply to rent-controlled apartments. If such application was contemplated, the Legislature would not have left intact two inconsistent limitations periods without making appropriate legislative amendments to the Rent Control Law.

The time within which the tenant of rent-controlled premises must seek recovery of an overcharge is provided by a particular statute and by regulations governing the operation and management of rent-controlled accommodations. With respect to amounts collected in excess of the established maximum rent, any refund is limited to the two-year period preceding the filing of the overcharge complaint or the commencement of an administrative proceeding, whichever is earlier, whether recovery of the

overpayment is sought before DHCR (N.Y. City Rent and Rehabilitation Law [Admin Code] §§ 26-412[a], 26-413[c][3]; N.Y. City Rent and Eviction Regulations [9 NYCRR] 2202.22[b]) or before the courts (Admin Code § 26-413[d][2][a]; *Matter of Christy v Lynch*, 259 AD2d 324, 326 [1999]). The procedure for commencing a timely overcharge proceeding is thus regulated by a rent-control statute containing a clearly different limitations period than CPLR 213-a, thereby rendering the provision inapposite, irrespective of the forum in which refund is pursued.

DHCR further argues that no statute, regulation or policy prohibits it from examining prior rent history of rent-controlled apartments for more than two or four years. We conclude that neither the four-year statute of limitations nor the restriction of the examination of a unit's rental history to the four-year period preceding the filing of a rent overcharge complaint (CPLR 213-a; Rent Stabilization Law [Admin Code] § 26-516[a][2]; *cf. Matter of Mengoni v New York State Div. of Hous. & Community Renewal*, 97 NY2d 630, 633 [2001]) limits the agency's review of the rental history of a rent-controlled apartment in determining the MBR.

As an initial consideration, the CPLR governs "civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent

statute" (CPLR 101). Two points should be noted. First, application of the CPLR is explicitly limited to judicial proceedings, whether brought in the form of an action or special proceeding (CPLR 103[b]); the statute does not purport to govern proceedings before administrative agencies. Second, even before the courts, application of the CPLR is expressly restricted to matters not governed by another statute, thereby "enabling more specific statutes to govern in special situations or in courts with particularized functions" (Siegel, NY Prac § 2, at 2 [4th ed]). By legislative expression, the CPLR does not purport to dictate the procedure to be applied in administrative matters; and even if the statute, while not controlling, is construed as providing general guidance in the conduct of administrative proceedings, it clearly does not supplant the procedures specified by any statute specifically governing the agency's operation or by regulations promulgated in the exercise of an agency's administrative prerogative. By way of illustration, the statute of limitations governing commencement of the instant special proceeding (CPLR 7804[a]) is found not in the CPLR, but in the New York City Rent and Eviction Regulations (9 NYCRR) § 2208.12, which provides that a proceeding seeking judicial review of DHCR's ruling must be filed "within 60 days after the final determination of the PAR."

With respect to CPLR 213-a in particular, that section is specifically made applicable to an "action on a residential rent overcharge," which clearly contemplates recovery in a judicial action or special proceeding (CPLR 103[b], 105[b]). Petitioner maintained that the RRRA, which amended CPLR 213-a to include the restriction on a court's examination of rental history, makes the provision applicable to administrative proceedings. Specifically she contended that under the RRRA, the restriction applies generally to "any application, complaint or proceeding before an administrative agency on [June 19, 1997], as well as any action or proceeding commenced thereafter" (L 1997, ch 116, § 46 [1]).

Petitioner misapprehends the purpose of the quoted language. RRRA § 46 concerns the effective date of the enactment and refers to pending administrative proceedings to which it applies (*see Mengoni*, 97 NY2d at 633; *Zafra v Pilkes*, 245 AD2d 218, 219 [1997]). That the RRRA's restriction on examinations of rental history of rent-stabilized dwelling units is made applicable to pending administrative proceedings does not compel the conclusion that CPLR 213-a is similarly applicable to pending administrative proceedings.

Petitioner's argument fails to distinguish the statutory limitation imposed on administrative agencies from that imposed

on the courts. As we observed in *Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [2000], *appeal dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001]), the four-year restriction is "applicable to both administrative and judicial rent overcharge claims." However, as the basis for that conclusion, we cited, respectively, Rent Stabilization Law [Admin Code] § 26-516[a][2], extending the restriction to DHCR, and CPLR 213-a, extending the restriction to the courts. *Brinckerhoff* does not apply CPLR 213-a to administrative proceedings. Petitioner has brought no case to our attention that holds otherwise, and none has been located (*cf. Saracco v New York State Div. of Hous. & Community Renewal*, 236 AD2d 219 [1997], *lv denied* 89 NY2d 816 [1997] [confirming DHCR's determination of 1970 MBR]). While the RRRA modified CPLR 213-a to include the restriction, the RRRA provision seized upon by petitioner (L 1997, ch 116, § 46 [1]) does not reflect any legislative intent to extend the scope of the CPLR beyond judicial actions and, particularly, does not modify CPLR 101 limiting the CPLR's application to "civil judicial proceedings." Thus, CPLR 213-a does not apply to administrative proceedings. Even if this Court were to assume, for the sake of argument, that the CPLR applies to administrative proceedings, as Supreme Court implicitly supposed, application of CPLR 213-a is nonetheless

precluded in this instance by the existence of an inconsistent rent control statutory provision (CPLR 101).

It is not a reviewing court's function to render a de novo decision or to reach a contrary conclusion by subjecting the administrative process to a procedural rule limited to judicial actions or by expanding judicial review beyond its prescribed limits (CPLR 7803). Contrary to Supreme Court's analysis, there is no basis for regarding this proceeding as seeking declaratory relief under CPLR 3001 (*cf. Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184, 192 [1972] [constitutional question]). Nor did the court purport to issue any declaration in rendering its judgment (*cf. Matter of 10 W. 66th St. Corp. v New York State Div. Of Hous. & Community Renewal*, 184 AD2d 143, 148-149 [1992]).

When examined in the context of the governing statute and regulations, DHCR's practice of reviewing the rent history of the premises is not irrational or unreasonable (*see Gaines*, 90 NY2d at 548-549). By legislative design, the legal rent for a rent-controlled apartment is determined by reference to the history of the premises dating back to the time the initial base rent was established. With respect to fixing the maximum rent, City Rent and Rehabilitation Law (Admin Code) § 26-405(a)(3) and (4) mandate that DHCR establish an initial base rent for rent-

controlled accommodations effective January 1, 1972, and thereafter make biennial adjustments to the MBR based upon periodic examination of an owner's books and records to assess the actual operating expenditures for the building (*see Matter of Drennan v New York State Div. of Hous. & Community Renewal*, 30 AD3d 281, 282 [2006]. The agency's calculation of the maximum collectible rent for the subject premises is supported by substantial evidence in the record, and petitioner does not attempt to demonstrate otherwise. Therefore, DHCR's determination is not arbitrary and capricious, and unless the agency's review of the rent history of the premises is otherwise barred by statute, as petitioner maintains, the courts are required to sustain the agency's findings.

We have considered the remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Donna Mills, J.), entered April 5, 2007, which granted the petition challenging the determination of respondent, dated July 5, 2006, establishing petitioner's maximum collectible rent,

should be reversed, on the law, without costs, the petition denied, the determination confirmed and the proceeding dismissed.

All concur.

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

ENTERED: MAY 11, 2010

CLERK