SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 3, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4932 In re The State of New York, Index 403501/10
Petitioner-Respondent,

-against-

Harold Nelson,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Zainab A. Chaudhry of counsel), for respondent.

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Order, Supreme Court, New York County (Daniel Conviser, J.), entered December 17, 2010, which denied respondent's motion to dismiss the State of New York's petition for sex offender civil management pursuant to the Sex Offender Management and Treatment Act (L 2007, ch 7), unanimously affirmed, without costs.

Respondent was convicted in 1995 of kidnapping in the second degree and promoting prostitution in the second degree, based on conduct that included abducting his victim, restraining her for more than 12 hours, repeatedly raping her and engaging in deviate

sexual intercourse and forcing her to engage in prostitution. Petitioner filed a sex offender civil management petition pursuant to the Sex Offender Management and Treatment Act (SOMTA or article 10), alleging inter alia that respondent was a sex offender requiring civil management, that the acts underlying his conviction were "sexually motivated" within the meaning of Mental Hygiene Law § 10.03(s), and that he therefore had been convicted of a "sex offense" within the meaning of Mental Hygiene Law § 10.03(p). Respondent moved to dismiss the petition, claiming that the statute violated various constitutional protections.

We reject respondent's claim that the statutory provisions retroactively transformed his non-sex felony convictions into "sexually motivated felonies" in violation of the ex post facto clause. To determine whether the prohibition against retroactive punishment forbidden by the ex post facto clause applies, a court must first determine whether the legislature meant the statute to enact a regulatory scheme that is civil and non-punitive (*Smith v Doe*, 538 US 84, 92 [2003]; *see Kansas v Hendricks*, 521 US 346, 361 [1997]). If so, the court must examine whether the statute

is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil" (*Smith v Doe*, 538 US at 92 [citations and internal quotation marks omitted]). "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*id.*).

We conclude that the proceedings under SOMTA are nonpunitive civil proceedings to which the ex post facto clause is inapplicable. The determination of whether a designated felony was sexually motivated is simply a screening device to determine which offenders convicted of designated felonies prior to the enactment of article 10 are eligible for civil management. The Legislature sought to provide past offenders with the treatment they needed and also to protect the public; although these provisions require a finding of sexual motivation, it does not automatically follow that the Legislature was masking punitive provisions behind the veneer of a civil statute (*see Doe v Pataki*, 120 F3d 1263, 1277-1278 [2d Cir 1997], *cert denied* 522 US 1122 [1998]).

Nor was the retroactive "sexually motivated" designation punitive in effect. While a person found to be a sex offender in need of civil management will be subject to an affirmative

disability or restraint, civil commitment for the purposes of mental health treatment has historically not been considered punishment, and similar civil management laws have been found not to implicate either of the traditional aims of punishment - retribution and deterrence (*see Hendricks*, 521 US at 361-362; *Kennedy v Mendoza-Martinez*, 372 US 144, 168 [1963]).

We further find respondent's challenge on due process grounds to be without merit. SOMTA provides that its civil management provisions may apply to offenders convicted of designated felonies where the State proves by "clear and convincing evidence" that the conduct underlying the conviction was sexually motivated (Mental Hygiene Law [MHL] § 10.07[c], [d]). The "clear and convincing" standard set forth in MHL § 10.07[d] is in accordance with *Addington v Texas*, 441 US 418 [1979]. Since article 10 is a civil management scheme and does not impose criminal detention or other punitive consequences, due process does not require a higher standard of proof *(see Mathews v Eldridge*, 424 US 319, 334-335 [1976]; *Matter of State of New York v Farnsworth*, 75 AD3d 14, 29 [2010], *appeal dismissed* 15 NY3d 848 [2010]).

Finally, we conclude that the application of a clear and convincing standard to designated felony offenders convicted

prior to SOMTA's effective date does not violate equal protection guarantees. Article 10 was enacted to provide treatment for those with mental abnormalities which predispose them to engaging in repeated sex offenses and to protect the public from the danger of sexual predators, compelling governmental objectives (*see Farnsworth*, 75 AD3d at 31; *People v Taylor*, 42 AD3d 13, 16 [2007], *lv dismissed* 9 NY3d 887 [2007]; *Mental Hygiene Legal Serv. v Spitzer*, 2007 WL 4115936 at *20, 2007 US Dist LEXIS 85163 [SD NY 2007], *affd* 2009 WL 579445, 2009 US App LEXIS 4942 [2d Cir 2009]). Designated felony sex offenders under article 10 fall into two categories – those who have committed past crimes and those committing crimes after the statute's effective date. The Legislature handled prospective felony sex offenders by creating a new crime, which could not be applied retroactively to past offenders under the ex post facto clause. Thus, in a distinction that was narrowly tailored to serve the State's compelling interest, the Legislature provided for designation of past offenders under a "clear and convincing" standard, which would permit the State to detain and treat dangerous past sex offenders.

We recognize that a federal district court sitting in New York has found Mental Health Law §§ 10.07(c) and (d) to be

facially unconstitutional, insofar as the statute purports to apply the term "sex offender" and its attendant consequences based only on a finding by clear and convincing evidence, and has permanently enjoined the defendant in that case from enforcing those provisions (*see Mental Hygiene Legal Serv. v Cuomo*, 2011 WL 1344522, 2011 US Dist. LEXIS 40434 [SD NY Mar. 29, 2011]), raising questions of mootness and subject matter jurisdiction.

We agree with the view expressed by our sister court in *Matter of State of New York v Daniel OO.* (__ AD3d __, 2011 NY Slip Op 06196, *5 [3rd Dept 2011]), that the instant proceeding is not rendered moot due to the pendency of the federal action. The current injunction does not prohibit civil management of sex offenders, but rather mandates use of a reasonable doubt standard in determining whether a respondent has committed conduct constituting a sex offense. If the injunction is vacated on appeal, the statute would go back into full force and effect. As the Third Department noted in *State v Daniel OO.*, in "passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same [position]; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of

the Supreme Court" (*id.* [internal quotation marks and citations omitted]). While mindful of the guidance offered by the federal district court in *Mental Hygiene Legal Serv. v Cuomo*, we are compelled to disagree with the reasoning of the case, for the reasons expressed herein.

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

ENTERED: NOVEMBER 3, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5779 Joan Skolnick, Index 300798/09
Plaintiff, 84286/09

-against-

Max Connor, LLC, et al.,
Defendants.

- - - - -

Max Connor, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

J. Siebold Construction Corporation,
Third-Party Defendant-Respondent.

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Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for appellants.

The Law Offices of Jeffrey S. Shein & Associates, P.C., Syosset (Frank A. Polacco of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 15, 2010, which, insofar as appealed from as limited by the briefs, granted third-party defendant's motion to dismiss the third-party complaint, unanimously affirmed, without costs.

The record establishes that dismissal of the third-party complaint under CPLR 1010 was a provident exercise of the court's discretion. Defendants/third-party plaintiffs delayed in bringing the third-party action until almost a year after the main action for personal injuries was commenced and months after

the filing of the note of issue, despite being aware of a potential contractual indemnification claim against third-party defendant (*see Grant v Wainer*, 179 AD2d 364, 365 [1992]). The record supports the court's finding that the defendants "knowingly and deliberately delayed the commencement of the third-party action."

Third-party defendant was also prejudiced by the filing of the third-party complaint months after third-party defendant had dissolved its business and thus, as stated by counsel, no longer had access to employees or records (*see Gomez v City of New York*, 78 AD3d 482, 483 [2010]). This would put third-party defendant at a severe disadvantage in gathering evidence to defend itself (*see id.* at 483-484).

Additionally, CPLR 1010 authorizes discretionary dismissal of a third-party complaint where the controversy "will unduly delay the determination of the main action." Here, the 79-year-old plaintiff is entitled to a trial preference pursuant to CPLR 3403(a)(4). Her action, which is trial ready, should not be delayed because of defendants' failure to diligently pursue their claims against third-party defendants. It is noted that defendants and third-party plaintiffs did not seek a severance of the third-party claim.

We note that inasmuch as a CPLR 1010 dismissal is "without prejudice," defendants have a remedy in that they could commence a separate action for contractual indemnity and contribution pursuant to the terms of the contract.

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

ENTERED: NOVEMBER 3, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5101 & M-1892 Amy Roberts, et al., Plaintiffs-Respondents, Index 100956/07

-against-

Tishman Speyer Properties, L.P., et al., Defendants,

Metropolitan Insurance and Annuity Company, et al., Defendants-Appellants.

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Debevoise & Plimpton LLP, New York (Bruce E. Yannett of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Alexander H. Schmidt of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 5, 2010, which denied the motion of defendants Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company to dismiss this action as against them pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In January 2007, plaintiffs commenced this action (*Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 73 [2009][*Roberts I*], *affd* 13 NY3d 270 [2009]). In the complaint, plaintiffs contended they represented a class of "all persons who are or were, or

become, residential tenants of Stuyvesant Town and Peter Cooper Village who have signed or will sign a market lease or any lease other than a Rent Stabilized lease for any period during which Defendants (and any successors or assigns) were receiving or are scheduled to receive real estate tax benefits under New York City's J-51 program." Plaintiffs sought a declaration that Stuyvesant Town and Peter Cooper Village remain subject to rent stabilization as long as defendants receive J-51 tax benefits; plaintiffs also sought the difference between their rents and rent-stabilized rents for the four-year period preceding the commencement of their action. They estimated their damages at not less than $215 million.

In *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009][*Roberts II*]), the Court of Appeals set out defendants' position as "[defendants] moved to dismiss the complaint for failure to state a cause of action, arguing that the RRRA's exception to deregulation for apartments that 'became or become' subject to the RSL 'by virtue of' receiving J-51 tax benefits did not apply to the properties because they did not 'become subject to' the RSL 'by virtue' of the receipt of J-51 tax benefits. Rather, the apartment complex 'became subject to rent stabilization in or prior to 1974,' nearly two decades before

MetLife [i.e., Met Insurance and Met Tower] first received J-51 benefits" (13 NY3d at 282-283).

Supreme Court originally dismissed the complaint, but this Court unanimously reversed (*Roberts I*, 62 AD3d at 75). The Court of Appeals affirmed (*Roberts II*, 13 NY3d at 280, 287). MetLife has now moved to dismiss, arguing that *Roberts II* should not be applied retroactively.

The motion court properly gave retroactive effect to *Roberts II*. The motion court rejected MetLife's argument that retroactive application of *Roberts II* would violate due process: "MetLife's argument is based upon its assertion that the Decision was unforeseen, . . . [T]he Decision was not unforeseen, . . . Therefore, the retroactive application of the Decision is neither 'unexpected and indefensible to the law as it then existed' nor an 'arbitrary change[] in the law'" [internal citations omitted]. The background or default rule is that judicial decisions have retrospective effect (*see e.g. Harper v Virginia Dept. of Taxation*, 509 US 86, 94 [1993]; *Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 191 [1982], *cert denied* 459 US 837 [1982]). Prospective application is an exception which should not be permitted to swallow the rule (*see People v Favor*, 82 NY2d 254, 263 [1993]).

"The threshold question . . . is whether [the case whose retroactivity is at issue] is really a 'new' rule of law at all" (*Favor*, 82 NY2d at 262-263; *see also Matter of Americorp Sec. v Sager*, 239 AD2d 115, 117 [1997], *lv denied* 90 NY2d 808 [1997] ["*Before reaching any of [the three] factors*, the threshold question of whether the ruling at issue is really a new rule of law at all must be answered"] [emphasis added]). "'A judicial decision construing the words of a statute . . . does not constitute the creation of a new legal principle'" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 n 3 [2008], quoting *Gurnee*, 55 NY2d at 192; *see also People v Hill*, 85 NY2d 256, 262 [1995] ["Since [the case whose retroactivity was in question] construed the words of a statute, it established no new legal principle. . . . The construction of a statute is . . . the exercise of determining the intent of the Legislature when the act was passed"]).

Defendants claim that "the requirement that a decision announce a new principle of law is not a threshold requirement to the three-prong *Gurnee* test." This ignores the clear language of *Favor* (82 NY2d at 262) and *Americorp* (239 AD2d at 117).

Defendants note that when the *Favor* Court quoted *Gurnee*, the Court said, "'[a] judicial decision construing the words of a

statute [*for the first time*] does not constitute the creation of a new legal principle'" [emphasis added] (82 NY2d at 263). Defendants contend that *Roberts II* should not be deemed a first-time construction of a statute because it overruled established DHCR precedent. However, both *Favor* and *Gurnee* talk of *judicial decisions* construing a statute. A DHCR opinion letter or regulation is not a judicial decision. In addition, when the Court of Appeals more recently quoted *Gurnee* in *Pachter* (10 NY3d at 616 n 3), it did not add "for the first time." Similarly, *Hill*, which postdates *Favor*, did not add the "first time" requirement (85 NY2d at 262).

It is true that courts sometimes engage in a tripartite analysis even after deciding that the case whose retroactivity is at issue did not establish a new rule of law (*see e.g.*, *Americorp*, 239 AD2d at 117-18). However, in *Pachter*, the Court

of Appeals rejected the defendant's "argument that our conclusion should be applied prospectively only" without further analysis (10 NY3d at 616 n 3).

M-1892 - ***Amy L. Roberts, et al. v Tishman Speyer Properties, L.P., et al.***

Motion to supplement record granted.

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

ENTERED: NOVEMBER 3, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Román, JJ.

5273 The People of the State of New York, Ind. 4889/05
Respondent,

-against-

Akieme Nesbitt,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 24, 2008, convicting defendant, after a jury trial, of two counts of assault in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 25 years, affirmed.

Defendant and the victim, his roommate, became involved in an argument. According to witness testimony, after the victim removed himself from the apartment, defendant stated, "I'm going to show these little N----- how we do it . . . I'm from Brooklyn" and repeatedly asked where his "blade" was. Defendant then approached the victim from behind in the hallway and placed him in a chokehold. He then proceeded to cut the victim's neck, back, arm and face with a device that consisted of three scalpels

attached to a single handle. The victim ran back into the apartment and locked the door, which defendant unsuccessfully attempted to open.

Various witnesses testified that the victim's head was "squirting" with blood, and witnesses agreed that he was "cut bad." The victim's cuts were sutured an hour later at the hospital. He testified that for about two weeks after the incident, he had a headache and his face remained swollen. He also testified that a five-inch area of his arm was frequently numb. According to the testimony of a doctor from the Medical Examiner's Office, most of the victim's wounds were "superficial." However, he also testified that hospital records described the wounds to the victim's forehead and arm as "deep." Moreover, according to the doctor, the cut to the victim's neck was one inch away from the carotid artery. The doctor explained that had the artery been cut, the injury could have been life-threatening. He also indicated that the injury to the victim's right forearm was deep enough to have cut a tendon and could have caused permanent nerve damage. As a result of the attack, a visible scar was left on the victim's head, extending from his right forehead and temple across his right ear about six inches. Other wounds on the victim's arms, back, head and neck resulted

in keloid scars, which are visibly raised above the surrounding skin.

Defendant was indicted on a single count of attempted murder and two counts of assault in the first degree. The first count of assault charged defendant under Penal Law § 120.10(1), which requires that "with intent to cause serious physical injury to another person, [the defendant] causes such injury . . . by means of a deadly weapon." The second count charged defendant under Penal Law § 120.10(2), which requires intent to cause serious and permanent disfigurement of the victim, or intent to destroy, amputate or permanently disable a member or organ of the victim's body. After initially being found unfit to stand trial, defendant was found to be competent. However, defendant displayed extremely hostile and intransigent behavior throughout the proceedings.

Defense counsel, outside the presence of the jury, stated to the court that defendant was not cooperative, showed no interest in a plea offer, spit repeatedly in defense counsel's face and threatened to kill him. Nonetheless, counsel stated that he believed he could "fully represent [defendant] without any problem whatsoever." He further stated that the evidence of assault in the first degree was overwhelming and that the only

defense that he could foresee was that defendant did not commit attempted murder. He noted that the first-degree assault charge was a B felony that was the same as attempted murder and that he could think of no defense for the former charge. He also acknowledged that, on appeal, the issue of ineffective assistance of counsel might be brought up. However, he asserted that the overwhelming evidence against his client did not provide him an opportunity to provide for a defense on the first-degree assault charges or give an opening statement. In response to a question from the court on whether defense counsel would request any lesser-included offenses, counsel stated that he did not "have any lesser included in mind at this point, other than maybe an assault, third degree charge." Later counsel confirmed that he had "no requests for lesser includeds."

During the defense summation, counsel explained to the jury that the attempted murder and assault charges each had "different things that the People must prove" and he would leave it to the jury to decide whether or not the elements of the first-degree assault were met. "That's up to you," he stated. However, defense counsel asked that on the charge of attempted murder, the jury "check off the box that says 'Not Guilty,'" since there was "just not enough" to find for that particular charge. He told

the jury to "make the right decision as to the other charges" but "not guilty to attempted murder." The jury was unable to reach a verdict on the attempted murder charge, but convicted defendant of the assault charges.

Defendant does not challenge the sufficiency of the evidence supporting his conviction. Rather, he argues that, during his summation, trial counsel essentially conceded guilt on the assault charges, rendering his assistance fatally ineffective. Defendant contends that this claim need not be made in the context of a motion to vacate the conviction pursuant to Criminal Procedure Law § 440.10, because the record on appeal presents a complete explanation for counsel's trial tactics, that is, he believed the assault charges to be indefensible. Defendant argues that contrary to trial counsel's position, there was a strong basis to argue to the jury that the victim did not sustain an injury that rose to the level required for first-degree assault. The People, on the other hand, argue that no interpretation of the evidence could have permitted a rational jury to acquit defendant of assault in the first degree.

A defendant asserting a claim of ineffective assistance must demonstrate that his attorney failed to provide "meaningful representation" (*People v Benevento*, 91 NY2d 708, 712 [1998]).

The right to effective assistance of counsel "does not guarantee a perfect trial," and the defendant bringing such a claim bears a "high burden of showing that he was deprived of a fair trial and meaningful representation" (*People v Flores*, 84 NY2d 184, 187, 189 [1994]). While a "showing of prejudice [is] a significant" factor in determining whether meaningful representation was provided, it is not essential (*People v Stultz*, 2 NY3d 277, 284 [2004]). Rather, the "focus is on the fairness of the proceeding as a whole" (*id.*). However, where defense counsel completely abandons a viable line of argument that probably would have resulted in a different outcome, the representation may be found to have been ineffective as a matter of law (*People v Daley*, 172 AD2d 619, 621 [1991]). On the other hand, where defense counsel has "limited options for advancing a viable defense," the strategy which counsel does employ will rarely result in a determination that counsel was ineffective (*People v Green*, 187 AD2d 259, 259 [1992], *lv denied* 81 NY2d 762 [1992]). After all, "'counsel may not be expected to create a defense when it does not exist'" (*People v Day*, 51 AD3d 584, 585 [2008], *lv denied* 11 NY3d 831 [2008], quoting *People v DeFreitas*, 213 AD2d 96, 101 [1995]).

As a preliminary matter, the record before us is sufficient,

without the need for a CPL 440.10 motion, to determine whether counsel was effective (*see People v Monroe*, 6 AD3d 240 [2004], *lv denied* 3 NY3d 644 [2004]). To the extent that trial counsel did not argue vociferously for acquittal on the assault charges, he fully explained to the court that he did not believe there was a meritorious defense.

The first assault theory charged by the People was that defendant, with intent to cause serious physical injury to the victim, caused such injury to him by means of a deadly weapon or a dangerous instrument (Penal Law § 120.10[1]). Serious physical injury is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]). "Serious" disfigurement, in turn, exists "when a reasonable observer would find [a person's] altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315 [2010]). The standard is "an objective one," but the nature of the injury is not "the only relevant factor"; the injury "must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*id.*).

There is no basis to argue that defendant did not intend to cause serious physical injury to complainant. His belligerent comments just before the attack, the nature of the weapon, the manner in which he struck the victim with it, including on his neck near the carotid artery, and the fact that he attempted to pursue the victim back into his apartment, indicate that defendant had the requisite intent. As for the serious physical injury element, it is questionable whether the evidence supported a theory that defendant placed the victim at substantial risk of death. However, there was strong evidence that the victim suffered a serious and protracted disfigurement as a result of multiple visible and permanent scars. One scar was six inches extending across his right forehead and temple and across his right ear (*see People v Martinez*, 257 AD2d 667 [1999], *lv denied* 93 NY2d 974 [1999]), and there were keloid scars on his back and the back of his head and neck (*see People v Mingo*, 1 AD3d 298 [2003], *lv denied* 2 NY3d 743 [2004]). In addition, the victim suffered protracted impairment of the function of a bodily organ in that, at the time of trial, he suffered loss of sensation in his right arm (*see People v Moreno*, 233 AD2d 531, 532 [1996], *lv denied* 89 NY2d 944 [1997]). This same evidence also strongly supported the conviction for first-degree assault pursuant to

Penal Law § 120.10(2), as the victim was seriously or permanently disfigured.

While defense counsel might have made a colorable argument to the jury that the People did not meet the elements of first degree assault, the mere ability to make such an argument is not the standard on an ineffective assistance claim. As explained above, it is whether defendant was deprived of a fair trial. A significant factor to consider is whether defendant was actually prejudiced because a different result would have followed if counsel would have avoided the mistakes alleged on appeal (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Crique*, 63 AD3d 566, 567 [2009], *lv denied* 13 NY3d 835 [2009]; *People v Sellers*, 59 AD3d 294 [2009], *lv denied* 12 NY3d 859 [2009]). Here, no prejudice has been shown. Based on the evidence, it is unlikely that, had counsel made the arguments advanced by defendant now, the outcome would have been different. The evidence of disfigurement and impairment suffered by the victim strongly supported defendant's conviction, and it is not probable that the jury would have found them only to meet the elements of a lesser included offense of assault in the second degree.

Of course, the lack of prejudice is not dispositive, since the proper analysis is not one of strict harmless error (see

People v Benevento, 91 NY2d at 714]); it entails whether counsel's actions deprived defendant of a fair trial. Nevertheless, defendant has not met that standard. Foremost, as explained above, the question of whether defendant would have prevailed had counsel acted differently is not a close one, so it cannot be said that defendant suffered a fundamental unfairness by counsel's decision not to argue more vociferously for an acquittal on the assault charges. Moreover, it cannot be ignored that counsel did mount a strong, and ultimately successful, argument, that defendant was not guilty of attempted murder. In doing so, he argued that the wounds the victim received were superficial, which could have given the jury a basis for finding defendant not guilty of the assault charges as well. Although counsel did not explicitly argue to the jury that they should find defendant not guilty on those charges, his comments were not a concession of guilt. Rather, it is apparent that counsel's strategy was to focus the jury on what he correctly believed was the winnable part of the People's case. This necessarily involved foregoing an argument on the much less defensible assault charges, which counsel would not have been unreasonable in believing would have eroded his credibility and resulted in conviction on all three counts. In light of the

foregoing, counsel's tactics did not result in defendant receiving a trial that was less than fair.

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

RENWICK, J. (dissenting)

I must respectfully dissent. In my opinion, defendant received ineffective assistance of counsel when his attorney essentially conceded his guilt of first-degree assault, choosing only to litigate the charge of attempted murder, also a class B felony. While in some cases a partial concession of guilt may be a sound strategy, this was not such a case.

Ordinarily, a CPL 440.10 motion to vacate the judgment of conviction is needed to generate the fuller record needed to adequately assess a claim of ineffective assistance of counsel. In this case, however, defendant's trial counsel deliberately made a record of his view of the strength of the People's case and explained that he felt he had no defenses to the first-degree assault charges. Asked by the court if he wished to request a charge on a lesser included offense, counsel repeatedly stated that he could not think of an applicable one. Hence, the existing record is adequate for review of the ineffective assistance claim, as counsel chose to make his own record as to why he was virtually abandoning any defense to first-degree assault.

The People's evidence established that, after a heated argument, defendant pulled out a weapon consisting of three

scalpels attached to one handle, rushed the victim, and slashed him on the neck from behind. Defendant then inflicted additional slash wounds to the victim's face, arm and back before the victim fled into his apartment. Defense counsel reasonably recognized, given this evidence, that defendant had no plausible defense to the charge that he committed at least some kind of assault.

The indictment charged defendant with attempted murder, of which he was found not guilty. It also charged first-degree assault under a theory of intentionally causing serious physical injury to the victim by means of a dangerous instrument, as well as under a theory of seriously and permanently disfiguring the victim, or destroying, amputating, or permanently disabling a member or organ of his body, with intent to cause such injury (*see* Penal Law § 120.10[1],[2]).

"Serious physical injury" is an injury that creates "a substantial risk of death," "serious and protracted disfigurement," or which causes "protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]). Certainly, the evidence here was legally sufficient to support the first-degree assault convictions. Nonetheless, even given the strength of the People's case, there was room for argument that defendant had not

committed the crime of first-degree assault.

The People's medical expert did not testify that any of the victim's injuries created a "substantial risk of death." The expert did opine that one of the cuts to his neck *would have been* life-threatening *if* it had been an inch deeper and severed the carotid artery. The carotid artery was not severed, however, and none of the wounds was actually life-threatening.

Whether a wound creates "serious disfigurement" is judged under an objective, "reasonable observer" standard, considering the nature of the wound, its location on the body, and the victim's overall physical appearance (*see People v McKinnon*, 15 NY3d 311, 315 [2010]). Here, photographs of the victim's injuries indicate that the slash wounds, although shocking in appearance immediately after the attack, appeared to have healed well. Counsel could have made a reasonable argument that the victim's scars have not left his appearance so "distressing or objectionable" as to constitute "severe disfigurement" (*McKinnon*, 15 NY3d at 315).

In addition, "serious physical injury" may exist where the victim suffers "protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Here, the only injury that might have met this standard is one of the

wounds to the victim's forearm, which cut a tendon. The medical expert testified that such an injury could have resulted in nerve damage, and the victim testified that a small section of his arm was sometimes numb. The numbness appears to have been intermittent, however, and, in any event, the victim did not testify that he could not use the arm when it was numb. Under these circumstances, it could be argued that the victim's use of his arm was not so impaired as to constitute "serious physical injury."

In sum, despite the strength of the People's case, there was a sound basis for counsel to argue that the victim did not suffer the requisite "serious physical injury" or "serious disfigurement." Moreover, each of the first-degree assault counts required proof of intent to cause the respective type of injury. Although the jury was certainly permitted to infer, from the nature of the victim's injuries (or from defendant's threatening statements as he was leaving the apartment) that defendant intended to inflict serious physical injury, it was not required to draw that inference (*see People v Steinberg*, 79 NY2d 673, 685 [1992]).

Defendant's counsel reasonably should have defended against the first-degree assault charges, and should have at least

requested submission of second-degree assault as a lesser included offense. If the jury found that the People failed to prove the requisite injury, the requisite intent, or both, but still found that defendant intentionally caused physical injury by means of a dangerous instrument, defendant would have been convicted of a class D felony (*see* Penal Law § 120.05[2]). The People's case was strong, and, of course, defendant might well have been convicted of first-degree assault even had the jury also had the option of convicting him of a lesser offense. But defendant's counsel's error deprived the jury of that choice. The majority inexplicably ignores the fact that counsel accomplished little or nothing by only defending against the attempted murder charge, albeit successfully. The acquittal did not limit defendant's sentencing exposure under the circumstances of the case. He was still convicted of class B felonies and sentenced to the maximum permissible term of imprisonment.

Of course, I recognize that defendant was an extraordinarily uncooperative and disruptive client. Nevertheless, there is no indication that defendant's lack of cooperation impaired his attorney's ability to defend against the assault charges. Under all of the circumstances of this case, counsel's failure to make any arguments against the first-degree assault counts, and his

failure to request second-degree assault as a lesser included offense, compromised defendant's right to a fair trial and deprived him of meaningful representation (*People v Caban*, 5 NY3d 143, 156 [2005]; *People v Hobot*, 84 NY2d 1021, 1022 [1995]). For the same reasons, defendant has also established a reasonable probability that the outcome at trial would have been different but for his counsel's errors (*see Strickland v Washington*, 466 US 668, 694 [1984]). I would therefore reverse, on the law, and remand the matter for a new trial.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5753 Aris Multi-Strategy Fund, L.P., et al., Plaintiffs-Appellants, Index 601110/09

-against-

Accipiter Life Sciences Fund II (QP), L.P., et al. , Defendants-Respondents.

_____

Kirkland & Ellis LLP, New York (Jay P. Lefkowitz of counsel), for appellants.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Thomas J. Fleming of counsel), for respondents.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered January 22, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for gross negligence, breach of fiduciary duty, and unjust enrichment, unanimously affirmed, with costs.

In Delaware, as elsewhere, a court will give full force to the terms of a contract that diminishes the fiduciary duty of care a general partner owes the limited partners (*see Continental Ins. Co. v Rutledge & Co., Inc.*, 750 A2d 1219, 1235 [Del Ch 2000]; *Collins & Aikman Corp. v Stockman*, 2009 WL 1520120, *20, 2009 US Dist LEXIS 43472, *63-64 [D Del 2009]). Here, contractual clauses limited defendants' liability to losses

caused by "gross negligence, willful misconduct, or violation of applicable laws," and thus served to exculpate defendants from breach of fiduciary duty claims that do not involve allegations of this misconduct (*see Schuss v Penfield Partners, L.P.*, 2008 WL 2433842, *10, 2008 Del Ch LEXIS 73, *33-34 [Del Ch 2008]; *Cincinnati Bell Cellular Sys. Co. v Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906 *9, 1996 Del Ch LEXIS 116 [Del Ch 1996], *affd* 692 A2d 411 [Del 1997]).

That defendants failed, in the months prior to the financial crisis of October 2008, to prepare to liquidate the funds to make an equitable distribution to all partners, such as by suspending all redemptions at a time when there was sufficient liquidity to satisfy all redemption requests was insufficient to allege "gross negligence, willful misconduct, or violation of applicable laws." Also insufficient is the allegation that defendant Hoffman failed to fulfill purported representations made to plaintiffs that he would: (1) protect all investors by not letting the funds' illiquid positions grow; (2) liquidate the funds and offer any remaining investors the opportunity to transfer their investments into another fund; and (3) personally buy all illiquid positions from the funds. These allegations cannot overcome the presumption that these were business decisions made on an

informed basis (*see Albert v Alex Brown Mgt. Servs.*, 2005 WL 5750602, 2005 Del Ch LEXIS 133 [Del Ch 2005]). Accordingly, the court properly dismissed the causes of action for breach of fiduciary duty and gross negligence.

Dismissal of the claim for unjust enrichment was also proper because the governing agreements between the parties cover any allegations in connection with the procedures for requesting redemptions, payment upon redemption, and the general partner's ability to suspend redemptions to limited partners, including plaintiffs' claims regarding the purported representations defendant Hoffman made (*see Kuroda v SPJS Holdings, LLC*, 971 A2d 872, 891 [Del Ch 2009]; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). Nor may plaintiffs hold defendant Hoffman individually liable on a theory of unjust enrichment because he was not a party to the contract (*Kuroda*, 971 A2d at 891-892).

The court did not err in dismissing the claims without leave to replead. The facts alleged are not sufficient to support any of plaintiff's asserted claims, and would not support newly asserted claims of fraudulent inducement or promissory estoppel.

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: NOVEMBER 3, 2011

CLERK

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

5922 The People of the State of New York, 14326C/05
Respondent,

-against-

Marvin Byer,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered December 18, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Although the court made several erroneous evidentiary rulings, the evidence of defendant's guilt was so overwhelming that these errors were harmless. Initially, we note that defendant's constitutional claims are unpreserved and without merit, and that the standard relating to nonconstitutional harmless error applies (*see People v Kello*, 96 NY2d 740, 743-744 [2001]).

When defendant confessed to a detective, he volunteered that this was not his first "body," and that there had been nine

others. The court concluded that these remarks tended to refute defendant's claim that his confession had been coerced, because they showed that defendant was in control of the information he chose to provide. While this evidence had some relevance for that purpose, its probative value was far outweighed by its potential for prejudice. Accordingly, these remarks should have been redacted.

However, there is no reasonable probability that this error contributed to the conviction. In detailed oral, written and videotaped confessions, defendant described how he became enraged at the victim, stabbed her to death, and dismembered and disposed of her body. Moreover, defendant's trial testimony was more inculpatory than exculpatory. He testified that he dismembered and disposed of the body, but that he was not the killer. His explanation for this behavior was utterly implausible and had no hope of convincing the jury.

The court also improperly admitted hearsay declarations by several persons. These declarations did not qualify under any hearsay exception, and since their relevance depended on their being true, they were not admissible under the theory that they

were not received for their truth. However, the errors were likewise harmless. The hearsay declarations added little or nothing to the already overwhelming evidence of guilt.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5924 In re Javon Reginald G., also known as Javon N.-L., also known as Javon N.,

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

Everton Reginald G.,
Respondent-Appellant,

Edwin Gould Services for Children and Families,
Petitioner-Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about February 9, 2010, which, insofar as appealed from, determined that respondent father's consent was not required for the subject child's adoption, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The consent of respondent to the adoption of the subject child was not required since he did not maintain "substantial and

continuous or repeated contact with the child" (Domestic Relations Law § 111[1][d]). Respondent admittedly provided no financial support for the child, and the record does not contain any objective evidence of efforts to visit or communicate with the child (*see Matter of Marc Jaleel G.*, 74 AD3d 689 [2010]; *Matter of Chandel B.*, 58 AD3d 547 [2009]. His incarceration does not absolve him of his responsibility for supporting the child or for maintaining regular contact (*see Matter of Bryant Angel Malik J.*, 76 AD3d 936 [2010]; *Matter of Aaron P.*, 61 AD3d 448 [2009]).

The court's determination that the child's best interests would be served by adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147–148 [1984]). The child has lived with his foster parents since he was one month old, and the foster parents, who have provided the child with a loving and nurturing home, have been attentive to the child's developmental and extraordinary medical needs

(*see Matter of Joshua Jezreel M.*, 80 AD3d 538 [2011]; *Matter of Joaquin Enrique C., III*, 79 AD3d 548 [2010]). We have considered and rejected respondent's additional arguments.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5925 Randy Hernandez, an Infant by his Mother and Natural Guardian, Yalitza Diaz, Plaintiff-Respondent, Index 350378/09

-against-

St. Barnabas Hospital, Defendant-Appellant,

Dr. Christopher Leong, M.D., et al., Defendants.

_____

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

Thomas L. Bondy, P.C., New York (Thomas L. Bondy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 16, 2010, which, in this medical malpractice action, to the extent appealed from as limited by the briefs, denied defendant-appellant's motion to dismiss the complaint on the basis of res judicata, unanimously affirmed, without costs.

Supreme Court correctly determined that this action is not barred by the doctrine of res judicata. The prior action was dismissed as a result of plaintiff's counsel's failure to attend a calendar call (*see* 22 NYCRR 202.27[b]). Accordingly, the dismissal was not on the merits and thus does not have res

judicata effect (*Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [2006]; *Kalisch v Maple Trade Fin. Corp.*, 35 AD3d 291 [2006]). We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5926-
5927 Stanislaw Bajor,
Plaintiff-Respondent,

Index 104873/08
590135/09

-against-

75 East End Owners Inc., et al.,
Defendants-Appellants-Respondents,

Renotal Construction Inc.,
Defendant-Respondent-Appellant,

Church Management Corp.,
Defendant.

- - - - -

[And a Third Party Action]

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants-respondents.

Morgan Melhuish Abrutyn, New York (Erin A. O'Leary of counsel), for respondent-appellant.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 15, 2010, which granted plaintiff's motion for partial summary judgment as against defendants 75 East End Owners Inc. (75 East) and Renotal Construction Inc. on the issue of liability under Labor Law § 241(6), and denied that portion of 75 East's cross motion for summary judgment seeking common-law indemnification against Renotal, unanimously affirmed, without

costs.

Plaintiff was injured while working on a renovation project in an apartment located in a building owned by defendant 75 East when he severed his thumb, middle and index fingers while using a table saw that lacked safety devices. Defendant Renotal was the general contractor for the project. Plaintiff established his entitlement to summary judgment as against 75 East and Renotal on his claim pursuant to Labor Law § 241(6) by demonstrating that defendants violated Industrial Code § 23-1.12(c)(2), which requires power-driven saws, other than portable saws, to be equipped with a safety guard. Contrary to defendants' argument, the mere fact that the table saw utilized by plaintiff could be moved from room to room does not render it portable such that this section is not applicable. Further, since there is evidence that plaintiff, who was cutting a six to seven foot length of wood when he was injured, was engaged in ripping, i.e., cutting with the grain (*see Gould v Rexon, Indus. Corp.*, 2006 WL 2301852, *3 n 1, 2006 US Dist LEXIS 73949, *9 n 1 [ND NY 2006]), section 23-1.12(c)(3), which requires that every table saw used for ripping "be provided with a spreader securely fastened in position and with an effective device to prevent material kickback," was also violated.

Although comparative negligence constitutes a valid defense to a Labor Law § 241(6) claim (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]), defendants have not established any comparative negligence.

The motion court properly denied 75 East's motion for common-law indemnification against Renotal, as the evidence indicated that Renotal had general supervisory and coordinating authority at the worksite, but did not supervise or control the work performed (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [2007]; *Burgalassi v Mandell Mech. Corp.*, 38 AD3d 363, 364 [2007]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5928 Ana DiStefano, Index 101657/08
Plaintiff,

-against-

Kmart Corporation International,
Defendant-Appellant,

770 Broadway Owner, LLC,
Defendant,

Thyssenkrupp Elevator Corporation,
Defendant-Respondent.

_____

Lynch Rowin LLP, New York (Karen L. Kirshenbaum of counsel), for appellant.

Babchik & Young LLP, White Plains (Bruce M. Young of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered on or about October 14, 2010, which, after a nonjury trial, dismissed defendant Kmart Corporation International's cross claim for contractual indemnification against defendant Thyssenkrupp Elevator Corporation (TEC), unanimously affirmed, with costs.

There is no conflict between New York and Michigan law on the issue presented. Thus, the dispute of which state's law

should be applied need not be resolved by this Court (*see Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 225 [1993]; *Uygur v Superior Walls of Hudson Val., Inc.*, 35 AD3d 447, 448 [2006]).

The court properly dismissed Kmart's cross claim for contractual indemnification. The indemnity provision of the parties' agreement was not triggered by plaintiff's claim because the evidence, which included, inter alia, Kmart's own expert witness and Department of Buildings records, showed that no malfunction of the subject elevator occurred and that plaintiff's negligence was the sole cause of her accident. Accordingly, plaintiff's accident did not "aris[e] out of [or] in connection with [TEC's] performance or failure of performance" of its work under the agreement (*see Dos Santos v Port Auth. of State of N.Y.*, 85 AD3d 718, 721-722 [2011]; *Rosen v New York City Tr. Auth.*, 295 AD2d 126 [2002]; *compare Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]).

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

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5929 Angelo G. Arias, Index 113044/08
Plaintiff-Respondent,

-against-

Skyline Windows, Inc.,
Defendant-Appellant.
- - - - -
[And a Third-Party Action]

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

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 11, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff maintenance worker alleges that he was injured when, while pulling a trash container, he slipped on broken glass and fell, resulting in the trash container rolling over his foot. Defendant was the company that had been hired to replace and install new windows at the building where plaintiff worked. Defendant failed to demonstrate that its employees did not

perform work at the location until after the day of the subject accident. Although an "affidavit[] indicating that a search of business records had demonstrated a negative is admissible" and can substantiate a summary judgment movant's initial burden (*Dickson v City of New York*, 43 AD3d 809 [2007]; *see Piccinich v New York Stock Exch.*, 257 AD2d 438 [1999]), here, the affidavit of defendant's director of field operations for volume was inconsistent with his own deposition testimony and indicated a lack of "familiarity with the . . . project at issue" (*Barraillier v City of New York*, 12 AD3d 168, 169 [2004]).

Even were we to determine that defendant met its initial burden, plaintiff's opposition raised triable issues as to whether defendant's employees were responsible for creating the condition that caused his injuries. Plaintiff testified that he observed defendant's employees at the building in the days prior to the accident and the affidavit of plaintiff's coworker is consistent with plaintiff's testimony. Although defendant disputes the veracity of the coworker's affidavit, its truth is presumed at this procedural posture where the court's duty is to find issues rather than determine them (*see Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [2010]).

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

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

ENTERED: NOVEMBER 3, 2011

CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, JJ.

5930- Akabas & Cohen, Index 600861/10
5931 Plaintiff-Appellant,

-against-

Fox Rothschild LLP,
Defendant-Respondent.

_____

The Serbagi Law Firm, P.C., New York (Christopher Serbagi of counsel), for appellant.

Ciampi LLC, New York (Arthur J. Ciampi and Maria L. Ciampi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered February 14, 2011, which, insofar as appealed from, granted defendant's motion to dismiss the first, second, third, and fifth causes of action, and order, same court and Justice, entered March 7, 2011, which specified that the dismissal was with prejudice, unanimously affirmed, with costs.

The claims are barred by the doctrine of res judicata (*see generally Matter of Hunter*, 4 NY3d 260, 269 [2005]). It is true that the prior action (*Cohen v Akabas & Cohen*, 71 AD3d 419 [2010] *and* 79 AD3d 460 [2010]) was between plaintiff and nonparty Richard Cohen, not between plaintiff and defendant. However, Cohen, who was a partner at defendant at all relevant times, was

in privity with defendant (*see Pitcock v Kasowitz, Benson, Torres & Friedman, LLP*, 27 Misc 3d 1238[A], 2010 NY Slip Op 51093[U], *affd* 80 AD3d 453 [2011], *lv denied* 16 NY3d 711 [2011]). In the prior action, plaintiff could have argued that Cohen was required to account for the cases that he took with him to defendant law firm (*see Shandell v Katz*, 217 AD2d 472, 473 [1995]), but it did not do so; instead, it argued that Cohen was entitled to the cases, but to no other assets of the partnership.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5932 The People of the State of New York, Ind. 23093C/05
Respondent,

-against-

Darren Gunter,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered February 17, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. After being lawfully arrested on unrelated charges, defendant was in police custody at Central Booking. A detective moved defendant to an interview room in the same building, administered *Miranda* warnings, and questioned him about this murder case. On appeal, defendant challenges his statements solely on Fourth Amendment grounds. However, the detective simply moved defendant from one room to another to speak with him, while he was still in lawful police custody. This was, at

most, a "minimal 'additional intrusion' on the defendant's lawful confinement" (*People v Whitaker*, 64 NY2d 347 [1985], *cert denied* 474 US 830 [1985]). Accordingly, the detective's action did not implicate the Fourth Amendment, and it did not require defendant's consent or any particular level of suspicion. Although defendant asserts that the detective "removed" him from custody, he was actually in police custody throughout. This case does not involve an investigative transfer of an inmate from a correctional facility to police custody, and we need not decide any issue relating to such a transfer.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence did not establish the affirmative defense to felony murder (Penal Law § 125.25[3]). Defendant's videotaped statement undermined his claim that he had no reasonable ground to believe that any of the other participants was armed with a deadly weapon.

Of defendant's challenges to the prosecutor's summation, the only claim that he properly preserved by way of a timely and specific objection was his claim that a particular comment asserted facts not in evidence. However, that remark constituted fair comment on the evidence and reasonable inferences to be drawn therefrom, made in response to defense arguments.

Defendant's remaining challenges to the summation are 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]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5933 In re Bryahanna W.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about May 5, 2002, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated her a juvenile delinquent and imposed a conditional discharge. Given the seriousness of the underlying assault, which caused injury to the victim, as well as appellant's significant pattern of misconduct at school and at

home, this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Accordingly, the court properly concluded that appellant was in need of a full year of supervision.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5934 The People of the State of New York, Ind. 90078/05
Respondent,

-against-

Angelo Diaz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman 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 (Martin Marcus, J.), rendered on or about March 9, 2009,

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

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

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

5935 Angela Davido, Index 306128/08
Plaintiff-Respondent-Appellant,

-against-

Jorge Salazar, et al.,
Defendants,

Juda Construction, Ltd.,
Defendant-Appellant-Respondent.

_____

Cerussi & Spring, White Plains (David H. Strong of counsel), for appellant-respondent.

Lever & Stolzenberg, LLP, White Plains (David B. Lever of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered February 2, 2011, which, to the extent appealed from, in this action for personal injuries sustained when a truck allegedly leased by defendant Juda Construction, Ltd. (Juda) to defendant JCV Trucking, LLC (JCV) and driven by defendant Salazar ran over plaintiff's foot as she crossed an intersection, denied plaintiff's motion for summary judgment on the issue of liability as against Juda, and denied Juda's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Juda failed to establish its entitlement to judgment as a

matter of law on its defense that the Graves Amendment applied to shield it from vicarious liability for plaintiff's injuries (*see* 49 USC § 30106; *Graham v Dunkley*, 50 AD3d 55, 57-58 [2008], *appeal dismissed* 10 NY3d 835 [2008]). The record presents triable issues of fact with respect to whether Juda was a bona fide commercial lessor of motor vehicles and whether it had entered into a valid lease agreement with JCV, which was Salazar's employer.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5937 Gerald I. Cheves, Index 116036/09
Plaintiff-Appellant,

-against-

The Trustees of Columbia University,
sued herein as Columbia University,
Defendant-Respondent.

_____

Gerald I. Cheves, appellant pro se.

Toback, Bernstein & Reiss LLP, New York (Brian K. Bernstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 25, 2010, insofar as appealed from as limited by the briefs, in this action arising from plaintiff being banned from the campus of Columbia University, dismissing plaintiff's causes of action alleging breach of contract and defamation, unanimously affirmed, without costs.

Dismissal of the breach of contract cause of action was proper. "The rights and obligations of the parties, as contained in the university's bulletins, become a part of the parties' contract," but "only specific promises set forth in a school's bulletins, circulars, and handbooks, which are material to the student's relationship with the school, can establish the

existence of an implied contract" (*Keefe v New York Law School*, 71 AD3d 569, 570 [2010] [internal quotation marks and citation omitted]). Here, although the Alumni Relations brochure lists certain benefits and services generally available to alumni, nothing in that document guarantees unfettered, irrevocable access for alumni to the campus or its facilities. Accordingly, even if read broadly, the complaint fails to rely on a specific promise material to plaintiff's relationship with Columbia that has been breached.

The court properly determined that the cause of action sounding in defamation was time-barred (CPLR 215). Contrary to plaintiff's argument, defendant did not "continue[]" its allegedly tortious conduct by repeating in the motion to dismiss that plaintiff committed acts of harassment. Statements made in the course of judicial proceedings pertinent to the litigation are privileged (*see Mintz & Gold, LLP v Zimmerman*, 56 AD3d 358, 359 [2008]. Furthermore, there is no support for plaintiff's

proposition that the statute of limitations governing actions for defamation is subject to a "continuing tort" exception.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5938 In re Jonnevin B.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew S. Wellin of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 14, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him on probation for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order a supervised adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1).

The court improvidently exercised its discretion when it imposed a juvenile delinquency adjudication with probation. This

was not "the least restrictive available alternative" (Family Ct Act § 352.2 [2] [a]). Instead, a supervised adjournment in contemplation of dismissal would adequately serve the needs of appellant and society (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [2011]).

The underlying offense was simple possession of a toy or imitation revolver. There is no evidence of unlawful use or threatened use. Appellant was 14 years old at the time of the adjudication, and this was his first offense.

The court promised appellant at the time of his admission that if he did not commit any further offenses and the probation report did not reveal any negative history not previously disclosed, it would grant an ACD. The report did not disclose any significant negative history. On the contrary, it appeared that appellant was living in an unstable home at the time of the offense and had subsequently been placed in a stable foster home, where he posed no behavioral problems and had been attending school without any absences or further disciplinary issues. In light of the progress made and absence of aggravating factors, an

ACD should have been granted. There is no reason to believe appellant needs any court-imposed supervision beyond the supervision that can be provided under an ACD.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5939 The People of the State of New York, Ind. 443/06
Respondent,

-against-

Jason Wine,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel)and Wachtell, Lipton, Rosen & Katz, New York (Blair E. Kaminsky of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at hearing; James A. Yates, J. at plea and sentencing), rendered March 22, 2007, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Based on the totality of information in their possession (*see e.g. People v Williams*, 273 AD2d 79 [2000], *lv denied* 95 NY2d 940 [2000]), the police had probable cause to arrest defendant and his codefendant for a series of robberies.

Although defendant and the codefendant only matched a general description of the two robbery suspects, and were in a

car whose characteristics were somewhat different from the described getaway car, the two men were in possession of two articles of clothing and a bag that precisely matched the same three particularly described items that were featured in reports of the three recent robberies. In addition, the two men gave the police inconsistent and implausible information, and the codefendant behaved in a belligerent manner and appeared to be hiding something either in the glove compartment or on the floor of the car. While these pieces of information had innocent explanations when viewed individually, they added up to probable cause. Accordingly, the police lawfully arrested the two men and conducted a lawful search of the car under the automobile explanation (*see People v Belton*, 55 NY2d 49, 55 [1982]).

The record also supports the hearing court's alternative finding that these same circumstances posed an actual and

specific danger to the officers' safety that justified a limited search for weapons (*see People v Mundo*, 99 NY2d 55 [2002]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5940 Ramona Rosello, Index 400061/10
Petitioner,

-against-

John B. Rhea, etc., et al.,
Respondents.

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Jeanette Zelhof, MFY Legal Services, Inc., New York (Sara J. Fulton of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondents.

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Determination of respondent The New York City Housing Authority, dated August 26, 2009, approving the decision of the Hearing Officer which denied petitioner's remaining-family-member (RFM) grievance, 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 October 12, 2010), dismissed, without costs.

The determination has a rational basis and is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner admits and the record reflects that her deceased husband, the tenant of record, never received written consent for her to reside in his

apartment, and that she was not an authorized occupant of the apartment for a one-year period before his death (*Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580, 581 [2011]; *Matter of Rivera v New York City Hous. Auth.*, 60 AD3d 509, 509 [2011]). The record does not support petitioner's claim that before the tenant of record's death, he asked respondent for assistance in adding petitioner to his household. In any event, respondent may not be estopped from denying RFM status even if it, among other things, failed to assist the tenant of record with the necessary forms or was aware of petitioner's occupancy (*Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Matter of Edwards v New York City Hous. Auth.*, 67 AD3d 441, 442 [2009]).

We reject petitioner's argument that respondent violated federal, city and state discrimination laws by failing to make reasonable accommodations for her and the tenant of record's disabilities. Petitioner lacks standing to assert disability claims on the tenant of record's behalf (*see Matter of Filonuk v Rhea*, 84 AD3d 502, 503 [2011]). Further, petitioner's alleged disability is irrelevant since, as she concedes, under

respondent's rules, only the tenant of record could have requested and obtained written permission for her occupancy (*see Rivera*, 60 AD3d at 510).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5941- Rossini Excavating Corporation, Index 310423/08
5942- Plaintiff-Respondent,
5943-
5944 -against-

Shelter Rock Builders, LLC, et al.,
Defendants-Appellants.

_____

Robert Litwack, Forest Hills, for appellants.

Arnold S. Kronick, White Plains, for respondent.

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Judgments, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 4, 2010, and April 1, 2011, in plaintiff's favor, unanimously reversed, on the law, with costs, and the judgments vacated. Appeal from order, same court and Justice, entered September 8, 2010, which granted plaintiff's motion for a default judgment and denied defendants' motion to compel acceptance of their late answer, unanimously dismissed, without costs, as subsumed in the appeal from the October 4, 2010 judgment. Appeal from order, same court and Justice, entered April 11, 2011, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

There was no default in answering. Plaintiff waived its objections to the untimeliness of defendants' answer by serving a reply to the counterclaims after rejecting the late answer and

moving for a default judgment (*cf. Oparaji v Duran 18 AD3d 725*). In view of the foregoing, whether defendant demonstrated the grounds required for vacatur of a default and the other issues arising from the subsequent chain of events are academic.

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5945 The People of the State of New York, Ind. 1279/03
Respondent,

-against-

John Burke,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Thomas Farber, J.), rendered June 15, 2010, resentencing defendant to a term of 8½ years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5946 In re Lynn Alice Chan Belarrem, Index 106502/09
Petitioner-Appellant,

-against-

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

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered August 6, 2010, denying the petition to annul respondent's determination, dated January 9, 2009, which denied her appeal from a housing company's rejection of her application for succession rights to an apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to establish that she lived in the subject apartment with her parents for at least two years before their deaths (*see* 9 NYCRR 1727-8.2[a][1]). To the contrary, the evidence showed that petitioner's parents lived in an apartment in another building during that time. Petitioner's claim that

the two nonadjacent apartments should have been considered a single primary residence is also unsupported, since there is no evidence that her parents maintained the subject apartment as an extension of their residence in the other building (*see Sharp v Melendez*, 139 AD2d 262 [1988], *lv denied* 73 NY2d 707 [1989]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5947 Jairo Martinez, Index 309937/09
Plaintiff, 83892/10
83960/10

-against-

342 Property LLC, et al.,
Defendants-Appellants,

Site Safety LLC,
Defendant-Respondent.

- - - - -

[And Other Actions]

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Smith & Laquercia, LLP, New York (Lana S. Kaganovsky of counsel), for appellants.

Miller & Associates, P.C., New York (Scott E. Miller of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 20, 2010, which, to the extent appealed from as limited by the briefs, granted defendant Site Safety LLC's (Site Safety) motion for summary judgment dismissal of all cross claims against it, unanimously affirmed, without costs.

Under their written agreement, defendant Flintlock Construction Services, LLC (Flintlock), as general contractor, retained Site Safety to provide site safety management services, including maintenance of an onsite safety manager during normal business hours and whenever requested by Flintlock, to conduct

weekly safety meetings and periodic safety inspections as per applicable City rules, to advise Flintlock of any trades or subcontractors who failed to comply with the construction project's safety program, and to record observations of safety compliance or non-compliance. In an affidavit offered in opposition to Site Safety's summary judgment motion, Flintlock's field supervisor added that Site Safety "had the authority to stop work that was being performed in an unsafe manner," and averred that he had in fact seen Site Safety stop work, although he offered no details as to any such incident. The field supervisor further added that Flintlock "relied upon Site Safety to correct unsafe work practices at the site." The field supervisor asserted that, although he did not witness plaintiff's accident, he was at the worksite that day, and knew that Site Safety was also present that day "performing safety inspections." In his affidavit, Site Safety's onsite safety manager attested that he rendered services as outlined in the parties' contract, and did not "control, supervise or direct" any work at the site. The safety manager particularly denied supervising or controlling any of plaintiff's work. The safety manager also stated that he did not witness plaintiff's accident, stating that he learned of it from other workers.

In sum, viewing the record in the light most favorable to appellants, Site Safety advised Flintlock on safety matters and, at most, had the authority to stop unsafe work practices. Under these circumstances, Site Safety lacked the control over the conduct of work at the project necessary to impose liability upon it under Labor Law § 200 or common-law negligence (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [2007]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 139-140 [2005]). Site Safety is accordingly entitled to summary judgment dismissing appellants' contribution and common-law indemnity claims, premised on Site Safety's alleged common-law negligence and violation of Labor Law § 200 (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400, 401-02 [2004]). The parties' contract provides for Site Safety to indemnify Flintlock only for losses caused by Site Safety's negligence. Since Site Safety lacked control over plaintiff's work, Site Safety is likewise entitled to summary judgment dismissing appellants' contractual indemnification claim (*see Kemp v Lakelands Precast*, 55 NY2d 1032, 1034 [1982]; *Arteaga v 231/249 W 39 St. Corp.*, 45 AD3d 320, 321 [2007]). We reject Flintlock's argument that it is entitled to contractual indemnification, because it relied on Site Safety to correct unsafe work

practices. Flintlock's argument in this regard is based solely on its field supervisor's allegation to that effect in his affidavit, as the parties' contract makes no mention of Flintlock's intention to rely on Site Safety to correct unsafe work practices. Instead, the contract unambiguously limits Site Safety's indemnification duty to instances of negligence by Site Safety. Accordingly, there is no basis to look outside of the contract to discern Flintlock's alleged intention to rely on Site Safety to correct unsafe work practices (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]). In any event, Flintlock's assertion that it relied upon Site Safety to stop unsafe work practices cannot obviate the contract's clear provision that Site Safety would owe a duty to indemnify only if it were negligent. Since there is no evidence that Site Safety was negligent, it owes no duty to indemnify Flintlock under the contract.

We agree with the motion court's finding that appellants have failed to point to any facts within the exclusive knowledge of Site Safety which may exist and are essential to justify opposition to the summary judgment motion. We thus affirm the motion court's conclusion that there was no need to await further

discovery prior to decision of the motion (*see* CPLR 3212 [f]; *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 361 [1995]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

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

5948N-
5949N

Dow Kim,
Petitioner-Respondent-Appellant,

-against-

Vitaly Dukhon,
Respondent-Appellant-Respondent.

Index 600515/10

Winslett Studnicky McCormick & Bomser LLP, New York (Usher Winslett of counsel), for appellant-respondent.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Leo V. Leyva and Jed M. Weiss of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 12, 2011, which granted respondent's motion to reargue, and upon reargument, granted respondent's prior cross motion to the extent of denying and dismissing the petition to permanently stay arbitration, unanimously affirmed, with costs. Order and judgment (one paper), same court and Justice, entered November 8, 2010, which, to the extent not mooted by the reargument order, denied the cross motion for sanctions, unanimously affirmed, with costs.

In this article 75 proceeding, Dow Kim seeks to stay the arbitration commenced by Vitaly Dukhon on the ground that Kim never agreed to be personally obligated to arbitrate. The underlying dispute involves Dukhon's claim that he is owed

compensation in connection with his work as a portfolio manager for a hedge fund that failed to launch.

In 2007, Kim, a partner in Diamond Lake Investment Group, L.P. (LP) and member of Diamond Lake GP, LLC (LLC, together with LP, Diamond Lake), created a hedge fund (the fund). In connection with the anticipated launch of the fund, Dukhon was hired as a portfolio manager with a minimum compensation for 2007 of $2.5 million, and the parties entered into a number of agreements. In addition, Dukhon alleges that Kim personally guaranteed his salary.

Kim executed Diamond Lake GP LLC's Limited Liability Company Agreement (the LLC agreement) as a "Managing Member." The LLC agreement, which contains a Delaware choice of law provision (§ 9.05), provides:

> "With respect to any controversy or dispute arising out of this Agreement, interpretation of any of the provisions hereof, or the actions or omissions of any Member in connection with the business of the Company, each of the parties consents to submit any such controversy or dispute to be finally resolved by arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration" (§ 9.06).

Kim is personally a "party" to, and bound by, the LLC Agreement and arbitration clause contained therein. As stated in

its preamble, the agreement is "among the undersigned (collectively, the '*Members*,' which term shall include any persons admitted to Diamond Lake GP LLC [])" and Delaware law, which controls (§ 9.05), provides that "a member . . . of a limited liability company is bound by the limited liability company agreement whether or not the member . . . executes the . . . agreement" (Del. Code Ann., Tit. 6, § 18-101[7]).

On reargument, the Court properly determined that the issue of the arbitrability of the claims asserted is for the arbitration panel, given the "clear and unmistakable" intent contained in the arbitration provision (*see McLaughlin v McCann*, 942 A2d 616, 625-626 [Del Ch 2008]*; Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]).

The Court providently exercised its discretion in denying sanctions (*see Arnav Indus., Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner,* 281 AD2d 192 [2001]).

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

ENTERED: NOVEMBER 3, 2011

CLERK

Saxe J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5040 Chelsea 18 Partners, LP, Index 110264/10
Plaintiff-Appellant,

-against-

Sheck Yee Mak, et al.,
Defendants-Respondents.

_____

Belkin Burden Wenig & Golman, LLP, New York (Joseph Burden of counsel), for appellant.

Benjamin R. Kaplan, New York, for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 13, 2010, reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded to Supreme Court for further proceedings.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Sheila Abdus-Salaam
Nelson S. Román, JJ.

5040
Index 110264/10

_____x

Chelsea 18 Partners, LP,
Plaintiff-Appellant,

-against-

Sheck Yee Mak, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 13, 2010, which granted defendants' motion to dismiss the complaint.

Belkin Burden Wenig & Goldman, LLP, New York (Joseph Burden and Madga L. Cruz of counsel), for appellant.

Benjamin R. Kaplan, New York, for respondents.

CATTERSON, J.

In this landlord-tenant dispute, we find that the plaintiff-landlord has the right to bring an action for common-law nuisance in Supreme Court in the face of defendants-tenants' alleged four-year campaign of premeditated and malicious harassment designed to prevent the landlord from collecting lawful rents and effectively managing and operating its building. The landlord's complaint includes a litany of allegations amounting to 159 paragraphs in 43 pages, and the landlord seeks injunctive relief in the form of ejectment of the tenants as well as damages in the amount of $45,205.79 and punitive damages in the amount of $500,000.

We note at the outset that this action is clearly distinguishable from the type of action brought by a landlord in Housing Court where nuisance is a statutorily authorized basis for eviction, and where the action is generally brought for the protection and safety of a third party, namely the other tenants of a building.[1]

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[1] See e.g. Administrative Code of the City of New York § 26-408(a)(2); 9 NYCRR 2104.2 & 2204.2; Brodcom W. Dev. Co. v. Best, 23 Misc.3d 1140(A), 889 N. Y.S.2d 881 (Table)(Civ. Ct., N.Y. County 2009); 33-39 E. 60th St. LLC v. Hunter, 21 Misc.3d 129(A), 873 N.Y.S.2d 237 (Table) (App. Term, 1st Dept. 2008); 17th Holding, LLC v. Rivera, 21 Misc.3d 55, 871 N.Y.S.2d 585 (App. Term, 1st Dept. 2008); 405 E. 56th St., LLC v. Morano, 19 Misc.3d 62, 860 N.Y.S.2d 784 (App. Term, 1st Dept. 2008).

Hence, not only is Supreme Court a proper forum in this case, but we also find that the landlord's allegations of the tenants' uniquely egregious, scheming and recurring objectionable conduct are simply not amenable to adjudication in a summary proceeding in Civil Court.

The following facts are undisputed: The plaintiff landlord is the owner of a 26-unit walk-up apartment building in lower Manhattan. The defendant tenants are members of a family that occupy two rent-controlled units in the landlord's building. Sheck Yee Mak and Choi Kuen Mak are the tenants of apartment 13, and their son, Michael Mak, is the tenant of apartment 15. The record reflects that the parties have been adversaries in several proceedings in the Housing Part of Civil Court for the tenants' nonpayment of rent, refusal of access, and harassment of other tenants.

In June 2010, the landlord served the tenants with notices of termination pursuant to Administrative Code § 26-408(a)(2). The notice included this warning to the tenants:

> "... [U]pon your failure to so quit, vacate and surrender possession thereof, the Landlord will commence an action or proceeding in the Courts of the State of New York to recover possession of the Subject Apartment[s]."

It is undisputed that the tenants continue in possession of the two apartments without permission.

On August 2, 2010, the landlord brought this action in Supreme Court for, inter alia, common-law nuisance, seeking possession and/or monetary damages. By notice of motion dated August 22, 2010, the tenants moved to dismiss the complaint pursuant to CPLR 3211(a)(2) and CPLR 3211 (a)(5). They argued that Supreme Court lacks jurisdiction and that the action is barred by the doctrines of res judicata and collateral estoppel.

By order dated October 13, 2010, Supreme Court dismissed the landlord's complaint, describing the action as a "summary proceeding guised as a plenary action." The court noted that although the landlord seeks injunctive relief and money damages, the plenary action is "enmeshed" with an action seeking possession based on "non-payment of rent/nuisances/non-compliance with prior stipulations between the parties," and concluded that Civil Court is the proper forum for this action.

For the reasons set forth below, we reverse and reinstate the complaint. As a threshold issue, Supreme Court has unlimited general jurisdiction over all plenary real property actions, including those brought by a landlord against a tenant. N.Y. Const. art. VI, § 7(a); see Nestor v. McDowell, 81 N.Y.2d 410, 415, 599 N.Y.S.2d 507, 509, 615 N.E.2d 991, 993 (1993). Moreover, as the landlord correctly asserts, it is for the plaintiff to determine how, and in which court, to plead its

case. Lex 33 Assoc. v. Grasso, 283 A.D.2d 272, 273, 724 N.Y.S.2d 413, 414 (1st Dept. 2001) (plaintiff entitled to "chart its own procedural course"). Thus, the tenants are entirely incorrect in asserting that Supreme Court lacks subject matter jurisdiction.

Supreme Court, in its discretion, may decline to review an action it considers appropriately brought in Civil Court. Nestor, 81 N.Y.2d at 415, 599 N.Y.S.2d at 509; see also Cadle Co. v. Lisa, 46 A.D.3d 422, 848 N.Y.S.2d 626 (1st Dept. 2007). In this case, however, Supreme Court improvidently exercised that discretion. It clearly failed to understand the thrust of this action as a common-law cause of action for private nuisance arising from the landlord's interest in the use and enjoyment of its property.

In a common-law cause of action for nuisance, the plaintiff must sufficiently plead, and subsequently establish, the following elements: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169, 173, 362 N.E.2d 968, 972 (1977); see also Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 769 N.Y.S.2d 785, 802 N.E.2d 135 (2003) (nuisance is implicated by a pattern of

continuity or recurrence of objectionable conduct).

In this case, the landlord alleges the following recurring objectionable conduct: The tenants illegally altered plumbing in both apartments, switching the position of the sink and the bathtub, and added outlets, switches and fixtures creating a hazardous electrical condition with exposed wiring. They then complained to the New York City Department of Buildings (hereinafter referred to as "DOB") that the plumbing and electric in the apartments were defective, and the DOB and Environmental Control Board issued violations against the landlord requiring it to repair the tenants' handiwork. The tenants thwarted the landlord's attempts to cure the violations by refusing access to the apartment, and then applied for rent reductions based on the very same conditions that they refused to allow the landlord to repair. Over a period of three years, the tenants procured 76 Housing and Preservation Department violations against the landlord. No violations were lodged concerning other tenancies in the building.

The complaint further alleges that the tenants not only unjustifiably denied or failed to arrange access, but also, knowing of the agency and court-imposed deadlines, attempted to extort extra work from the landlord in return for access, such as a new linoleum floor and bathtub of the tenants' choosing; and

that tenant Michael Mak attempted to coerce the building superintendent to agree to a $50,000 penalty if the workers were late or the work was not completed to code.

Of the 21 instances of denial of access catalogued in the landlord's complaint beginning in February 2008, only Michael Mak's denial of access to apartment 15 from November 2009 to March 2010 was addressed in a March 24, 2010 holdover proceeding and was settled by stipulation. Further, the landlord alleges that the Mak tenants harassed other tenants on the floor to the point of driving out those tenants, thereby forcing the landlord to bear the expense and inconvenience of repainting and re-letting the apartment.

The harassment by the Mak tenants allegedly extended to the landlord and its staff: the tenants allegedly physically obstructed work, videotaped, and threatened and intimidated the landlord's workers by yelling and screaming at them. As a result, the building manager and superintendent were forced to remain in the apartments during the repairs to prevent altercations and to keep workers from walking off the job.

Michael Mak also allegedly accosted, harassed, and threatened the owner and operator of a café, the only commercial enterprise in the building, and filed meritless complaints with the New York Department of Environmental Protection for excessive

noise. The tenants also threatened and intimidated the landlord's attorney, including following him out of court hissing and muttering. On another occasion, the tenants refused to leave the building manager's office after the landlord's attorney declined to renegotiate a stipulation, and the police were summoned.

The complaint also chronicles the tenants' unjustified withholding of rent, forcing the landlord to bring three nonpayment proceedings in Housing Court in 2007, 2008 and 2010. Additionally, the allegations of objectionable conduct include the tenants' multiple, duplicative applications to the New York State Division of Housing and Community Renewal for rent and fuel cost reductions.

Accepting all of the landlord's allegations as true and affording them every favorable inference, as we must on a CPLR 3211 motion to dismiss (Salles v. Chase Manhattan Bank, 300 A.D.2d 226, 754 N.Y.S.2d 236 (1st Dept. 2002)), the landlord's complaint sufficiently pleads a pattern of recurring objectionable conduct. Moreover, the landlord sufficiently pleads that the tenants' interference with its use and enjoyment of the property is intentional. It is well established that interference "'is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is

substantially certain to result from his conduct.'" Copart Indus., 41 N.Y.2d at 571, 394 N.Y.S.2d at 174, quoting Restatement of Torts § 825. Here, the allegations include the tenants' unrebutted threats to the landlord that they would "not make this easy" on the landlord, and their statements that they had filed complaints because the landlord was "suing them;" the latter statement made in reference to the nonpayment proceeding the landlord brought in Housing Court for their months-long arrears.

Indeed, in many cases of private nuisance the intentional element is satisfied simply by a defendant's knowledge that interference with use and enjoyment *will be the result* of his/her intentional act. See 61 W. 62 Owners Corp. v. CGM Emp. LLC, 77 A.D.3d 330, 906 N.Y.S.2d 549 (1st Dept. 2010), aff'd as modified, 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172 (2011). In contrast, this is one of the rare cases where the landlord's detailed complaint presents a clear picture of the tenants' scheme to intentionally and directly interfere with landlord's use and enjoyment for the sole purpose of such interference; and where tenants' recurring, objectionable conduct has deprived the landlord of the fruits of tenancy to the point that the landlord is no longer able to collect rent or provide services.

Finally, although the motion court did not directly address

the tenants' argument that the doctrines of res judicata or collateral estoppel bar the landlord's action, we find this argument utterly without merit. In the face of the lengthy, detailed complaint and the tsunami of allegations set forth above, it is preposterous for the tenants to argue that the landlord is merely relitigating previous Housing Court proceedings. The references to prior proceedings serve only to further support landlord's assertion that it has a cognizable claim in common-law nuisance. See e.g. Greene v. Stone, 160 A.D.2d 367, 553 N.Y.S.2d 421 (1st Dept. 1990); 25th Realty Assoc. v. Griggs, 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dept. 1989).

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 13, 2010, which granted the defendants' motion to dismiss the complaint, should be reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded to Supreme Court for further proceedings.

All concur.

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

ENTERED: NOVEMBER 3, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Abdus-Salaam, JJ.

5543 In re Chandra LaSonde, et al., Index 114818/10
Petitioners-Respondents,

-against-

Norman Seabrook, etc., et al.,
Respondents-Appellants.

_____

Koehler & Isaacs LLP, New York (Howard G. Wien of counsel), for appellants.

Carter & Associate Attorney, PLLC, New York (Damond J. Carter of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered April 12, 2011, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Rolando T. Acosta
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

5543
Index 114818/10

_____x

In re Chandra LaSonde, et al.,
Petitioners-Respondents,

-against-

Norman Seabrook, etc., et al.,
Respondents-Appellants.

_____x

Respondents appeal from an order and judgment (one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered April 12, 2011, which, in this CPLR article 78 proceeding, denied their motion to dismiss the petition, granted the petition and directed them to call a special meeting for the purpose of resolving petitioner Chandra LaSonde's charges against respondent Norman Seabrook, in his capacity as President of respondent Correction Officers' Benevolent Association.

Koehler & Isaacs LLP, New York (Howard G. Wien of counsel), for appellants.

Carter & Associate Attorney, PLLC, New York (Damond J. Carter of counsel), for respondents.

ACOSTA, J.

Petitioners are members of Correction Officers' Benevolent Association (COBA), a labor union and not-for-profit corporation with over 8,000 members, all of whom are correction officers employed by the City of New York. Respondents are COBA as well as COBA's President, Norman Seabrook, and its Recording Secretary, Karen Belfield. At issue in this case is whether respondents are obligated under COBA's constitution and bylaws to call a special meeting at which petitioners can present charges of malfeasance and misconduct against COBA's entire Executive Board (including respondents Norman Seabrook and Karen Belfield) in accordance with Article IX, Section 1 of COBA's constitution.

Background

Between July 1, 2006 and November 20, 2009, petitioner LaSonde was COBA's financial secretary. Between October 2007 and the week of July 6, 2009, she also served as administrator of two union-sponsored employee benefit trust funds. On or about November 20, 2009, LaSonde and co-executive board member Allen Blake were accused by Seabrook of having committed insurance fraud by improperly submitting a claim for death benefits for Blake's former wife. After being confronted by Seabrook regarding the fraud allegations, LaSonde and Blake resigned from

their executive positions with COBA.[1] One week later, LaSonde sought to rescind her resignation, but that request was denied.[2]

By letter to Belfield dated December 21, 2009, LaSonde charged Seabrook with misconduct and demanded a special meeting be scheduled to resolve the charges.[3] Belfield responded to LaSonde's letter on December 28, 2009, informing LaSonde that the charges would not be processed due to technical defects in how they were filed. In a letter to Belfield dated January 5, 2010, LaSonde set forth additional charges against Seabrook.[4] By letter dated January 12, 2010, Belfield informed LaSonde that the charges in her January 5, 2010 letter would not be processed because she had not asserted violations of COBA's constitution and bylaws. On January 12, 2010, LaSonde wrote a third time to

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[1]In addition to confronting Blake and LaSonde, Seabrook also reported the alleged insurance fraud to the New York City Department of Investigation, which commenced an investigation. On March 31, 2010, Blake and LaSonde were arrested and charged in federal court with one count each of mail fraud in connection with the insurance fraud allegations. In June of 2010, Blake was convicted of the charge; LaSonde was acquitted.

[2]LaSonde alleges that the resignations were coerced while respondents insist that the resignations were voluntary.

[3]Specifically, LaSonde claimed that Seabrook violated COBA's constitution and bylaws by disregarding a motion which sought to refuse to accept the resignations of LaSonde and Blake at a December 16, 2009 general membership meeting.

[4]The new charges were that Seabrook (1) improperly demanded LaSonde's resignation; (2) falsely imprisoned LaSonde at COBA's offices and (3) coerced and threatened LaSonde.

Belfield in order to resubmit the charges that she had set forth against Seabrook in her December 21, 2009 letter. By letter dated January 21, 2010, LaSonde filed charges against Belfield for misconduct in connection with her failure to serve and process the charges she made against Seabrook.[5] On January 22, 2010, Belfield advised LaSonde that the charges regarding Seabrook in the January 12, 2010 letter would not be processed because she failed to allege violations of COBA's constitution and bylaws.

On February 1, 2010, Blake and LaSonde commenced a federal lawsuit against Seabrook, COBA and others, which included various federal and state claims alleging, inter alia, that Seabrook violated COBA's duty of fair representation by asserting false allegations of insurance fraud, coercing Blake and LaSonde to resign, falsely imprisoning them in COBA's office, denying their request for a special hearing to determine the merits of the allegations of fraud, and inducing the City Department of Investigation to retaliate against Blake and LaSonde. In late July 2010, the court dismissed all of the federal claims with prejudice and all of the state law claims without prejudice (*see LaSonde v Correction Officers' Benevolent Assoc.*, 2010 WL

[5]LaSonde has charged Belfied with misfeasance for failing to serve and process the charges against Seabrook.

3034246, 2010 US Dist LEXIS 78698 [SD NY 2010]).

By letter dated August 17, 2010, LaSonde filed additional charges with Belfield, alleging that various members of COBA's Executive Board (including Seabrook and Belfield) had committed numerous acts of misconduct.[6] LaSonde specifically requested a special meeting to resolve the charges. In a September 24, 2010 letter to Belfield, LaSonde added more charges against the various board members and once again requested a special meeting.[7] Finally, by letter to Belfield dated October 13, 2010, LaSonde resubmitted the August 17 and September 24, 2010 charges and requested a special meeting. In her response, dated March 10, 2011, Belfield unequivocally stated that the charges contained in LaSonde's October 13, August 17 and September 24, 2010 letters would not be presented to a special meeting.

On November 8, 2010, petitioners commenced this proceeding

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[6]The charges were directed at (1) the scheduling and cancelling of union meetings; (2) ignoring and refusing to recognize motions; (3) refusing her reinstatement; (4) misleading the membership on "legal guidelines/restrictions"; (5) refusing to provide copies of documents to members; (6) "violating their fiduciary responsibility to represent all COBA Members as well as report wrongdoing within the union"; (7) failing to call the "prior special meetings that were requested"; (8) "[m]isappropriation of Union dues"; and (9) "[f]raudulent State of the Union Financial Reports."

[7]The new charges against the Board included that they (1) lodged false allegations, (2) made false testimony and (3) refused her reinstatement.

for an order directing respondents to schedule a special meeting to consider the charges brought against Seabrook. On December 29, 2010, respondents filed a motion to dismiss asserting, inter alia, that (1) the petition failed to state a cause of action because COBA was not required to call a special meeting to consider the charges raised by LaSonde; (2) the petition was barred by the applicable statute of limitations; and (3) dismissal of the federal civil lawsuit barred this petition. On March 11, 2011, COBA filed a verified answer.

As a threshold matter, Supreme Court determined that this proceeding was not barred by the dismissal of LaSonde's federal civil suit. As for the statute of limitations argument, the court found that the responses written before August 17, 2010 lacked the clarity of an actual determination required for the statute of limitations to start running. The court further found that COBA's constitution and bylaws mandated that a special meeting be called promptly to resolve charges made against an executive board member. Accordingly, the court denied the motion to dismiss, granted the petition, and directed COBA's executive board to promptly call a special meeting to resolve the charges. This appeal followed.

Analysis

It is well established that "[a] union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured and the duties assumed by those who become members, unless contrary to public policy" (*Ballas v McKiernan*, 41 AD2d 131, 133 [1973], *affd* 35 NY2d 14 [1974]). A union that is a not-for-profit corporation - such as COBA[8] - is a quasi-governmental body for the purpose of ensuring that such an entity acts in accordance with its rules and regulations (*see Simoni v Civil Serv. Empl. Assn.*, 133 Misc 2d 1, 9 [Sup Ct Albany County, 1986] ["The law has long been settled that once a union decides to incorporate it is subject to New York State's statutes controlling corporate activity irrespective of any countervailing union policy"]). The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an article 78

[8]See NYS Dep't of State, Div. of Corps., Entity Information for Correction Officers' Benevolent Association, Inc. <http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=48730&p_corpid=40498&p_entity_name=Correction%20Officers&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0> This Court has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State (*see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-20 [2009]).

proceeding (*Allen v New York City Tr. Auth.*, 109 Misc 2d 178, 182-183 [Sup Ct Kings County, 1981], citing *Caliendo v McFarland*, 13 Misc 2d 183, 188 [Sup Ct New York County, 1958]).

Generally, a court considering the validity of actions taken by a union official must determine whether said actions are authorized under the union's constitution or bylaws (*Allen*, 109 Misc 2d 178 at 184). In so doing, the court must assess the union official's claim that his or her actions are authorized under the constitution or bylaws by (1) independently reviewing the constitution or bylaws "in accordance with the general rules of construction appertaining to contracts" and (2) determining whether the union official's interpretation is a reasonable interpretation of the constitution or bylaws (*id.*).[9]

Here, COBA's constitution and bylaws provide that meetings are governed generally by Article X of the bylaws. Section 3 of that article provides that "[s]pecial meetings of the Association *may* be called by the President at his/her discretion" (emphasis added).

Article IX, Section 1, of COBA's constitution and bylaws permits a member of the union to charge any other union member or

[9]In other words, the court must review the union's interpretation of its constitution or bylaws for consistency with the principles of good faith and fair dealing (*Allen*, 109 Misc 2d 178 at 184).

union officer with "misconduct, misfeasance, nonfeasance or malfeasance." Such charges are required to be submitted to the recording secretary - here respondent Karen Belfield - and the processing of charges "follows the same [procedures] as in Article IV, Section [4]." Article IV, Section 4, in turn, provides that "if the [charged] individual is an executive Board member . . . a special meeting of general membership *shall* be called promptly for the purpose of resolving the charges" (emphasis added).

On appeal, respondents first contend that the court erred in granting the petition in that it erroneously found that respondents' failure to hold a special meeting violated COBA's bylaws, or was arbitrary, capricious or an abuse of discretion. According to respondents, a correct reading of the bylaws leads to the conclusion that the decision to call a special meeting is always in the president's discretion despite the language requiring that a special meeting *shall* be called to resolve charges against an executive board member. Although we recognize that Section 3 of Article X permits the president to call special meetings at his/her discretion, there is no indication that such discretion overrides the mandatory calling of a special meeting in the event of charges of misconduct. Adopting respondents' interpretation of Section 3 of Article X would inappropriately

transform the language of Article IV, Section 4 into mere surplusage (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [2008] ["a contract should be construed so as to give full meaning and effect to all of its provisions"] [internal citations omitted]). Since we do not believe that respondents' self-serving interpretation is the most reasonable interpretation of COBA's constitution and bylaws (*id.*), we conclude that Supreme Court was correct in finding that respondents' refusal to call a special meeting violated COBA's constitution and bylaws, was arbitrary, capricious and an abuse of discretion (*see Allen*, 109 Misc 2d 178).[10]

Respondents next contend that Supreme Court erred in determining that the petition was timely with regard to certain charges that LaSonde had initially asserted in December 2009 and January 2010 and then reasserted in her August and September 2010 letters. Respondents are correct in observing that an article 78 proceeding must be commenced within 4 months of the "determination to be reviewed becom[ing] final and binding upon

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[10]In any event, there are strong prudential reasons for declining to endorse an interpretation of COBA's constitution and bylaws that would allow one of the union's officers to serve as his or her own judge. (*cf*. The Federalist No. 10 (James Madison) ["No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity"]).

the petitioner . . ., or after the respondent's refusal, upon the demand of the petitioner . . ., to perform its duty" (CPLR 217). "To determine if agency action is final . . . consideration must be given to the completeness of the administrative action and a pragmatic evaluation [must be made] of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998] [internal quotation marks and citation omitted]). "A determination generally becomes binding when the aggrieved party is notified. [Moreover, t]he burden rests on the party seeking to assert the statute of limitations as a defense to establish that its decision provided notice more than four months before the proceeding was commenced" (*Berkshire Nursing Ctr., Inc. v Novello*, 13 AD3d 327, 328 [2004] [internal quotation marks and citations omitted]).

We agree with Supreme Court that none of the responses to LaSonde's letters in January 2010 contained "the kind of clarity of actual determination that is required to begin the time to run for statute of limitations purposes." Specifically, none of the responses clearly stated that a special meeting would not be held but, rather, provided various reasons why the charges could not be processed, such as failure to file the charges in duplicate. By contrast, in the March 2011 letter finally responding to the

August, September and October letters from LaSonde, Belfield specifically and clearly advised that the charges would not be presented to a special meeting. Accordingly, the re-asserted charges were not time-barred (*see Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983] ["[F]or the purposes of the commencement of the statutory period, the petitioner cannot be said to be aggrieved by the mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final"]; *Berkshire Nursing Ctr.*, 13 AD3d 327 at 328).

Respondents' final argument is that because LaSonde's federal law suit arose out of the same facts and circumstances, the charges against Seabrook are barred by res judicata.

The doctrine of res judicata dictates that, "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" *(Gramatan Home Inv. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Here, the dismissal of LaSonde's federal claims "with prejudice" constitutes an adjudication "on the merits" as to those claims *(see Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, 509 [2004] ["A dismissal 'with prejudice' generally signifies that the court intended to dismiss

the action 'on the merits'"], quoting *Yonkers Constr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375 [1999]). Nonetheless, LaSonde's federal lawsuit dealt with different issues of fact and questions of law from those raised in this proceeding - i.e., she was not seeking an order directing that the union schedule a special meeting in her federal claim but, rather, monetary damages based on alleged retaliation. As such, the dismissal of LaSonde's federal claims does not preclude consideration of this petition (*see Silberstein, Awad & Miklos, P.C. v Spencer, Maston & McCarthy, LLP*, 43 AD3d 902, 903 [2007]). Similarly, given the lack of finality inherent in the federal court's dismissal "without prejudice" of LaSonde's state claims, the doctrine of res judicata cannot be applied on the basis of those claims (*see Landau, P.C. v LaRossa, Mitchell, & Ross*, 11 NY3d 8, 13 [2008]; *American Equit. Corp. v Parkhill*, 252 App Div 260, 262-263 [1937]).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered April 12, 2011, which, in this CPLR article 78 proceeding, denied respondents' motion to dismiss the petition, granted the petition and directed respondents to call a special meeting for the purpose of resolving petitioner Chandra LaSonde's charges against

respondent Norman Seabrook, in his capacity as President of COBA, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 3, 2011

CLERK