SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 15, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Acosta, Freedman, Abdus-Salaam, JJ.

5204 In re People Care Incorporated, doing business as Assisted Care, Petitioner-Appellant, Index 109193/09

-against-

The City of New York Human Resources Administration, et al., Respondents-Respondents.

Hiscock & Barclay, LLP, New York (Richard S. Fischbein and Todd V. Lamb of counsel), for appellant.

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

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered January 7, 2010, which denied the petition seeking to prohibit and vacate a March 11, 2009 demand by respondent NYC Human Resources Administration, Department of Social Services (HRA) that petitioner pay it $6,998,432, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, the facts and

in the exercise of discretion, without costs, the petition reinstated and the matter remanded for further proceedings.

Petitioner supplies personal care services under contract with HRA to persons covered by the Medicaid program. At issue is a determination by HRA to recoup nearly $7 million in contested funds paid to petitioner under a program to promote recruitment and retention of personal care workers. The judgment appealed from granted HRA's motion to dismiss the petition on the ground that petitioner failed to comply with the dispute resolution procedures contained in the governing agreement (CPLR 7804[f]). At this juncture, HRA has neither answered the petition nor filed the transcript of the proceedings (CPLR 7804[d], [e]), and we remand to develop the record, both as to whether HRA is authorized to recoup the funds and whether petitioner was excused from exhausting the contractual procedures.

The doctrine of exhaustion of administrative remedies applies "to contractual provisions which provide for dispute resolution procedures as a condition precedent to any action or proceeding in the courts" (*Pantel v Workmen's Circle/Arbetter Ring Branch 281*, 289 AD2d 917, 918 [2001]). However, a party may be relieved of the requirement to exhaust administrative remedies when "an agency's action is challenged as . . . wholly beyond its

grant of power" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Where the petitioner demonstrates that such a challenge has substance (*see e.g. Matter of First Natl. City Bank v City of New York*, 36 NY2d 87, 92-93 [1975] [unconstitutional tax levy]; *Matter of Huntington Yacht Club v Inc. Vil. of Huntington Bay*, 272 AD2d 327, 328 [lack of jurisdiction]), the court has the discretion to rely on this exception to the exhaustion requirement (*see Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 318, 322 [2003]).

Public Health Law § 2807-v(1)(bb)(iii) provides that the state Commissioner of Health "shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility." Neither the statute nor the memorandum of understanding between the New York State Department of Health (DOH) and HRA delegates this power to HRA. Significantly, respondents cite no specific statute or regulation that gives them the power to recoup funds awarded pursuant to Public Health Law § 2807-v(1)(bb). Nonetheless, it may be well within DOH's power to delegate auditing responsibilities to another agency such as HRA (*see* Social Services Law § 364-a; § 368-c[2]).

DOH has not been shown to be a necessary party (*see* CPLR 1001[a]). Petitioner seeks no relief against it (*see Knapton v Kitchin*, 98 AD2d 937, 938 [1983]) and reversal is sought solely on the basis of HRA's lack of power. Furthermore, a finding that HRA is without authority to recoup the subject funds will not impact the DOH Commissioner's ability to recover the funds from petitioner and thus would not inequitably affect his interests.

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

5401 The People of the State of New York, Respondent,

-against-

Bernell Frank, Defendant-Appellant.

Ind. 6415/03

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

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 24, 2006, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

Following our remittitur (65 AD3d 461 [2009]), Supreme Court conducted a hearing and properly denied the motion to suppress. Defendant's contention that Supreme Court incorrectly limited the scope of the suppression hearing to issues arising out of *Payton v New York* (445 US 573 [1980]) is not preserved for our review (*see* CPL 470.05[2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* 470.15[6][a]). Defense counsel raised no

objection to the court's repeated pronouncements as to the scope of the hearing and implicitly approved the determination that the hearing would be limited to the alleged *Payton* violation. As an alternative holding, we find no error since our remittitur was based on our finding that defendant's counsel provided all the particulars required in a motion alleging a *Payton* violation and the People's response was inadequate to resolve that issue without a hearing.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5427 In re Sam Domb, et al., Petitioners,

-against-

Rafael Cestero, Commissioner of the Department of Housing Preservation and Development of the City of New York, et al., Respondents.

Index 112951/09

Robinson, Brog, Leinwand, Greene, Genovese & Gluck, P.C., New York (Philip T. Simpson of counsel), for petitioners.

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

Determination of respondent Department of Housing Preservation and Development, dated May 13, 2009, which denied petitioners' application for a certificate of no harassment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered March 19, 2010), dismissed, without costs.

The denial of petitioners' application for a certificate of no harassment was proper. The record shows that the ALJ's finding that petitioners engaged in harassment, as the term is defined by Administrative Code of City of NY § 27-2093(a), was

supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]). "Substantial evidence" is merely "relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . and it is of no consequence that the record would have also supported a contrary conclusion" (*Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [2006]). The testimony adduced at the hearing showed that conditions at the premises during the 36-month period prior to petitioners' application (*see* Administrative Code § 27-2093[c]) included, inter alia, leaks in tenants' apartments and lead-paint and mold conditions in another tenant's apartment (*see Matter of Hersh v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 44 AD3d 525 [2007]). No basis exists to disturb respondents' findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]), which, in any event, are generally unreviewable by the courts (*id.*; *see also Silbergarb v Bd. Of Coop. Educ. Servs., Third Supervisory Dist., Suffolk County,* 60 NY2d 979, 981 [1983]; *Matter of Vaughn v Michetti*, 176 AD2d 144 [1991]).

That being said, we agree with petitioner that respondent Department of Housing, Preservation and Development's (HPD) modification of the ALJ's findings to include three additional

instances of harassment rejected by the ALJ is not supported by substantial evidence. Indeed, HPD acknowledges in its brief that no finding of harassment is warranted in one of those instances.

Contrary to petitioners' contention, the fact that the final determination was issued by the Deputy Commissioner, as opposed to the Commissioner, does not render it defective (*see* 28 RCNY 10-01; 28 RCNY 10–07).

We have considered petitioners' remaining contentions and find them to be unavailing.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Acosta, JJ.

5496 The National Black Theatre Workshop Incorporated, Plaintiff-Respondent, Index 105906/08

-against-

Nubian Properties LLC, et al., Defendants-Respondents-Appellants,

Harlem Apple, LLC, Defendant-Appellant-Respondent.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Mason A. Barney of counsel), for appellant-respondent.

Reitler Kailas & Rosenblatt LLC, New York (Craig J. Albert of counsel), for respondents-appellants.

Herrick, Feinstein LLP, New York (Raymond N. Hannigan of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered August 31, 2009, declaring the sublease between defendants Nubian Properties LLC and Harlem Apple, LLC void, and bringing up for review an order, same court and Justice, entered July 20, 2009, which granted plaintiff's motion for summary judgment declaring the sublease void, and so declared, implicitly denied so much of Harlem Apple's motion for summary judgment as sought a declaration that the sublease is valid and enforceable and denied so much of Harlem Apple's motion as sought summary

judgment on its cross claims for breach of the sublease and indemnification against Nubian Properties and Nubian Realty LLC, unanimously reversed, on the law, without costs, the judgment vacated, Nubian Realty added as a defendant pursuant to CPLR 305, 1003, and 3019(b) and (d), plaintiff's motion denied, Harlem Apple's motion granted, and it is declared that the sublease is valid and enforceable. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly found that section 8.8.2 of the operating agreement between plaintiff and Nubian Properties prohibited the latter from subletting to Harlem Apple the portion of the premises it had leased from Nubian Realty, LLC, the company created by the operating agreement for the sole purposes of acquiring, leasing, managing and selling real property (the Company). Nevertheless, plaintiff may not void the sublease, because Nubian Properties, assuming it had no actual authority, had apparent authority to enter into the sublease, and Harlem Apple's reliance on that authority was reasonable (*see Hallock v State of New York*, 64 NY2d 224, 231-232 [1984]; *Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 362-363 [2008], *lv denied* 14 NY3d 703 [2010]; *1230 Park Assoc., LLC v Northern Source, LLC*, 48

AD3d 355 [2008]; Limited Liability Company Law § 412[b][2]).

Before entering into the sublease, Harlem Apple learned the uncontested facts that Nubian Properties was the general manager of the Company and that the Company was the owner of the subject premises. Harlem Apple also reviewed the overlease between the Company and Nubian Properties, which permitted Nubian Properties to sublease the premises, and received warranties from Nubian Properties, on its own behalf and as general manager of the Company, that either no consents were needed to sublease the premises or that all such consents had been obtained. That Nubian Properties executed the overlease both as lessor, on behalf of the Company, and as lessee, on its own behalf, is not dispositive. It is uncontested that Nubian Properties was the general manager of the Company, with the sole authority to enter into leases on behalf of the Company. Thus, it was the only entity with the authority to execute the overlease as both lessor and lessee. Nor, contrary to plaintiff's contention, should the overlease have put Harlem Apple on notice that further inquiry was required. Nubian Properties appeared to be carrying on the normal business of the Company, as its general manager, with respect to the leasing of property, and had warranted on behalf of itself and the Company that it had the authority to sublease

these premises. Harlem Apple was not required to review the operating agreement before it could reasonably rely on Nubian Properties' authority (*see Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 46-47 [1989], *lv denied* 74 NY2d 604 [1989]).

Moreover, in the time preceding the execution of the sublease, Nubian Properties communicated to plaintiff its intention to sublease the premises to Harlem Apple, including by providing plaintiff with a copy of a draft of the sublease. Yet plaintiff made no effort to disabuse Harlem Apple of its understanding that Nubian Properties had the authority to enter into the sublease (*see Coopers & Lybrand v Arol Dev. Corp.*, 210 AD2d 181, 182 [1994], *lv denied* 85 NY2d 804 [1995]; *Merrell-Benco Agency, LLC v HSBC Bank USA*, 20 AD3d 605, 608 [2005], *lv dismissed in part, denied in part* 6 NY3d 742 [2005]).

In view of the foregoing, Harlem Apple is entitled to summary judgment on its cross claims for breach of contract and indemnification under the sublease. It is uncontested that, before terminating the lease, and although there was no temporary restraining order in effect, Nubian Properties and the Company continued to deny Harlem Apple access to the premises, despite Harlem Apple's satisfaction of all conditions precedent, which Nubian Properties conceded.

The parties appear to concede that the court improperly dismissed the Company as a defendant. In any event, the record supports the conclusion, and no party argues to the contrary, that Harlem Apple satisfied the provisions of CPLR 305, 1003 and 3019(b) and (d), entitling it to bring the Company into the action as a defendant for the purpose of asserting its cross claims against the Company.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Andrias, J.P., Sweeny, Acosta, Freedman, Manzanet-Daniels, JJ.

5867 In re Ivana Paul, Index 401991/10
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Ivana Paul, petitioner pro se.

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

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In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [O. Peter Sherwood, J.], entered September 23, 2010), to annul the determination of respondent New York City Housing Authority (NYCHA), dated July 7, 2010, which terminated petitioner's Section 8 rent subsidy on the ground that she failed to make payments due under a September 2006 stipulation, the petition is unanimously granted, without costs, the determination of NYCHA is annulled and vacated, and petitioner's Section 8 rent subsidy is reinstated.

Petitioner began receiving a Section 8 rent subsidy in about April 2000. In about September 2006, respondent NYCHA determined that between May 2001 and March 2005, petitioner had failed to

report over $25,000 in income. As a result, NYCHA calculated that it had overpaid Section 8 rent subsidies during that period by a total of $6,412. On September 28, 2006, the parties entered into a stipulation wherein petitioner acknowledged the overpayment of $6,412, and agreed to repay that sum at the rate of $120 per month, until fully repaid. Petitioner further acknowledged that if she should miss any payment, the entire sum would become due and NYCHA could commence proceedings to terminate her Section 8 subsidy.

In 2007, petitioner, the victim of domestic violence, left the apartment. She resided in women's shelters for a period of approximately 2½ years. During this time, she retained her Section 8 voucher. Between September 2006 and January 2010, petitioner paid $1,850 of the $4,800 due over that period, leaving a balance of $4,562.

On December 2, 2009, NYCHA sent petitioner a warning letter informing her of the outstanding balance and advising her to pay immediately, as well as a notice of termination of her Section 8 subsidy. On January 11, 2010, NYCHA sent petitioner a final notice of default and termination of the Section 8 subsidy. On June 10, 2010, NYCHA held a hearing to review the termination. Petitioner participated at the hearing without the assistance of

counsel. The housing assistant who testified on behalf of NYCHA stated that petitioner's current gross annual household income was $13,728, consisting of Social Security and SSI benefits. When petitioner attempted to question the housing assistant's testimony as to her current income, the hearing officer informed her that the only issue in the hearing was whether she had failed to make the payments required by the stipulation. Petitioner asserted that she did not know why she owed the monies due under the stipulation, claiming that she had "never even asked [any] questions," but had "just paid what [she] could pay, when [she] could pay."

The hearing officer sustained the charge that petitioner failed to honor the stipulation, finding that petitioner owed a balance of $4,562. A final determination terminating petitioner's Section 8 benefits was issued on or about July 7, 2010.

By verified petition sworn to on July 26, 2010, petitioner commenced this article 78 proceeding pro se. Petitioner contended that the termination should be "reversed" because she "d[id]n't understand how" the fact that the agency had overpaid her subsidy was "on [her]." Petitioner appended, inter alia, copies of two letters from the Taxpayer Advocate Service (an arm

of the Internal Revenue Service), indicating that her social security number had been used by another taxpayer, and that income had been wrongly attributed to her during tax year 2006. The letters indicated that a correction had been done on tax year 2006 to show no income for that year. NYCHA filed a verified answer generally denying the allegations of the petition. Finding that the petition raised questions of substantial evidence, Supreme Court transferred the article 78 proceeding to this Court pursuant to CPLR 7803(4) and 7804(g).

We find that NYCHA's determination to terminate petitioner's rent subsidy was not supported by substantial evidence, and accordingly should be annulled. The record shows that petitioner had been the victim of identity theft during the tax year 2006, and thus, that the parties were operating under a mistake as to the amount of petitioner's income.

Like any other contract, a stipulation may be rescinded or reformed where there has been "fraud, collusion, mistake or accident" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). The stipulation herein was entered into under a mutual mistake concerning petitioner's income. Any such stipulation memorializing petitioner's obligation to repay alleged overpayments, based on an erroneous figure reported for her

income, was thus void. The finding that petitioner failed to make required payments pursuant to a void stipulation lacks a rational basis and must be annulled.

Even if we were to find that the award had a rational basis, termination of petitioner's tenancy was "so disproportionate to the offense," underpayment of rent, "in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks and citation omitted]).

The record establishes that petitioner is disabled and must undergo dialysis three times per week. Due to her condition, she has been unable to work for the last seven years. Petitioner's social worker submitted letters stating that due to her medical condition, petitioner required safe, clean and affordable housing so as to reduce the chance of recurring infection and hospitalization. Termination of petitioner's subsidy would have severe consequences not only for petitioner, but for the minor

son she supports, both of whom face homelessness or an unstable life in the shelter system in the event of termination.

We have considering NYCHA's remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5891 Shine & Company LLP, Index 600551/10
Plaintiff-Respondent,

-against-

Angelo F. Natoli,
Defendant-Appellant.

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Ronald S. Herzog of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered July 19, 2010, which, among other things, granted plaintiff's motion for summary judgment on its first cause of action seeking a declaration that defendant is not entitled to share in any proceeds from the sale of all or part of plaintiff accounting practice to a third party, and so declared, unanimously affirmed, without costs.

Defendant failed to raise an issue of fact as to whether he is an equity partner in plaintiff (*see M.I.F. Sec. Co. v Stamm & Co.*, 94 AD2d 211, 214 [1983], *affd in part* 60 NY2d 936 [1983]). The motion court properly found that the letter of intent (LOI) controlling the terms of the parties' relationship was unambiguous. Thus, the court properly declined to consider

extrinsic evidence to interpret its terms (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Initially, we note that the LOI's express reference to defendant as an "equity partner" is not determinative (*see Kyle v Ford*, 184 AD2d 1036, 1037 [1992]). The LOI clearly did not provide for defendant to share in plaintiff's profits or losses. Both are essential elements of a partnership agreement, and defendant failed to present any evidence to support his assertion that he would have shared in either profits or losses (*see Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958], *lv dismissed* 358 US 39 [1958]; *Chanler v Roberts*, 200 AD2d 489, 491 [1994], *lv dismissed in part, lv denied in part* 84 NY2d 903 [1994]). Moreover, the LOI expressly provided for defendant to receive a Form 1099 rather than a Schedule K-1. As an accountant, defendant understood the difference between these two tax forms. Thus, he knew that his receipt of a 1099 meant that his compensation was not from profits and that he would not share in losses.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6001 The People of the State of New York, Respondent, Ind. 3314/99

-against-

Gadi Nachum, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

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Order, Supreme Court, New York County (Robert H. Straus, J.), entered October 19, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (John A.K. Bradley, J.), rendered October 27, 2000, convicting defendant, upon his plea of guilty, of grand larceny in the second degree, and sentencing him to a term of 5 years' probation, with restitution in the sum of $55,524, unanimously affirmed.

Defendant is not entitled to withdraw his plea, or to specific performance of a provision of his plea agreement whereby he could have earned a misdemeanor disposition by making full restitution. The plea was knowing, intelligent and voluntary, and defendant has forfeited the opportunity to have his felony

conviction replaced by a misdemeanor conviction (*see People v Jenkins*, 11 NY3d 282 [2008]).

The court stated the core provision of the agreement during the plea allocution. The court unambiguously told defendant that he was required to make restitution of the entire amount he had admittedly stolen, and that he could not replace his felony plea with a misdemeanor plea unless he did so. Defendant argues that the allocution was vague as to the terms of payment. However, it was perfectly clear that paying less than the entire amount would be a breach of the agreement that would forfeit the misdemeanor disposition. It is undisputed that defendant ultimately paid approximately $11,000 less than the full amount.

In any event, between the plea and sentencing, defense counsel, the prosecutor and the court negotiated further details regarding terms of payment, which were placed on the record. Defendant did not move to withdraw his plea or otherwise voice any complaint. The renegotiated clarifications did not constitute the imposition of additional conditions on defendant after he had pleaded guilty (*see Jenkins*, 11 NY3d at 288-289).

The expanded agreement clarified the required amount of restitution by adding the mandatory surcharge. The agreement gave defendant the opportunity to have his felony plea vacated

and replaced by a misdemeanor plea if he paid at least $300 every month in restitution during his five-year probation term, made diligent efforts to make larger payments, with the court to review the diligence of his efforts periodically, and completed paying the full restitution amount no later than the end of his probation period. Since payment of only $300 per month would not have paid off the debt in five years, the agreement clearly contemplated some larger payments.

Over the ensuing years, defendant missed numerous monthly payments. In 2003, the restitution obligation was eventually resolved when the victim agreed to accept two final $10,000 payments in satisfaction of the obligation. As a result, the court terminated defendant's probation two years early, and with no further restitution requirement, even though defendant never paid the full amount. Accordingly, both the failure to make the required periodic payments and the ultimate failure to pay the full amount were breaches of the agreed-on terms.

At no point in this case was defendant led to believe that he could pay less than the full amount and still earn the misdemeanor plea. Moreover, at the court appearance where the court finally terminated defendant's probation, the prosecutor mentioned that by not paying the full amount, defendant had lost

the opportunity for a misdemeanor plea. Defendant and his counsel remained silent, indicating that this was their understanding as well.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6002 Ifeytaya Nayo Bulow, Index 1683/03
Plaintiff-Appellant,

-against-

Women in Need, Inc., et al.,
Defendants-Respondents.

_____

Erika L. Hartley, Brooklyn, for appellant.

Willkie Farr & Gallagher LLP, New York (Kevin C. Brown and Martin B. Klotz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 21, 2010, which, to the extent appealed from as limited by the briefs, granted the motion by defendants Women In Need, Inc. (WIN) and Joyce Kelly to dismiss the defamation cause of action against them for failure to state the claim with specificity and the entire complaint as against Kelly as time-barred, unanimously affirmed, without costs.

Plaintiff, a former assistant teacher at WIN, a child care facility, was terminated after her direct supervisor made allegedly defamatory statements that she had observed plaintiff engaging in inappropriate “sexual horseplay” with a coworker in an area where children could see them.

Initially, we disagree with the motion court’s finding that

the complaint failed to plead defamatory words with adequate specificity. In opposition to defendants' motion for summary judgment and to dismiss the complaint, plaintiff submitted evidentiary material, including affidavits, deposition transcripts, and documents, to support the allegations of defamation. The court should have considered that evidence in assessing the adequacy of the pleadings under CPLR 3016(a) (*see Old Williamsburg Candle Corp. v Seneca Ins. Co., Inc.*, 66 AD3d 656, 658 [2009]; *Big Apple Car v City of New York*, 204 AD2d 109 [1994]). When considering that evidence, we find that plaintiff adequately alleged that the false allegations were repeated to other coworkers in the facility. She was not required to plead specific facts in support of her allegations of fault (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [2004]). Nor was she required to plead special damages, since the alleged defamatory statements disparaged her in her profession as a child care worker (*Pezhman v City of New York*, 29 AD3d 164, 167-168 [2006]).

However, defendants were entitled to summary judgment dismissing the defamation claim based on the qualified privilege protecting communications between employees on matters of common interest (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]; *Murganti v Weber*, 248 AD2d 208, 209 [1998]). Indeed, there is no

evidence to support a finding that the supervisor's challenged statements were made with actual malice (*see Sweeney v Prisoners' Legal Servs. of N.Y.*, 84 NY2d 786, 792-793 [1995]; *Murganti*, 248 AD2d at 209). Although the privilege may be overcome by a showing of excessive publication (*see McNaughton v City of New York*, 234 AD2d 83, 84 [1996], *lv denied* 90 NY2d 806 [1997]), defendant submitted evidence that none of the supervisory employees repeated the allegations to others. In opposition, plaintiff submitted only the statement of a coworker that the supervisor told her why plaintiff was terminated. Under the circumstances, this statement is also protected by the qualified privilege (*see Sanderson v Bellevue Maternity Hosp.*, 259 AD2d 888, 890-891 [1999]). Having concluded that the qualified privilege applies, we find that WIN cannot be held vicariously liable for the supervisor's statement under the theory of respondeat superior (*id.* at 891-892). The privilege is also not overcome by the claimed insufficiency of the investigation of the charges against plaintiff before she was terminated (*see Carone v Venator Group, Inc.*, 11 AD3d 399, 400 [2004]).

The action was also properly dismissed as time-barred as against defendant Kelly, who was served with the pleadings in the action two years beyond the expiration of the applicable one-year

statute of limitations (*see* CPLR 215[3]). Plaintiff failed to meet her burden of demonstrating the applicability of the relation-back doctrine (*see Cintron v Lynn*, 306 AD2d 118, 119 [2003]). Indeed, there were no factual allegations that Kelly, who was an intermediate supervisor for WIN, knew or should have known that, but for mistaken identity, she would have been named as a defendant in the action (*id*.).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6003 In re Shae Tylasia I.M.,

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

Lisa Anne G., etc.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Law Offices of Randall S. Carmel P.C., Syosset (Randall S. Carmel of counsel), attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about April 9, 2008, which, upon a finding of mental retardation, terminated the respondent mother's parental rights to the subject child, and committed custody and guardianship to petitioner agency and the Administration for Children's Services, unanimously affirmed, without costs.

The court-appointed psychiatrist provided clear and convincing evidence that the child was in danger of being neglected due to the mother's mental retardation (Social Services Law § 384-b[6][b][c]; *Matter of Erica D. [Maria D.]*, 80 AD3d 423,

424 [2011], *lv denied* 16 NY3d 708 [2011]). Although the mother completed numerous programs to enhance her parenting and other skills, the psychiatrist noted that there was no improvement in her ability to understand the child's special needs and properly care for the child.

Under these circumstances, the court did not improvidently decline to conduct a dispositional hearing, which the mother concedes was not required (*see Matter of Isiah J. [Janice J.]*, 82 AD3d 651, 652 [2011]). There was no evidence that post-termination visitation, if permitted, would be in the best interests of the child (*see Matter of Corinthian Marie S.*, 297 AD2d 382 [2002]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6004 The People of the State of New York, Ind. 1952N/08
Respondent,

-against-

Ramon Urena,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about February 10, 2009, unanimously affirmed.

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

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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6007-
6007A-
6007B In re Kie Asia T., and Others,

Children Under the Age
of Eighteen Years, etc.,

Shaneene T.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 21, 2010, which terminated respondent mother's parental rights, following fact-finding determinations that the mother permanently neglected the subject children, and committed the guardianship and custody of the children to Saint Dominic's Home and the Administration for Children's services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect entered against the mother was supported by clear and convincing evidence. Despite her

completion of the recommended services, she was unable to demonstrate the necessary parenting skills, failed to consistently visit with the children, and failed to adequately plan for them because of her inability to separate from the father. The father continuously failed at his attempts at alcohol rehabilitation to the point of showing up smelling of alcohol for visits with the children. In addition, he did not complete anger management courses despite the two domestic violence petitions the mother had filed against him (*see e.g. Matter of Jessica Victoria S.*, 47 AD3d 428 [2008]; *Matter of Monica Betzy D.*, 291 AD2d 289 [2002]).

It was in the best interests of the children to terminate the mother's parental rights in order to free the children for adoption by their foster mother, with whom they had already resided for three and one half years and who provided the children with a stable, nurturing, well-supported environment (*see e.g. Matter of Toyie Fannie J.*, 77 AD3d 449 [2010]).

We have considered the remaining arguments, including the mother's request for a suspended judgment, and find them unavailing.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6008 The People of the State of New York, Respondent,

-against-

Donald Perrington, Defendant-Appellant.

Ind. 294/08

- - - - - -

6009 The People of the State of New York, Respondent,

-against-

Omar Shabazz, Defendant-Appellant.

David K. Bertan, Bronx, for Donald Perrington, appellant.

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

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

Judgments, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 16, 2009, convicting defendants, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing each defendant, as a second violent felony offender, to a term of 8 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). The court appropriately charged the

jury on the Penal Law § 265.15(3) presumption that all the occupants of an automobile are presumed to possess a firearm found therein, and the jury properly drew that inference (*see People v Lemmons*, 40 NY2d 505, 510 [1976]).

The presumption was not rebutted by the fact that the pistol was found in a woman's purse. Defendants and a separately tried female codefendant were all passengers in the car. The pistol's grip was protruding from an unfastened purse located in the middle of the rear seat. The jury could have reasonably concluded that the codefendant was not the sole possessor of the pistol (*see Matter of Mark S.*, 274 AD2d 334 [2000]), and we find no basis to disturb that finding.

The court properly exercised its discretion in precluding defendants from introducing a statement made by the codefendant as a declaration against penal interest (*see People v Settles*, 46 NY2d 154, 167-170 [1978]). In the statement, the codefendant told defendant Perrington's former attorney that the pistol found in the car was hers. After making this statement, but before defendants' trial, the codefendant was tried separately. At that trial, she testified the weapon was not hers, and she was acquitted.

Defendants did not establish that the declarant could not be

located or was otherwise unavailable as a witness (*see People v Luckey*, 73 AD3d 568 [2010], *lv denied* 15 NY3d 807 [2010]). The People's inability to locate the codefendant after her own trial was not dispositive of whether she would cooperate with defendants, with whom she was associated. Furthermore, there was nothing to confirm the statement's reliability, and it was particularly unreliable in light of her testimony at her own trial. Indeed, defendant Shabazz's counsel acknowledged that he did not want to call the codefendant as a witness, because she would testify in accordance with her prior testimony rather than her hearsay declaration.

Defendants did not assert any constitutional right to introduce the precluded evidence. Accordingly, they did not preserve their constitutional claim (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, since this evidence was neither reliable nor critically exculpatory (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]). The codefendant's assertion that she owned the pistol would not have established

her exclusive possession of it at the time of the arrest (*see Mark S.*, 274 AD2d at 334).

The court properly exercised its discretion when it denied defendants' mistrial motions, which were based on aspects of the prosecutor's summation and her examination of a witness. In each instance, the court's curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). The remainder of defendants' challenges to the prosecutor's summation, as well as Pennington's claim that he was prejudiced by the People's use of an alternative theory of prosecution, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentences.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarrelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6010 McKayla Spencer, an infant by her Guardian ad Litem, Desmond Gordon, et al., Plaintiffs-Respondents, Index 350628/07

-against-

Astralease Associated, Inc., Defendant,

Lifeline Ambulance Services Inc., et al., Defendants-Appellants,

Perisis Y. Miller, et al., Defendants-Respondents.

Galvano & Xanthakis, P.C., New York (Steven F. Granville of counsel), for appellants.

Scott Baron & Associates, P.C., Howard Beach (Edward C. Lehman of counsel), for McKayla Spencer and Desmond Gordon, respondents.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Perisis Y. Miller and Alethia Gordon, respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 25, 2010, which, insofar as appealed from, in this action for personal injuries allegedly sustained by infant plaintiff in a motor vehicle accident, denied the motion of defendants Lifeline Ambulance Services Inc. and Gilberto Ward for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Lifeline

Ambulance Services, Inc. and Gilberto Ward dismissing the complaint as against them.

Infant plaintiff was a rear-seat passenger in a vehicle owned by defendant Miller and operated by defendant Gordon (infant plaintiff's mother). As the vehicle driven by Gordon proceeded through an intersection with a green light in her favor, it was struck by an ambulance leased by Lifeline and operated by Ward, who was responding to an emergency situation. The impact caused both vehicles to strike a third vehicle owned by a nonparty.

The record demonstrates that Lifeline and Ward were entitled to summary judgment. The evidence established that Ward activated his siren and emergency lights prior to the accident and hit the ambulance's air horn several times and slowed his rate of speed as he approached the intersection. Thus, he had a qualified privilege to proceed through the red light (*see* Vehicle and Traffic Law § 1104[b]; *Kabir v County of Monroe*, 16 NY3d 217 [2011]; *Turini v County of Suffolk*, 8 AD3d 260 [2008], *lv denied* 3 NY3d 611 [2004]). There was no evidence that Ward acted with reckless disregard for the safety of others during the emergency

operation of the ambulance (*see* Vehicle and Traffic Law § 1104[e]; *Saarinen v Kerr*, 84 NY2d 494 [1994]; *Gervasi v Peay*, 254 AD2d 172 [1998]).

Plaintiffs failed to raise a triable issue of fact in opposition to the prima facie showing. In her EBT, Gordon testified that she did not see the ambulance prior to the accident. Her testimony concerning the lights and sirens was based on observations made after the accident. Thus, Gordon's statements that the ambulance's lights and siren were not activated prior to the accident were insufficient to defeat the motion of Lifeline and Ward (*see e.g. Phillips v Bronx Lebanon Hosp.*, 268 AD2D 318, 320 [2000]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6011 The People of the State of New York, Ind. 4727/07
Respondent,

-against-

Jason Washington,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about September 4, 2008,

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6013-
6014-
6015-
6016

In re Henry C., and Another,

Children Under the Age
of Eighteen Years, etc.,

Henry C. (Anonymous),
Respondent-Appellant,

Tapitha C.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Todd D. Kadish, Brooklyn, attorney for the children.

_____

Appeal from order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 22, 2009, which, upon a fact-finding determination that respondent father neglected his children, placed the children in the custody of the Commissioner of Social Services until the completion of the next scheduled permanency hearing, and from permanency orders, same

court (Jennifer S. Burtt, Referee), entered on or about November 2, 2009, April 13, 2010, and October 14, 2010, extending the children's placement, unanimously dismissed, without costs, as moot.

Respondent's appeal is rendered moot by the subsequent entry of an order terminating his parental rights to the subject children (*see Matter of Erica D. [Maria D.]*, 77 AD3d 505 [2010]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6017 Madeline B. Ward, Index 112665/07
Plaintiff-Appellant,

-against-

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

Law Offices of Paul L. Brozdowski, LLC, Cortlandt Manor (Paul L. Brozdowski of counsel), for appellant.

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

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered June 11, 2010, which granted defendants' motion to dismiss the complaint, and denied plaintiff's cross motion to reopen her case in chief, unanimously affirmed, without costs.

At trial, plaintiff's counsel unequivocally stated that the sole theory of recovery upon which plaintiff's claims were premised was that of prior written notice to the City. Therefore, plaintiff waived affirmative negligence as a theory of liability, and her arguments pertaining thereto are not preserved for review (*see Spierer v Bloomingdale's*, 44 AD3d 336 [2007]).

Supreme Court providently exercised its discretion by denying plaintiff's motion to reopen.

We have considered plaintiff's remaining contentions and find them unpersuasive.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6020 In re Marsiste Adolphe, Index 115047/09
Petitioner-Appellant,

-against-

New York City Board of Education,
Respondent-Respondent.

_____

Valli Kane & Vagnini, LLP, Garden City (Robert J. Valli, Jr. of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 19, 2010, dismissing the petition to vacate an arbitration award dated October 16, 2009, unanimously affirmed, without costs.

Petitioner failed during the arbitration proceeding to preserve his argument that his First Amendment rights were violated. As a result, and contrary to petitioner's contention on appeal, the issue was improperly raised for the first time in his petition before the court (*see Matter of Migdal Plumbing & Heating Corp. [Dakar Devs.]*, 232 AD2d 62, 64 [1997], *lv denied* 91 NY2d 808 [1998]). Were we to consider this argument, we would find it without merit (*see Garcetti v Ceballos*, 547 US 410, 417 [2006]).

Petitioner's contention that the hearing officer's decision was based on mistakes of law and a disregard of the evidence is unavailing, since these are not grounds for vacating an arbitration award (*Matter of Merrill Lynch, Pierce, Fenner & Smith Inc. v Graef*, 34 AD3d 220 [2006]).

Petitioner's remaining contention, that the specifications against him were not brought in accordance with the Education Law, is unpreserved and, in any event, without merit.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6021 Barbara Urciuoli, Index 14198/06
Plaintiff-Appellant,

-against-

Lawrence Hospital Center, et al.,
Defendants-Respondents.

Frank & Seskin, LLP, New York (Richard Frank and Scott H. Seskin of counsel), for appellant.

Pilkington & Leggett, PC, White Plains (Michael N. Romano of counsel), for respondents.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered August 5, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was allegedly injured when she fell from a chair after becoming dizzy while she was at defendant hospital where her mother was being treated by defendant doctor. Plaintiff testified that, at her mother's request, she remained in the treatment room while a procedure was performed on her mother and that, while she was comforting her mother at defendant doctor's request, she became dizzy and asked for help. A nurse, following defendant doctor's directive, took plaintiff by the arm and sat her in a nearby chair. Shortly thereafter, the dizziness

worsened, plaintiff again asked for help, and within seconds, she slid off the chair and onto the floor, suffering spinal injuries that required surgical intervention.

Plaintiff commenced this action, asserting causes of action for medical malpractice and ordinary negligence. Defendants moved for summary judgment, arguing, inter alia, that they did not owe a legal duty to plaintiff.

Whether a duty is owed by a physician to a patient is a question of law for the court (*McNulty v City* of New York, 100 NY2d 227, 232 [2003]). Contrary to plaintiff's contentions, defendants did not owe her a duty merely because the hospital staff assisted her into a chair (*id.* at 233). This did not constitute medical treatment. Moreover, plaintiff's expectation that the hospital staff would protect her from falling was unreasonable under the circumstances (*id.*; *Pietrunti v Island Diagnostic Labs.*, 252 AD2d 576 [1998]).

Plaintiff contends that, even if no medical duty arose, she has stated a valid claim in ordinary negligence because her injuries were caused by defendant doctor's request that she "assist" him by comforting her mother while her mother was being treated. A plaintiff cannot circumvent dismissal under *McNulty*, by characterizing her cause of action as one for ordinary

negligence, rather than one for medical malpractice (*Candelario v Teperman*, 15 AD3d 204 [2005]; *see also Spina v Jack D. Weiler Hosp. of Albert Einstein Coll. of Medicine*, 28 AD3d 311, 312 [2006]).

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6022-
6023 Ivor W. Gilkes, Jr., Index 104730/09
Plaintiff-Respondent,

-against-

New York Wholesale Paper Corp.,
Defendant-Appellant.

_____

Baron Law Firm, PLLC, East Northport (Jeffrey T. Baron of counsel), for appellant.

Law Offices of Mark S. Gray, New York (Peter J. Eliopoulos of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 16, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion pursuant to CPLR 306-b to extend his time to serve the summons and complaint, and denied defendant's cross motion to dismiss for failure to timely serve said process, unanimously affirmed, without costs. Order, same court and Justice, entered March 24, 2011, which granted reargument and adhered to its prior decision, unanimously affirmed, without costs.

The IAS court providently exercised its discretion, in the interest of justice, by granting plaintiff's motion for an extension of time to serve the summons and complaint. The court

properly considered pertinent factors such as plaintiff's showing of merit, the expiration of the statute of limitations, the prompt receipt of plaintiff's notice of claim by defendant's insurer, and the failure of defendant's employee to provide contact information for himself or defendant at the time of the accident (*see Leader v Maroney*, 97 NY2d 95, 105-106 [2001]; *Sutter v Reyes*, 60 AD3d 448 [2009]; *Estey-Dorsa v Chavez*, 27 AD3d 277, 278 [2006]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6024 In re Gina Marie Reitano, etc., Index 500173/02

- - - - -

Jennifer Cangro, an Alleged Incapacitated Person,
Appellant,

-against-

Mary V. Rosado,
Respondent.

_____

Jennifer Cangro, appellant pro se.

R. Brent English, New York, for respondent.

_____

Order, Supreme Court, New York County (Lottie Wilkins, J.), entered June 28, 2010, after a hearing, which (1) confirmed the December 22, 2008 report of the Special Referee; (2) approved and judicially settled the amended final accounting of the guardian; (3) compensated nunc pro tunc respondent guardian $3,791.43 in commissions for the years 2003 through 2005; (4) compensated nunc pro tunc the guardian $3,113.50 for extraordinary services; (5) compensated nunc pro tunc the prior guardian ad litem $1,877.43; (6) compensated nunc pro tunc Donald Lefari, Esq., for legal services to the guardian in the amount of $1,200; (7) compensated nunc pro tunc Phyllis Solomon Esq. $1,500 for services rendered to Cangro; (8) ordered Cangro to pay $1,500 to Summerfield M.

Baldwin, Esq. for services rendered as guardian ad litem relating to the review of the amended final accounting; (9) ordered Cangro to pay $1,500 to R. Brent English, Esq. as compensation for services rendered as counsel to Rosado in the hearing to review the amended final accounting; and (10) ordered Cangro to pay the sum of $1,200 to Edward Chesnick for his services as special referee to review the amended final accounting, unanimously affirmed, without costs.

Supreme Court properly confirmed the Special Referee's report since the Referee's findings were supported by the record and there is no basis on this record to set aside his findings (*see Flanagan & Cooke v RC 27th Ave. Realty Corp.*, 305 AD2d 135 [2003]). Supreme Court also properly awarded respondent Rosado commissions for her work as appellant's guardian, as the record contains no evidence of wrongdoing (*see* SCPA 2307; *Matter of Ellman*, 7 AD3d 423 [2004]). The court properly exercised its discretion in awarding a fee to Rosado for extraordinary services in light of the significant time and effort she spent on appellant's behalf (*see Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]).

Supreme Court properly awarded the various fees to others involved in the matter. The fees for the guardian ad litem, the

special referee, and Rosado's counsel for this final accounting were supported by affidavits or affirmations of services and were reasonable fees for the services provided. Moreover, the sums were appropriately charged to Cangro since her baseless accusations necessitated this additional proceeding. The approval of the fees previously paid to Solomon, Reitano and Lefari was proper since they had also been supported by affidavits or affirmations of services, were reasonable, and were not objected to by the referee.

We find that appellant was not denied due process under the New York State Constitution. Pursuant to this Court's order (45 AD3d 281 [2007]), and as required by CPLR 1201, a guardian ad litem was properly appointed to represent appellant's interests in this proceeding in which she contested the accounting and fees awarded to Rosado. Appellant was provided ample opportunity to make her arguments regarding the accounting, in writings by her and her guardian ad litem, and she was also permitted to orally argue her position at a hearing. Similarly, the record is devoid

of evidence that could be construed as a denial of appellant's right to equal protection.

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6025N Sanford Weisburst, Index 312352/07
Plaintiff-Respondent,

-against-

Joanna Dreifus,
Defendant-Appellant.

_____

Chemtob Moss Forman & Talbert, LLP, New York (Susan M. Moss of counsel), for appellant.

Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered June 3, 2010, which, on plaintiff's motion, directed defendant, pursuant to 22 NYCRR 130-1.1, to pay plaintiff $35,500 in counsel fees, unanimously affirmed, without costs, and the matter remanded for entry of the award of costs as a judgment, pursuant to 22 NYCRR 130-1.2.

The court did not abuse its discretion in finding that defendant's underlying motion for an emergency stay contained "false charges [against plaintiff] that were expressed by means

of a tortured and very partial rendering of the facts that can only have been deliberately crafted to mislead" and was therefore frivolous within the meaning of 22 NYCRR 130-1.1 (*see e.g. Rogovin v Rogovin*, 27 AD3d 233 [2006]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6026N Ralph Brannon, Index No. 112619/08
Plaintiff-Appellant,

-against-

Maura McHugh Joseph Mills, et al.,
Defendants,

Paul Schreiber, etc., et al.,
Defendants-Respondents.

_____

Mayne Miller, Brooklyn, for appellant.

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

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 25, 2009, which granted the motion by defendants Paul Schreiber, the Department of Housing Preservation and Development of the City of New York (HPD), and the City of New York (the City defendants) to dismiss the complaint as against them, and denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff, an attorney employed by HPD, was charged by the agency with violating its Code of Conduct, based on allegations that after approaching another attorney in a hallway outside a courtroom and seeking unsuccessfully to settle a case he placed his hand on the attorney's arm and asked her for a kiss. After a

hearing, the ALJ sustained the charges and recommended a 30-day suspension without pay. HPD adopted the findings and recommendations of the ALJ, and plaintiff appealed to the Civil Service Commission. While the appeal was pending, he commenced this action, alleging defamation and retaliatory employment action and, later, malicious prosecution. The Civil Service Commission affirmed HPD's determination.

Plaintiff's complaint is premised on his denial of culpability for the conduct charged by HPD and his assertion that the disciplinary proceeding was baseless. However, the Civil Service Commission's affirmance of HPD's determination was "final and conclusive, and not subject to further review in any court" (Civil Service Law § 76[3]). Pursuant to the doctrine of collateral estoppel, it provides a complete defense to plaintiff's claims against the City defendants in this action (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]; *Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [2011]).

We also find that there is no basis for concluding that the disciplinary action was commenced in retaliation for a letter written by plaintiff 3½ years earlier to an assistant commissioner, complaining that the prices of properties offered for sale by the agency were improper. Nor does the complaint

allege a hostile work environment; that claim would, in any event, be time-barred.

Plaintiff's motion for leave to amend the complaint plainly lacks merit (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [2009], *lv dismissed* 12 NY3d 880 [2009]). Moreover, there is no authority for plaintiff's proposed hybrid proceeding.

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6029 In re Jamal N., and Others,

Children Under the Age of
Eighteen Years, etc.,

Shanikqua N.,
Respondent-Appellant,

Seaman's Society for Children
and Families,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

John R. Eyerman, New York, for respondent.

Cozen O'Connor, New York (Kenneth G. Roberts of counsel), attorney for the children.

Orders of disposition, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about November 23, 2009, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed the guardianship and custody of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that respondent failed substantially and

continuously to maintain contact with or plan for the future of her children despite the diligent efforts by both agencies involved in this case to strengthen her bond with the children (*see* Social Services Law § 384-b[7][a], [f]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). The agencies provided referrals for appropriate services, made suitable arrangements for visitation, and referred respondent for additional services when it became clear that she was unable to manage the children, who have special needs. However, respondent missed more than half of her scheduled visits and appeared late for most of the remainder (*see Matter of Gin Ho S.*, 192 AD2d 466 [1993]).

A preponderance of the evidence establishes that it was in the best interests of the children to terminate respondent's parental rights to them (*see Matter of Khalil A. [Sabree A.]*, 84 AD3d 632 [2011]). The children have been residing in a stable and nurturing environment with their foster mother, who is willing and able to adopt them (*see Matter of Fernando Alexander*

B. [Simone Anita W.], 85 AD3d 658 [2011]). In view of the foregoing, a suspended judgment was not appropriate.

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6030 The People of the State of New York, Ind. 3559N/09
Respondent,

-against-

Sidney Wright,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Analisa Torres J.), rendered on or about May 3, 2010,

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

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

6033 U.O.T.S. Inc., Index 115935/09
Plaintiff-Appellant,

-against-

DeBaron Associates LLC,
Defendant-Respondent.

Jacqueline M.H. Bukowski, New York, for appellant.

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

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 6, 2010, which denied plaintiff's motion seeking an order directing defendant's payment of reasonable use and occupancy at market level from November 2009 until resolution of this action, and a declaratory judgment that the 99-year lease between the parties be vacated as an unauthorized and unconscionable burden on plaintiff, and granted defendant's cross motion to the extent of dismissing the complaint pursuant to CPLR 3211(a)(5) and (a)(7), declaring the lease between the parties to be in full force and effect, and vacating the temporary restraining order precluding defendant ground-floor tenant from subletting the premises, unanimously affirmed, without costs.

Plaintiff owner, a not-for-profit corporation, entered into

a 99-year lease with defendant real estate company in 1989. Pursuant to the terms of the lease, defendant paid $30,000 at the time the lease was executed and was required to pay non-escalating rent in the amount of $175 per month for the full term of the lease in exchange for use and possession of one-third of the ground-floor commercial space (approximately 400 square feet). At the time the lease was executed, plaintiff owed approximately $30,000 in accrued real estate taxes and was seeking to avoid foreclosure. In addition, in 1989, the area where the building is located had a reputation for crime and drug use and property values in the neighborhood were low.

Plaintiff argues that the lease was never authorized by a requisite two-thirds vote of its board of directors (*see* Not-For-Profit Corporation Law § 509), and was unconscionable due to the alleged onerous terms, as well as in violation of the rule against perpetuities (*see* EPTL 9-1.1). The lease was entered into by the president of plaintiff's board, and correspondence from one of the president's attorneys indicates that plaintiff had legal representation at the time the lease was executed. Additionally, the record shows that plaintiff retained the initial $30,000 payment, its building was not foreclosed against, plaintiff collected rent from defendant for three years and,

thereafter, it knowingly allowed defendant to deposit rent in an escrow account set up in plaintiff's name until the commencement of the instant action in 2009. Plaintiff's board acknowledged its awareness of the lease terms in 1992 and, during the next 17 years, raised only various complaints regarding non-compliance with certain lease provisions, although taking no identifiable action and never arguing that the monthly rent provision, the lengthy lease term, or any other provisions were unauthorized or unconscionable. Thus, the evidence supports the conclusion that plaintiff's board ratified the lease, or, at the very least, that it is barred from contesting the lease provisions based on the doctrine of laches (*see e.g. Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 219 AD2d 186, 190 [1996], *lv denied* 88 NY2d 808 [1996]).

Plaintiff's argument that the lease violates the rule against perpetuities because there was no measuring life in being designated at the time of the lease's execution and thus, the lease should cease after 21 years, is misplaced. The rule against perpetuities prevents the "vesting" of an estate in another (i.e., alienation) which does not occur within the measuring period. Here, the lease was already "vested" in defendant at its inception, and no provision of the lease

attempted to further alienate the land in the future, beyond the initial, finite 99 years. Thus, no provision of the lease suspends the power of alienation longer than the measuring period (*see* EPTL 9-1.1; *see generally Symphony Space, Inc. v Pergola Props., Inc.,* 88 NY2d 466 [1996]; *Payne v Palisades Interstate Park Commn.*, 204 AD2d 787 [1994]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6035
6035A In re Cassandra Tammy S., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Babbah S., et al.,
Respondents-Appellants,

Episcopal Social Services,
Petitioner-Respondent.

Frederic P. Schneider, New York, for Babbah S., appellant.

Geoffrey P. Berman, Larchmont, for Elizabeth P., appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

Orders of disposition, Family Court, Bronx County (Allen Alpert, J.), entered on or about August 23, 2010, which, to the extent appealed from, upon findings that respondent father's consent for the adoption of his child was not required and that respondent mother abandoned the subject children, terminated the mother's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously modified, on the law and the facts, to vacate the

orders of disposition, and remand for a new dispositional hearing regarding the best interests of the children, and otherwise affirmed, without costs.

The father's consent for the adoption of his child was not required since he admitted that he had not provided her with consistent financial support, despite having the means to do so (*see* Domestic Relations Law § 111[1][d]; *Matter of Vanessa B. [Lebert Charles C.]*, 76 AD3d 912, 913 [2010]). The agency's alleged failure to instruct the father to provide financial support did not excuse him from doing so (*see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [2010]).

We reject the mother's claim that she was denied effective assistance of counsel with respect to the fact-finding proceeding (*see People v Benevento*, 91 NY2d 708, 714-715 [1998]). Given the mother's admission that she had no contact with the subject children or the agency during the relevant time period, she could not have been prejudiced by any failing on the part of her counsel (*see Matter of Nikeerah S. [Barbara S.]*, 69 AD3d 421, 422 [2010]).

No evidence was presented at the dispositional hearing with respect to the suitability of the foster home or the desires of the children and foster parents. Indeed, the court's best

interests determination rested exclusively on the arguments of counsel. Given the foregoing and evidence at the hearing that respondents' situation has improved, we remand for a new dispositional hearing with respect to the best interests of the children (*see generally Matter of Patrick L. McC.*, 179 AD2d 220, 223 [1992]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6037 Miguel Duran, Index 7152/06
Plaintiff-Respondent,

-against-

Jeong Hoy,
Defendant-Appellant.

_____

Kelly Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered March 1, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the part of defendant's motion that seeks dismissal of plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. Defendant submitted affirmed reports of an orthopedist and neurologist reporting normal ranges of motion in all tested body areas, specifying the objective tests they used to arrive at the measurements, and

concluding that plaintiff's injuries were resolved (*see De La Cruz v Hernandez*, 84 AD3d 652 [2011]).

In opposition, plaintiff raised a triable issue of fact, except with respect to his 90/180-day claim. Plaintiff submitted the sworn report of his treating chiropractor who attested that he performed objective tests and found limitations in range of motion of the cervical spine both recently and shortly after the accident (*see Dennis v New York City Tr. Auth.*, 84 AD3d 579 [2011]; *Colon v Bernabe*, 65 AD3d 969, 970 [2009]). The minor alterations in the report do not render it unreliable and may be explored by the parties at trial (*cf. Braham v U-Haul Co.*, 195 AD2d 277 [1993]). Plaintiff also submitted an MRI report, which was affirmed by a radiologist, noting disc herniations in plaintiff's cervical spine, as well as the affirmed report of a neurologist who found range-of-motion limitations in plaintiff's cervical spine.

Plaintiff's 90/180-day claim should have been dismissed because he asserted in his deposition testimony and bill of particulars that he was confined to bed or home for only a few

weeks after the accident (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522-523 [2010]).

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6040-
6041 In re Timothy Reynaldo L. M.,

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

Frances M., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent.

Lisa H. Blitman, New York, for Frances M., appellant.

John J. Marafino, Mount Vernon, for Reynaldo L., appellant.

Rosin Steinhagen Mendal, New York (Douglas H. Reiniger of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about May 18, 2009, which, upon a finding that respondent mother suffered from mental illness and that respondent father suffered from mental retardation, terminated respondents' parental rights to the subject child 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 finding that the mother suffered from mental illness was supported by clear and convincing evidence (*see* Social Services Law § 384-b[4][c], [6][a]). The court-appointed psychologist conducted a comprehensive evaluation of the mother and determined that the mother's mental illness, and her reluctance to take medication for her condition, rendered her incapable of caring for the child presently and for the foreseeable future (*see Matter of Roberto A. [Altagracia A.]*, 73 AD3d 501 [2010], *lv denied* 15 NY3d 703 [2010]; *Matter of Victoria Lauren W.*, 15 AD3d 165 [2005]).

Clear and convincing evidence, including the psychologist's testimony, also demonstrated that the father is unable, at present and for the foreseeable future, to provide proper and adequate care for the subject child by reason of his mental retardation, which originated during his developmental period (*see* Social Services Law § 384–b[4][c], [6][b]; *Matter of Jasmine Pauline M.*, 62 AD3d 483 [2009]).

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6042 Ronit D. Appel, Index 101923/10
Plaintiff-Appellant,

-against-

Paul M. Giddins, etc., et al.,
Defendants-Respondents,

Howard Goldberg, etc.,
Defendant.

_____

Ronit D. Appel, New York, appellant pro se.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 12, 2010, which, to the extent appealed from, denied plaintiff's motion to dismiss defendants Paul M. Giddins and Giddins & Claman, LLP's interpleader counterclaim and cross claim, and granted the Giddins defendants' cross motion to dismiss all causes of action as against them, unanimously affirmed, with costs.

Plaintiff's and defendant Goldberg's competing claims to the contract deposit held by the Giddins defendants (Giddins) as escrow agent are sufficient to support Giddins's interpleader counterclaim and cross claim (*see Fischbein, Badillo, Wagner v Tova Realty Co.*, 193 AD2d 442 [1993]). Giddins's claim for costs

and reasonable attorneys' fees may proceed because, notwithstanding plaintiff's characterization, her claims against Giddins are based on Giddins's performance of its duties as escrowee, and the contract provides for Giddins's recovery of costs and reasonable attorneys' fees incurred in connection with the performance of its duties as escrowee, which include responding to plaintiff's claims (*see* CPLR 1006[f]; *Sun Life Ins. & Annuity Co. of N.Y. v Braslow*, 38 AD3d 529 [2007]).

The tenth, eleventh and thirteenth causes of action, which seek damages arising from Giddins's holding of the deposit, fail to state causes of action because plaintiff does not allege that Giddins breached any of its duties as escrow agent.

The tenth cause of action, which alleges fraudulent inducement via the false statement that a lis pendens on the apartment would be removed before or at the closing, fails to state a cause of action for the additional reason that, since the closing never took place, it cannot be shown that such a statement was false (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [2010], *lv dismissed* 17 NY3d 782 [2011]). In any event, the documentary evidence shows that there was no promise that the lis pendens would be removed before the closing. The contract obligated plaintiff to accept such title as the title company was

willing to approve and insure, and the title company confirmed in writing that the lis pendens would be omitted from the title report as an exception to title. Plaintiff's email demanding confirmation that the lis pendens would be removed after the closing establishes that she knew that the lis pendens was to be removed after the closing.

Nor does the tenth cause of action state a cause of action for negligent misrepresentation, since plaintiff could not reasonably rely on Giddins in its role as Goldberg's attorney (*see Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [2000]; *Aglira v Julien & Schlesinger*, 214 AD2d 178, 185 [1995]).

In any event, whether it alleges fraud in the inducement or negligent misrepresentation, the tenth cause of action is barred by the merger clause in the contract (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499 [2011]).

In her claim for punitive damages, plaintiff failed to allege the requisite "egregious tortious conduct by which . . . she was aggrieved, [and] also that such conduct was part of a pattern of similar conduct directed at the public generally" (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

The claim for treble damages pursuant to Judiciary Law § 487 fails to state a cause of action because the conduct of which plaintiff complains did not occur in the course of a pending action (*see Hansen v Caffry*, 280 AD2d 704, 705 [2001], *lv denied* 97 NY2d 603 [2001]).

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6043 Wilfredo Rosado, etc., Index 603214/04
Plaintiff-Appellant,

-against-

Edmundo Castillo, Inc., et al.,
Defendants-Respondents.

_____

Caraballo & Mandell, LLC, New York (Dolly Caraballo of counsel), for appellant.

Timothy C. Parlatore, New York, for respondents.

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Judgment, Supreme Court, New York County (Charles Ramos, J.), entered January 21, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered May 8, 2009, which, inter alia, denied plaintiff's cross motion for a finding of contempt and vacated the temporary restraining order and the preliminary injunction, unanimously reversed, on the law, without costs, the complaint reinstated as against defendants Edmundo Castillo, Inc., Beverly Whitaker d/b/a Money Tree, Edmundo Castillo, and Denise Cassano, the determination on the contempt motion vacated, the temporary restraining order and the preliminary injunction reinstated, and the matter remanded for a new trial and subsequent determination of the contempt issue, to be determined before a different justice.

Defendant Castillo admitted that he diverted the assets of Castillo Rosado, Inc. (CRI) without authorization from his partner and in violation of their shareholders agreement. However, he defended his actions by claiming that plaintiff had abandoned the business and that he was acting to pay off the CRI debts, and further claimed that plaintiff suffered no damages because the business was worth nothing. While the court instructed the jury that it was Castillo's burden to prove that the CRI funds he diverted were all used to pay CRI bills, the second jury interrogatory asked the jury whether the funds collected by Castillo were greater than the amounts he used to pay CRI bills, debts and loans, and instructed that if five jurors found "no" or "unable to determine," the verdict was to be in favor of Castillo. This had the effect of improperly shifting the burden of proof to plaintiff on the very point that the court instructed the jury had to be proven by Castillo, depriving plaintiffs of a fair trial (*see Shapiro v Art Kraft Strauss Sign Corp.*, 39 AD2d 696 [1972]).

The court also erred in directing a verdict dismissing the claims against defendant Denise Cassano. Evidence was presented at trial legally sufficient to allow the jury to find that Cassano engaged in the conduct attributed to her in the

complaint.

Moreover, the court improperly dismissed the individual claims asserted by plaintiff, since defendants' alleged conduct and the other circumstances here suggest, as a matter of equity given the percentage of his interest in the company, that he have at least the opportunity to recoup the lost value of his shares (*see e.g. First Natl. Bank of Md. v Fancy*, 268 AD2d 229 [2000]; *Geltman v Levy*, 11 AD2d 411, 413-414 [1960]).

Finally, in our view the court improvidently exercised its discretion by deciding the issue of whether defendants acted in contempt of the temporary restraining order on the merits at a pretrial hearing. As the court previously determined, and this Court affirmed (54 AD3d 278 [2008]), it would have been preferable to delay the contempt determination until the factual issues in the underlying case were decided by the jury, since the

two matters were so closely intertwined.

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6044 The People of the State of New York, Respondent, Ind. 3437/09

-against-

Alex Echevarria, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered April 9, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 10 years, unanimously affirmed.

By limiting courtroom closure solely to the duration of the trial testimony of two undercover police officers, and by noting that it would separately consider opening the proceeding to defendant's family members if any requested access to the courtroom during the period of closure, the trial court discharged its duty to consider reasonable alternatives to

closing the proceeding (*see Presley v Georgia*, __US__, __, 130 S Ct 721, 724 [2010]; *People v Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011], *cert denied* __US__, 2011 WL 4534895, 2011 US LEXIS 5278 [Oct 3, 2011]).

The court's charge on the agency defense adequately conveyed the appropriate principles (*see People v Job*, 87 NY2d 956 [1996]; *People v Pratt*, 39 AD3d 315 [2007], *lv denied* 9 NY3d 849 [2007]). The court was not obligated to include all the language contained in the Criminal Jury Instructions (*see People v Ladson*, 41 AD3d 248, 249 [2009], *lv denied* 9 NY3d 877 [2007]), and nothing in the charge as given can be viewed as directing a verdict. In any event, defendant's own testimony negated his agency defense in that he admitted that his desire to obtain drugs as compensation for arranging the transaction was not incidental, but was his

sole motivation (*see People v Sanchez*, 35 AD3d 161 [2006], *lv denied* 8 NY3d 949 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6047 The People of the State of New York, Ind. 4698/09
Respondent,

-against-

Victor Morales,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman J.), rendered on or about March 10, 2010,

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

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

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

6048 In re Gloria Gonzalez, Index 250695/10
Petitioner-Respondent,

-against-

State of New York Office of Temporary and Disability Assistance,
Respondent-Appellant.

Eric T. Schneiderman, Attorney General, New York (Ana P. Zybert of counsel), for appellant.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered June 16, 2010, which granted the petition seeking to annul respondent's decision after fair hearing, which upheld a determination of the New York City Human Resources Administration to discontinue petitioner's public assistance benefits, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The subject petition raised an issue of substantial evidence and thus the proceeding should have been transferred to this Court pursuant to CPLR 7804(g) (*see e.g. Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388 [2006]). Accordingly,

we will "treat the substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1992]).

The determination to discontinue petitioner's public assistance benefits after she failed to return the required eligibility questionnaire is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). There exists no basis to disturb the credibility determinations of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443–444 [1987]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6049 Progressive Northeastern Insurance Company, Plaintiff-Respondent, Index 307512/08

-against-

Penn-Star Insurance Company, Defendant-Appellant,

A#1 Pelham Corporation, et al., Defendants.

Miranda Sambursky Slone Sklarin Verneniotis, LLP, Mineola (Steven Verveniotis of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Michael F. Ingham of counsel), for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about August 30, 2010, which granted plaintiff's motion for summary judgment, denied defendant Penn-Star Insurance Company's cross motion for summary judgment, and declared that defendant is obligated to defend and indemnify A#1 Pelham Corporation in the underlying personal injury action and to reimburse plaintiff for any costs it has incurred in the defense of the underlying action, unanimously affirmed, with costs.

In this action for a declaratory judgment in an insurance coverage dispute, arising from a slip and fall on oil which occurred in the basement boiler room of a residential building

one day after the insured's oil delivery truck delivered oil to the building, the motion court correctly found that the general automobile policy issued to the insured by plaintiff does not provide coverage for the underlying personal injury action. Defendant's argument that the automobile policy was implicated simply because the oil was transported in a covered vehicle is unpersuasive (*see Wausau Underwriters Ins. Co. v St. Barnabas Hosp.*, 145 AD2d 314, 315 [1988]; *see also Zaccari v Progressive Northwestern Ins. Co.*, 35 AD3d 597, 599-600 [2006]).

Defendant's argument regarding the implication of its own automobile exclusion clause is, for the same reasons, unpersausive. Neither do the facts of this case implicate the policy's exclusion from products-completed operations hazard coverage for "[w]ork that has not yet been completed or abandoned," in as much as the slip-and-fall accident occurred one day after the insured made the oil delivery.

Finally, summary judgment was not premature. Defendant has failed to present any "evidentiary basis [for its] suggest[ion] that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [2000]). Further, under the

circumstances of this case, plaintiff's counsel was entitled to rely on his affidavit in support of plaintiff's motion for summary judgment (*see Zuckerman v New York*, 49 NY2d 557, 563 [1980]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6051 Diane Warme, etc., Index 17164/02
Plaintiff-Appellant,

-against-

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

_____

Michael A. Cervini, P.C., Jackson Heights (Robin Mary Heaney of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered August 18, 2010, which, in an action to recover damages for defendants' alleged failure to prevent the suicide of plaintiff's decedent while an inmate at Rikers Island, granted defendants' oral application to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's opening statement, or her proffer of proof thereafter failed to set forth a prima facie case of negligence against defendants (*see Ortiz v City of New York*, 39 AD3d 359, 359 [2007], *lv denied* 9 NY3d 803 [2007]).

The trial court providently exercised its discretion in refusing to recuse itself, as there was no showing of bias (*Ronald S. v Lucille Diamond S.*, 45 AD3d 295, 297 [2007]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6052N Eugene Stolowski, et al., Index 8850/05
Plaintiffs, 894/06

Eileen Bellew, etc., et al.,
Plaintiffs-Respondents,

-against-

234 East 178th Street LLC,
Defendant-Appellant,

The City of New York,
Defendant.

- - - - - -

6053N Eugene Stolowski, et al.,
Plaintiffs-Respondents,

-against-

234 East 178th Street, LLC,
Defendant-Appellant,

The City of New York,
Defendant.

[And Other Actions]

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Eugene Stolowski, Brigid Stolowski, Eileen Bellew, Jeffrey G. Cool, Sr., Jill Cool, Joseph P. DiBernardo and Brandan K. Cawley, respondents.

Meyer, Suozzi, English & Klein, P.C. Garden City (Andrew J. Turro of counsel), for Jeanette Meyran, respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.),

entered on or about February 10, 2010, which, insofar as appealed from as limited by the briefs, denied defendant 234 East 178th Street LLC's motion to compel plaintiffs Bellew and Meyran to provide authorizations for death benefit information, unanimously reversed, on the law and the facts, without costs, and the motion granted. Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 7, 2011, which, insofar as appealed from as limited by the briefs, denied 234 East 178th Street LLC's motion for a protective order as to post-fire repairs and remedial measures, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Defendant bears the burden of establishing by clear and convincing evidence that it is entitled to an offset for any collateral source payment that represents reimbursement for a category of loss that corresponds to a category of loss for which damages are awarded in this action (*see* CPLR 4545; *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]. Thus, disclosure of the death benefits that were or will be received by plaintiffs Bellew and Meyran is material and necessary in defense of this action (*see* CPLR 3101). The collateral source hearing at which a defendant has the opportunity to make the above showing is held after a verdict has been rendered in the plaintiff's favor.

However, "[p]retrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing" (*Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 35 [2008], *lv denied* 11 NY3d 705 [2008]).

The records of defendant's post-fire repairs and remedial measures do not fall within any of the recognized exceptions to the general rule that evidence of post-accident repairs is generally inadmissible and may never be admitted to prove an admission of negligence (*see Fernandez v Higdon El. Co.*, 220 AD2d 293 [1995]). Contrary to plaintiffs' contentions, "general credibility impeachment" is not an exception. Control is not at issue here since defendant concedes that it owns the premises (*see Hyman v Aurora Contrs.*, 294 AD2d 229 [2002]). The fire department's full investigation of the fire, which produced diagrams and photographs, provides evidence of the existence of a defective condition (*compare Mercado v St. Andrews Hous. Dev. Fund Co.*, 289 AD2d 148 [2001] [plaintiff entitled to seek

disclosure of post-accident repairs or modifications where defective condition of sidewalk could not be proven otherwise]; *Longo v Armor El. Co.*, 278 AD2d 127 [2000] [same; parts removed during repair of defective elevator were discarded]).

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

ENTERED: NOVEMBER 15, 2011

CLERK

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

6054 In re Arthur Franklin, Ind. 4253/09
[M-4447] Petitioner, 5749/09

-against-

Hon. Gregory Carro, etc.,
Respondent.

Arthur Franklin, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Roberta L. Martin of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 15, 2011

CLERK