SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 3, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7746 Tayshah Armstrong Brown, Index 309587/09
Plaintiff-Appellant,

-against-

Mat Enterprises of NY Inc., et al.,
Defendants-Respondents.

Seiden & Kaufman, Carle Place (Steven J. Seiden of counsel), for appellant.

Weiner, Millo, Morgan & Bonanno, LLC, New York (Douglas A. Gingold of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 23, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

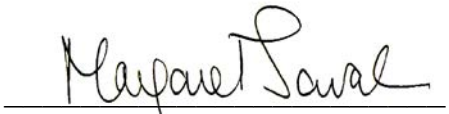
Defendants established their prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that she suffered a miscarriage as a result of the subject motor vehicle accident. Defendants submitted the report of their expert, who reviewed plaintiff's medical records and concluded that the accident did not cause plaintiff to lose the

fetus. The expert noted the two-week delay between the accident and the loss of the fetus, and the fact that in the intervening time, both plaintiff and the fetus had normal examinations (*see generally Franchini v Palmieri*, 1 NY3d 536, 537 [2003]).

In opposition, plaintiff raised a triable issue of fact. Her treating obstetrician found that the accident caused her to lose the fetus, and that her prior pregnancies, births and abortions did not play a role in the miscarriage (*see Pisani v First Class Car & Limousine Serv. Corp.*, 82 AD3d 596, 597 [2011]; *Tsamos v Diaz*, 81 AD3d 546 [2011]). Given the conflicting evidence in the medical records, the matter should be resolved by the trier of fact.

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

ENTERED: JULY 3, 2012



DEPUTY CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7755- Index 602335/09
7756-
7757-
7758 Alexander Gliklad,
Plaintiff-Respondent,

-against-

Michael Cherney,
Defendant-Appellant.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Philippe Adler of counsel), for appellant.

Winston & Strawn LLP, Chicago, IL (W. Gordon Dobie of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 24, 2011, which granted plaintiff Alexander Gliklad's cross motion to strike defendant's affirmative defense of lack of personal jurisdiction, unanimously reversed, on the law, without costs, and the cross motion denied. Order, same court and Justice, entered July 21, 2011, granting plaintiff's motion for a preliminary injunction enjoining defendant from prosecuting a pending action in Israel; order, same court and Justice, entered October 21, 2011, which denied defendant's motion to dismiss pursuant to CPLR 327 on the ground of forum non conveniens; and order, same court and Justice, entered October 27, 2011, which denied defendant's motion to renew and reargue

the July 2011 order, unanimously affirmed, without costs.

The IAS court erred in granting plaintiff's motion to strike defendant's affirmative defense of lack of personal jurisdiction. Contrary to plaintiff's contention, defendant did not waive this defense by moving for summary judgment dismissing the complaint on the merits, given that defendant had previously raised the jurisdictional defense. *Competello v Giorando* (51 NY2d 904 [1980]) is distinguishable, as the defendant in that case failed to raise the defense of lack of personal jurisdiction in a motion pursuant to CPLR 3211(a)(7).

Defendant failed to meet his burden of establishing that New York is an inconvenient forum for this action (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Further, the subject promissory note contained a clause selecting New York as the forum, barring defendant's forum non conveniens motion (*see Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 [2010]).

The court properly granted plaintiff's motion for a preliminary injunction barring defendant from prosecuting the action he had commenced in Israel over the same promissory note at issue in the instant action. A party moving for a preliminary injunction must establish a likelihood of success on the merits, irreparable harm if the injunction were not granted, and a

balance of the equities in the movant's favor (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Casita, L.P. v MapleWood Equity Partners [Offshore] Ltd.*, 43 AD3d 260 [2007]). Here, even if defendant may have a meritorious defense, plaintiff made a prima facie showing that his claim under the promissory note has merit (*see Matter of Witham v Finance Invs., Inc.*, 52 AD3d 403 [2008]; *Bingham v Struve*, 184 AD2d 85 [1992]). Plaintiff also established a risk that he would suffer irreparable harm if he were to travel to Israel to litigate the other action, since this act might jeopardize his Canadian asylum status. In addition, the balance of the equities favors plaintiff, since the expenditures of time and resources by the parties and the court would be potentially wasted if the Israeli action, which defendant commenced one-and-a-half years after the commencement of the instant action, were to result in a decision precluding any decision the court might have reached in this case (*see Jay Franco & Sons Inc. v G Studios, LLC*, 34 AD3d 297 [2006]).

Further, defendant appeared to be forum shopping by attempting to obtain a favorable decision from the Israeli court, which would interfere with the New York court's ability to resolve the issues before it (*see IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 59 AD3d 366 [2009]).

Finally, the court did not err in denying defendant's motion

to renew. Contrary to defendant's contention that the court should have ordered plaintiff to post an undertaking to cover defendant's damages in the event the injunction were found to have been erroneously issued, the injunction would actually save both parties time and money by relieving them from the burden of litigating a second action (*see Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 80 AD3d 455 [2011]; *Visual Equities Inc. v Sotheby's, Inc.*, 199 AD2d 59 [1993]).

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

ENTERED: JULY 3, 2012

Margaret Sowal

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6432 In re Jaquan M.,

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

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

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 10, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on probation for a period of 15 months, reversed, on the law, without costs, the motion to suppress granted, the order of disposition vacated, and the petition dismissed.

Appellant, who was 14 years old at the time of the incident, was observed by the police at approximately 9:35 p.m. in a drug-prone location, wearing a backpack. When the police first spotted him, they were in a car and he was walking slowly down a sidewalk. Appellant then passed between two parked cars, peering

up and down the street, and then passed back between the cars and looked up and down the sidewalk. Appellant stepped back onto the sidewalk, looked around and began pacing in a circle very slowly. He took out his cell phone and used it for about 30 seconds, put it back in his pocket, and then went back between the cars. He repeated the pacing and looking a second time. Appellant then took off his backpack and placed it on the ground between the cars. He kneeled down and removed a white object very slowly and gently from his waistband, placing the object in an outer pocket on the side of the backpack. He used one hand to grip the object and the other to hold the waistband, making it appear to the observing officers that he did not want the object to get caught in his pants and that he was trying to remove the object as quickly, but as carefully, as possible. Appellant placed one hand on the pocket of the backpack and used the other hand to place the object inside the pocket. He zipped up the pocket, put the backpack on his shoulder, and crossed the street. The police thought the object "could" have been a firearm because of the way appellant was handling it and because it was in his waistband, the most common location for carrying a gun. However, by the officers' own admissions, nothing about the appearance of the object which appellant placed in the backpack supported that suspicion.

One of the officers got out of the car and walked side by side with appellant. The officer saw that appellant's backpack seemed to be bottom-heavy. The officer identified himself and told appellant to walk with him across the street. Appellant replied, "[W]hat do you want from me? I am only fourteen." Another officer went to appellant's right, and the one who originally approached him frisked his waistband and patted down his pockets. When asked where he was coming from, appellant replied that he was coming from his uncle's house. When asked where he was going, appellant stated, "I don't know. I am going here," and showed an address written on his forearm which was located in a housing development in the South Bronx, and which the police knew to be a high-crime, drug-prone location. The first officer, upon smelling marijuana, asked appellant if he was in possession of any. Appellant said, "[N]o." The officer asked if appellant had ever been in trouble with the law, and he answered, "No. This is the first time." When the officer asked what was in the backpack, appellant replied, "[N]othing."

The officer took the backpack by the upper strap handle at the top and shook it a little. He asked appellant why the bag was so heavy and what was in it. Appellant again replied that there was nothing in the backpack. The officer believed that appellant was lying because the bag was very heavy and he had

previously seen appellant place something inside it. The officer asked for pedigree information, and appellant gave him his date of birth and first name. Appellant stated that papers bearing his name might be found among school papers and a folder in his backpack and stated, "You could check if it's in any of those papers in my bag." The officer told appellant to take off the backpack and hand it to him. Appellant placed the bag on the ground and the officer opened up the larger pocket and looked through the paperwork for something with appellant's name on it, but was unsuccessful. He then opened the outer pocket, which contained no paperwork. However, the officer saw the object that he had seen earlier, a white bag. The officer placed his hand on the bag, which was hard and heavy. He stated that the object "could have been anything," but it felt like a firearm. The officer placed appellant in handcuffs for his safety, and detained him so that he could determine the contents of the bag. Also, he considered appellant a flight risk because appellant was nervous, turning his head and leaning his body from side to side. When the officer opened the bag, he saw a firearm wrapped in bubble wrap, and placed appellant under arrest. Eleven rounds of ammunition were loaded in the magazine, and $963 in currency was also recovered from appellant's jeans pocket.

The court denied appellant's motion to suppress the gun.

The court found that the search was justified by appellant's presence at night in a high-crime neighborhood, his furtive actions such as peering up and down the street and sidewalk, and his removal of a white object from his waistband, which, in the officers' experience, is where weapons are frequently concealed. The court noted appellant's inability to tell the officers where he was going without first looking at an address written on his arm, and that the officers knew that address to be in a high-crime area. The court further observed that appellant did not have identification, did not give his full name, and suggested that the officer look for some papers in the backpack. The court also relied on the fact that the officer who searched the backpack testified that it was much heavier than it would have been had it contained only papers.

Upon the denial of his suppression motion, appellant admitted that he had committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree. He was adjudicated a juvenile delinquent, and placed on enhanced supervision probation for a period of 15 months. He was also directed to obey his parents, attend school regularly, refrain from the use of drugs or alcohol, complete 60 hours of community service and have no gang affiliation or further difficulties at home or in the community.

In determining whether the encounter between the police and appellant ultimately justified the seizure of the weapon and appellant's arrest, we rely on the four-tiered methodology enunciated by the Court of Appeals in *People v De Bour* (40 NY2d 210 [1976]). In *De Bour*, the Court delineated the various steps of justifiable intrusion: (1) an approach to request information based on some objective credible reason, not necessarily indicative of criminality; (2) the common-law right to inquire (short of forcible seizure), based on a founded suspicion that criminal activity is afoot; (3) a forcible stop and detention (and limited pat-down/frisk), based on a reasonable suspicion that a particular person has committed, is committing or is about to commit a crime; and (4) an arrest, based on probable cause to believe the person committed a crime (*id*. at 223).

Clearly, the police in this case were justified in taking the first two steps. Appellant's seemingly furtive behavior at night and in a high-crime neighborhood provided a reasonable basis for the police to form a founded suspicion that appellant was engaged in criminal activity. This gave the officers the right to approach appellant and to make inquiries of him. However, the presentment agency argues that the police were justified in seizing appellant and then searching his bag because, based on the totality of the circumstances, the officers

formed a reasonable suspicion that he was in possession of a weapon. These circumstances included appellant's apparently furtive movements, his removal of an object from his waistband, the heavy appearance of his backpack after he placed the object inside it, and his denial that there was anything at all in the backpack.

"'[R]easonable suspicion' [to justify a seizure] has been aptly defined as the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand. The requisite knowledge must be more than subjective; it should have at least some demonstrable roots. Mere 'hunch' or 'gut reaction' will not do" (*People v Sobotker*, 43 NY2d 559, 564 [1978] [internal quotation marks and citations omitted]). This Court has specifically held that the mere fact that an officer sees a person holding something near his waistband is not enough to form a reasonable suspicion, "absent any indication of a weapon, such as the visible outline of a gun" (*People v Fernandez*, 87 AD3d 474, 476 [2011]; *see People v Manuel*, 220 AD2d 263 [1995] [observation of large bulge under the defendant's shirt above the waistband did not provide a reasonable basis to believe that the defendant was armed]; *People v Barreto*, 161 AD2d 305 [1990] [same], *lv denied* 76 NY2d 852 [1990]; *see also People v Crawford*,

89 AD3d 422, 423 [2011] [“Defendant’s flight, when accompanied by nothing more than the presence of an object in his pocket that was unidentifiable even at close range, did not raise a reasonable suspicion that he had a gun or otherwise was involved in a crime”]).

We reject the dissent’s implication that an officer’s suspicion that an unidentified object in, as opposed to near, a person’s waistband, is a gun, is always reasonable. This Court did not go that far in *People v Alozo* (180 AD2d 584 [1992]), which the dissent cites in support of that position. It is noted that in *People v Alozo*, this Court found that one of the factors justifying the frisk of the defendant was that “[t]he officer believed the item to be a gun because of its appearance (*id.* at 586).” Here, by contrast, the officers conceded that nothing about the appearance of the object which appellant pulled from his waistband revealed what it was. It is further noted that *People v Benjamin* (51 NY2d 267 [1980]), which, as the dissent points out, was cited by this Court in *People v Alozo*, found that a frisk was justified because the defendant there reached for his waistband and “[i]t would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety” (51 NY2d at 271). Here, there was no evidence that the officers ever felt that their lives were in

danger by the possible presence of a gun.

Further, absent such an actual indication of a firearm, "other objective indicia of criminality" are necessary before a suspect may be seized (*People v Powell*, 246 AD2d 366, 370 [1998], *appeal dismissed* 92 NY2d 886 [1998]). Thus, in *Powell*, suppression of a gun was granted where the defendant, while walking at a quick pace, adjusted his waistband and walked with one arm held stiffly against his body, because those "actions were at all times innocuous and readily susceptible of an innocent interpretation" (*id.* at 369). On the other hand, in *People v Rodriguez* (71 AD3d 436 [2010], *lv denied* 15 NY3d 756 [2010]), suppression of a weapon was denied even though the police only observed that defendant's waistband was weighed down by "a concealed object (*id*. at 437)." However, in *Rodriguez*, the defendant was stealthily approaching an apartment which was under surveillance as a known drug location and was a possible target for a home invasion robbery. Further, the defendant was carrying latex gloves, which the police knew had been used in such armed robberies. Similarly, in *Matter of Wilberto R.* (220 AD2d 332 [1995]), cited by the dissent, the defendant, whose vest had a drooping pocket that this Court held the police justifiably believed contained a gun, closely matched the description of a person who a radio call had stated was carrying a gun. A similar

description of suspects who had just fired weapons formed a predicate for the search in *People v Flores* (226 AD2d 181 [1996], *lv denied* 88 NY2d 985 [1996]), also cited by the dissent. Here, appellant had never been described to the police as being armed. Certainly the dissent would not argue that any person on the street, even in a high-crime area, is presumed to be carrying a weapon based only on a drooping pocket or backpack.

Reasonable suspicion could not be formed in this case based strictly on the officers' observation of appellant removing an object from his waistband, because they conceded that the object bore no obvious hallmarks of a weapon. Further, there were no other objective indicia of criminality because there were plausible, non-criminal reasons for appellant's behavior. For example, the fact that the backpack sagged at the bottom could have been the result of any number of things which it would have been legal for appellant to possess. Nor did appellant's actions in pacing back and forth and peering up and down the street and sidewalk, and then kneeling down to transfer something into the backpack exclude the reasonable possibility that he was engaged in innocent behavior. The fact that appellant was in a high-crime area and on his way to another high-crime area does not, without more, constitute a factor sufficient to create reasonable suspicion (*Powell,* 246 AD2d at 369-370). Nor do we believe that

all of these factors, taken together, reasonably lead to the conclusion that appellant was in the process of committing a crime.

Even if the seizure of appellant was legal, we find that appellant's denials that there was anything inside the bag did not justify an increase in the level of suspicion such that the police properly searched his bag. In the cases on which the presentment agency and the dissent rely in arguing that similar lies can create probable cause, *People v Febus* (11 AD3d 554 [2004] *lv dismissed* 7 NY3d 743 [2004]) and *People v Scott-Heron*, 11 AD3d 364 [2004], *lv denied* 4 NY2d 804 [2004]), the police had already developed strong reason to believe that the defendants had secreted drugs, and the defendants' denials were found to have buttressed that belief. Here, as discussed above, the police had no basis to believe that there was a gun in appellant's backpack, other than their hunch. Appellant's denials were insufficient, on their own, to create probable cause.

Finally, we find that the presentment agency failed to meet its heavy burden of establishing that appellant voluntarily consented to the search of the entire bag (*see People v Barreras*, 253 AD2d 369 [1998]). Based on the exchange with the officers, appellant's reasonable expectation was that he had consented to a

limited search of papers that might contain identifying information (see *People v Gomez*, 5 NY3d 416, 419 [2005]). When the officer opened a separate compartment in the backpack which did not contain any papers, the right to proceed further was lost.

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

CATTERSON, J. (dissenting)

I must respectfully dissent. In my view, the totality of the circumstances justified not only a De Bour level-two common-law inquiry, but also provided the police with reasonable suspicion to believe that the appellant was illegally carrying a gun in his backpack justifying a level three stop and frisk.

Relying on People v. Fernandez, (87 A.D.3d 474, 928 N.Y.S.2d 293 (1st Dept. 2011), the majority acknowledges that the appellant's "furtive behavior at night and in a high-crime neighborhood" justified a level-two inquiry. However, because the object that the appellant secreted in his backpack "bore no obvious hallmarks of a weapon" and there were no other "indicia of criminality," the majority concludes that there was no justification for a level three stop and frisk. I disagree. It is not necessary for an officer to see the "outline of a gun" in order to form a reasonable suspicion that the defendant is armed. A defendant's "describable conduct" may provide a "reasonable basis for the police officer's belief that the defendant [has] a gun in his possession." People v. Marine, 142 A.D.2d 368, 371-372, 536 N.Y.S.2d 425, 427 (1st Dept. 1989) (internal quotation marks and citation omitted).

In any event, Fernandez is inapposite. In Fernandez, the officer saw the defendant in a high-crime area, crouched behind

an SUV, holding his hand "near" his waist, but never saw the defendant take anything out of his waistband, nor what the defendant was holding. We found that the mere fact that an officer sees a person holding something *near* his waistband is not enough to form a reasonable suspicion "absent any indication of a weapon, such as the visible outline of a gun." 87 A.D.3d at 476, 928 N.Y.S.2d at 294.

By contrast, in this case the officer saw the appellant take a white object large enough to be a gun *out of his waistband* and put it in his backpack. The officer testified that he thought the object could have been a gun not only because it was *in* his waistband, but also because the appellant handled the object "with care." See e.g. People v. Alozo, 180 A.D.2d 584, 586, 580 N.Y.S.2d 298, 299 (1st Dept. 1992), citing People v. Benjamin, 51 N.Y.2d 267, 271, 434 N.Y.S.2d 144, 146, 414 N.E.2d 645, 648 (1980). In People v. Alozo, we found that the object's "appearance, *the manner in which defendant held it* and the fact that it was inserted *in* the back waistband of his pants" (180 A.D.2d at 586, 580 N.Y.S.2d at 299) (emphasis added) provided a reasonable basis for the officer to believe that the defendant had a gun. We further observed that "'[i]t is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in

the waistband.'" Id., quoting People v. Benjamin, 51 N.Y.2d at 271, 434 N.Y.S.2d at 146. The officer in this case also testified that the backpack appeared to be empty, but sagged from a heavy weight at the bottom, heightening his suspicion that the object was a gun. See e.g. Matter of Wilberto R., 220 A.D.2d 332, 332-333, 633 N.Y.S.2d 15, 15 (1st Dept. 1995) (defendant's vest pocket drooped, "indicating a heavy object that the officer believed could have been a gun").

Moreover, contrary to the majority's finding, in my opinion there were other "indicia of criminality." The appellant's efforts to keep the object concealed, his surreptitious conduct looking up and down the street, and his presence alone at night in a drug-prone location where armed robberies were increasing, were all factors that aroused the officer's reasonable suspicion. See e.g. People v. Martin, 88 A.D.3d 473, 931 N.Y.S.2d 7 (1st Dept. 2011) (the drug-prone location of the transaction contributed to the trained officer's suspicion); People v. Flores, 226 A.D.2d 181, 641 N.Y.S.2d 14 (1st Dept. 1996), lv. denied 88 N.Y.2d 985, 649 N.Y.S.2d 391, 672 N.E.2d 617 (defendant's effort to conceal a bulge in his waistband escalated the encounter to reasonable suspicion); People v. Alozo, 180 A.D.2d at 586, 580 N.Y.S.2d at 298 (1st Dept. 1992) ("[t]he officer's suspicions were further aroused" when the defendant

looked “up and down the block both before and after retrieving the object”).

While it may be true, as the majority finds, that individually these circumstances were “susceptible of an innocent interpretation,” here, they have to be viewed as a progression of actions, with each circumstance increasing the level of the police officer’s suspicion. Thus, I would find that taken together, they provided the officer with reasonable suspicion that the appellant was illegally carrying a gun in his backpack. In People v. Rodriguez, (71 A.D.3d 436, 895 N.Y.S.2d 94 (1st Dept. 2010), lv. denied 15 N.Y.3d 756, 906 N.Y.S.2d 829, 933 N.E.2d 228 (2010)), we concluded that although “[e]ach of the[] circumstances, when viewed in isolation, might be considered innocuous,” when viewed “in totality,” they provided reasonable suspicion that justified a stop and frisk. 71 A.D.3d at 436-437, 895 N.Y.S.2d at 95 (defendant behaved “stealthily” in an area known as a “distribution point for drugs and firearms,” his waistband was “weighed down” by an object that he attempted to conceal, and he was carrying a latex glove).

Furthermore, the officer testified that he knew that the appellant was lying when he repeatedly said that there was “nothing” in the backpack because he saw him put the object there and could see the weight of it at the bottom. Thus, in my

opinion, because the police already had reasonable suspicion to believe that the appellant illegally possessed a gun, his prevarication increased the officer's level of suspicion to probable cause to believe that there was a weapon in the backpack, justifying the search. See e.g. People v. Febus, 11 A.D.3d 554, 783 N.Y.S.2d 55 (2nd Dept. 2004), lv. dismissed 4 N.Y.3d 743, 790 N.Y.S.2d 656, 824 N.E.2d 57 (2004) (because the officer had reasonable suspicion to stop the defendant, the defendant's lie that he had "nothing" in his pocket raised the level of the encounter to probable cause); People v. Scott-Heron, 11 A.D.3d 364, 364, 783 N.Y.S.2d 368, 369 (1st Dept. 2004), lv. denied 4 N.Y.3d 803, 795 N.Y.S.2d 178, 828 N.E.2d 94 (2005) ("defendant's patently false responses to the detective's initial questions clearly raised the level of suspicion to probable cause").

In any event, I disagree with the majority that the invitation to search limited the search to the main compartment of the appellant's backpack. As the majority acknowledges, the appellant explicitly suggested that the officer look inside the backpack for papers that might contain identifying information. When the officer did not find any papers in the main compartment with the appellant's name on them, he opened the outer pocket. I do not believe that the right to proceed to the outer pocket was

"lost" when the officer failed to find papers in the main compartment. The scope of a search is "generally defined by its expressed object" and the "reasonable" expectation of the person consenting to the search. People v. Gomez, 5 N.Y.3d 416, 420, 805 N.Y.S.2d 24, 26, 838 N.E.2d 1271, 1273 (2005) (internal quotations and citations omitted). Here, the appellant did not expressly limit the search to the main compartment, nor could he have reasonably expected it to be limited to that area since a school paper with a student's name on it could be located in any pocket of a student's backpack, not just the main compartment.

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

ENTERED: JULY 3, 2012

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6436 The People of the State of New York, Respondent, Ind. 3063/09

-against-

Seugn Samba, etc., Defendant-Appellant.

Goldberg & Kaplan, LLP, New York (Brian Kaplan of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 7, 2010, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

At trial, Rashad Blake, the victim of the assault, testified as follows: Shortly after 11 p.m. on May 30, 2009, defendant approached Blake and his friend, Keith Edwards, on West 111th Street in Manhattan. Blake and Edwards had known defendant for several years. During a verbal exchange concerning Blake's brother, defendant removed a gun from his vest. Defendant stepped back and pointed his gun at Blake's waist. When Blake stepped forward, defendant hit Blake in the head with "the butt

of the gun." As defendant hit him, Blake heard the gun "[go] off [with] a loud pop" sound. Blake fell to the ground, not knowing if he had been shot or hit with the gun. Blake lost consciousness, and when he came to, his head was bleeding and he was in pain. Edwards also testified and corroborated Blake's testimony. Edwards explained that the sound he heard when Blake was hit "was a gunshot like."[1]

A bystander called the police. A police officer who responded testified that Blake told him that he had been "hit over the head with a gun" and that "the gun had gone off." Although the area was searched, no gun or ballistics evidence was recovered.

Blake was brought to the hospital by ambulance. The physician who treated him testified that Blake told him he had lost consciousness for a short time after he was hit with the handgun. The physician further testified that he diagnosed Blake with a scalp laceration and head injury, and closed the wound with three staples. A detective who visited Blake in the hospital that evening testified that Blake told him that

---

[1]The use of "like" by the witness following "gunshot" is not a grammatical error to be acknowledged by *sic*. Rather, it is the popular jargon of the grammatically superfluous repetition of "like" as a mental punctuation or method of adding cadence to speech. In no way does it indicate that the witness was making an analogy to the sound of a gunshot.

defendant had hit Blake over the head with a gun, causing the gun to discharge.

Following a jury trial, defendant was convicted of second-degree assault, and second-degree and third-degree criminal possession of a weapon. The People asked for the maximum sentence of 15 years. Defendant was adjudicated a second violent felony offender and sentenced to an aggregate term of 10 years.

On appeal, defendant argues that the People failed to prove his guilt with legally sufficient evidence. With regard to the assault conviction, defendant claims that the People failed to present evidence that Blake suffered "physical injury." With regard to the weapon possession convictions, defendant argues that the People did not present sufficient evidence that defendant possessed an "operable weapon" that "was loaded with 'live' ammunition." Defendant claims that as a result, the sentences imposed were excessive.

For the reasons set forth below, we find that all of the convictions were based on legally sufficient evidence. This Court's review of the legal sufficiency of trial evidence requires us to determine whether "any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the

People" (*People v Williams*, 84 NY2d 925, 926 [1994]). Furthermore, it is "well settled that matters of credibility are reserved for the triers of fact, who have had an opportunity to observe the demeanor of the witnesses and are therefore in the best position to weigh their testimony" (*People v Jones*, 165 AD2d 103, 108 [1991], *lv denied* 77 NY2d 962 [1991]).

Initially, we note that defendant's argument that the victim did not suffer physical injury is unpreserved (*see People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. To establish second-degree assault the People must prove beyond a reasonable doubt that defendant intentionally caused the victim to suffer physical injury by means of a dangerous instrument (*see* Penal Law § 120.05[2]). "'Physical injury' . . . means 'impairment of physical condition or substantial pain'" (*People v Chiddick*, 8 NY3d 445, 447 [2007], quoting Penal Law § 10.00[9]). Generally, issues of physical condition and substantial pain are questions for the trier of fact (*People v Guidice*, 83 NY2d 630, 636 [1994]). Factors considered in resolving such issues include the subjective seriousness of a victim's wound and the medical treatment required (*see id.*). Pain need not be excruciating or

incapacitating to support physical injury (*see Chiddick*, 8 NY3d at 447). Evidence that a victim's injury required medical attention, such as stitches, and caused him substantial pain, is generally sufficient to establish physical injury (*see e.g. People v Stone*, 45 AD3d 406 [2007], *lv denied* 10 NY3d 817 [2008]).

In this case, Blake testified that when defendant struck him on the head with the revolver, he temporarily lost consciousness and awoke bleeding and in pain. The physician and hospital records establish that his head was cut and that staples were used to close the wound. Blake further testified that when he woke the next morning, his jaw was swollen, his face was numb, and he had difficulty eating. He continued to have pain for the next two weeks and was unable to work for one week. In court, he pointed to a scar on the side of his head left by defendant's gun. The direct testimony of Blake, as well as that of the physician who treated him, provided the jury with sufficient evidence to conclude that Blake suffered "physical injury" within the meaning of the Penal Law.

As to the criminal possession of a weapon charges, the People presented sufficient evidence that defendant possessed an operable firearm. To establish defendant's guilt of criminal possession of a weapon in the second degree, the People must

prove beyond a reasonable doubt that defendant possessed a loaded firearm outside his home or business, and that he intended to use it unlawfully against another (Penal Law § 265.03[3]; *People v Longshore*, 86 NY2d 851, 852 [1995]). To establish criminal possession of a weapon in the third degree, the People must prove that defendant possessed a firearm and had been previously convicted of a crime (Penal Law § 265.02[1]). Proof of operability is an essential element of the crime of criminal possession of a weapon (*People v Hechavarria*, 158 AD2d 423, 424-425 [1990]). An operable firearm is one that is capable of discharging ammunition (*see People v Velez*, 278 AD2d 53 [2000], *lv denied*, 96 NY2d 808 [2001]).

Here, defendant does not dispute that he possessed a weapon outside of his home, that he intended to use it unlawfully and that he had been previously convicted of a crime. Instead, defendant argues that the People failed to prove that he was holding an "operable" gun, or a gun that was loaded with "live" ammunition.

Where, as here, there is no gun or ballistics evidence recovered, those elements may be proved circumstantially through eyewitness testimony and surrounding circumstances (*Hechavarria*, 158 AD2d at 425, *citing People v Borrero*, 26 NY2d 430, 436*; see e.g. People v Bianca*, 91 AD3d 1127 [2012]; *People v Jackson*, 288

AD2d 52 [2001], *lv denied* 97 NY2d 729 [2002]). Thus, a witness's testimony that he or she heard gunshots provides circumstantial evidence that a gun was loaded and operable (*see e.g. People v Maeweather*, 159 AD2d 1008, 1008 [1990], *lv denied* 76 NY2d 738 [1990] [witnesses "heard a noise like the firing of a gun"]; *Hechavarria*, 158 AD2d at 423-425 [the defendant was seen holding a gun and there was the sound of gunfire]; *People v Ciola*, 136 AD2d 557 [1988], *lv denied* 71 NY2d 893 [1988] [witnesses saw and heard the defendant fire the gun]). Furthermore, no expert testimony is required when the matter to be determined lies 'within the ken' of an ordinary juror (*see Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 147 [1976]; *People v Madera*, 24 AD3d 278 [2005], *lv denied* 6 NY3d 815 [2006].

Here, there is no dispute that defendant was holding a gun and that he struck Blake in the head with it. Both Blake and Edwards testified that when defendant struck Blake, the gun "went off," and that they heard a "loud pop" or gunshot sound as it discharged. The sound of a gunshot may be said to be within the realm of common knowledge. Thus, the jury needed no expert assistance to determine that the witnesses heard the gun fire. Presented with Blake's and Edwards' testimony, the jury was

entitled to conclude that defendant possessed a loaded, operable handgun. Accordingly, there is no basis upon which to disturb the jury's verdict.

We find that defendant's sentences were not excessive.

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

ENTERED: JULY 3, 2012

DEPUTY CLERK

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

7823 In re Kenneth Paccio, Index 115490/09
Petitioner-Appellant,

-against-

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

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for respondents.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered May 5, 2010, denying the petition to annul respondents' determination, dated July 8, 2009, which denied petitioner's application for accident disability retirement pension benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Board of Trustees denied petitioner's application for accident disability retirement (ADR) benefits, as a consequence of a tie vote upon the issue of whether petitioner's disability was caused by a service-related accident. Since there was some credible evidence to support the Medical Board's conclusion that petitioner's disability was not caused by a service-related accident, the Board of Trustees was entitled to rely on the

Medical Board's recommendation as to causation, and its determination denying petitioner ADR benefits may not be disturbed (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]; *Matter of Beckles v Kerik*, 1 AD3d 215 [2003], *lv denied* 1 NY3d 507 [2004]).

Contrary to petitioner's contention that the Board of Trustees failed to address explicitly all the medical evidence and to explain fully its reasons for disagreeing with petitioner's experts, it is clear from the record that the Board considered the relevant medical records, and the proceedings disclose the reason for its denial of ADR benefits sufficiently to permit judicial review (*see Matter of Galli v Bratton*, 238 AD2d 252 [1997]; *Matter of Curran v McGuire*, 87 AD2d 223, 226 [1982]).

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

ENTERED: JULY 3, 2012

Margaret Sowal

DEPUTY CLERK

Tom, J.P., Moskowitz, Renwick, Abdus-Salaam, JJ.

7926 In re Joseph Golia, Petitioner, Index 402677/10

–against–

Roberto Velez, etc., et al., Respondents.

Richard Whitten, New York, for petitioner.

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

Determination of respondent Environmental Control Board, dated September 24, 2009, finding that petitioner owner had illegally altered his residence in violation of former § 27-118.1 of the Administrative Code of the City of New York, and imposing a penalty of $3050, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Donna M. Mills, J.], entered June 21, 2011), dismissed, without costs.

Respondent's determination was supported by substantial evidence (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]), including the inspector's testimony that the residence's garage space had been converted into a separate dwelling unit, which was not permitted by the

certificate of occupancy. Petitioner was provided with sufficient notice of the violation (*see Matter of McDonald v Fischer*, 93 AD3d 969, 969 [2012]).

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

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

ENTERED: JULY 3, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6630 Alphonse Fletcher, Jr., et al., Index 101289/11
Plaintiffs-Respondents,

-against-

The Dakota, Inc., et al.,
Defendants-Appellants,

Pamela Lovinger, et al.
Defendants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Christine H. Chung of counsel), for appellants.

Vladeck, Waldman, Elias & Engelhard, P.C., New York (Milton L. Williams, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 27, 2011, modified, on the law, to dismiss the first cause of action as against The Dakota, with prejudice, and as against Barnes and Nitze, without prejudice; the second cause of action as against The Dakota, with prejudice; so much of the fifth cause of action as is based on statements made in defendants' affidavits, with prejudice; so much of the seventh and ninth causes of action as are based on plaintiff Fletcher's conduct with respect to the African-American shareholder who wanted to renovate her apartment as against The Dakota, without prejudice; and the seventh, ninth and eleventh causes of action as against Barnes, without prejudice, and otherwise affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
James M. Catterson
Rolando T. Acosta
Nelson S. Román, JJ.

6630
Index 101289/11

_____x

Alphonse Fletcher, Jr., et al.,

-against-

The Dakota, Inc., et al.,
Defendants-Appellants,

Pamela Lovinger, et al.
Defendants.

_____x

Defendants The Dakota, Inc., Bruce Barnes and Peter Nitze appeal from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered July 27, 2011, which, insofar as appealed from, denied their motion to dismiss the first, second and fifth through eleventh causes of action as against The Dakota, the first and sixth through eleventh causes of action as against Barnes in his individual capacity, and the first and fifth causes of action as against Nitze in his individual capacity.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Christine H. Chung, Jake M. Shields and Maaren A. Choksi of counsel), and Balber Pickard Maldonado & Van Der Tuin, PC, New York (John Van Der Tuin of counsel), for appellants.

Vladeck, Waldman, Elias & Engelhard, P.C., New York (Milton L. Williams, Jr. and Maia Goodell of counsel), and Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz, David E. Ross, Trevor J. Welch and Kanchana Wangkeo Leung of counsel), for respondents.

ACOSTA, J.

Plaintiff Alphonse Fletcher, Jr., an African-American resident of defendant co-op The Dakota, alleges that The Dakota and, as relevant to this appeal, two of its directors (defendants Barnes and Nitze) discriminated against him, inter alia, on the basis of race in refusing to approve his purchase of an apartment adjacent to one he owns for the purpose of combining the two. According to Fletcher, the case is about retaliation against him for sticking up for the rights of others, including minority and Jewish shareholders and applicants at The Dakota, and then to further defame him when he brought the discriminatory conduct to light.

Prior to discussing the relevant causes of action, we address individual board member liability in the context of discriminatory acts, and clear up an element of possible confusion in this area of law that may arise out of this Court's decision in *Pelton v 77 Park Ave. Condominium* (38 AD3d 1 [2006]). In short, although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability.

Turning to the contentions on appeal, defendants argue that all claims should be dismissed as against Nitze and Barnes

because the complaint fails to allege that they engaged in any acts separate and distinct from actions they took as board members. The claims that remain as against Nitze that we must address are breach of fiduciary duty (first cause of action) insofar as it is based on allegations of defamation, and defamation (fifth cause of action). As to Barnes, the remaining causes of action are the first insofar as it is based on defamation, the sixth and eighth, which allege discrimination under the New York State and City human rights laws, the seventh and ninth, which allege retaliation in violation of the State and City human rights laws, respectively, the tenth, which alleges a violation of the Civil Rights Law, and the eleventh, which alleges tortious interference with contract. Since defendants are not challenging the motion court's ruling that the discrimination-based claims (the sixth, eighth and tenth) otherwise fail to state a cause of action, but only that they fail to allege independent conduct on Barnes's part, we begin with those claims.

The provisions of the State Human Rights Law (State HRL) that proscribe discrimination in housing apply not only to the "owner" of the housing, but also to a "lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation . . . or any agent

or employee thereof" (Executive Law § 296[5][a]). The City Human Rights Law (City HRL) similarly provides for individual liability (Administrative Code of the City of NY § 8-107[5]). Although both statutes contain exceptions to their housing coverage (*compare* Exective Law § 296[5][a]) *with* Administrative Code of the City of NY §§ 8-107[5][a][4], [g]-[m],[o]), there are no exemptions in either statute for directors or officers of a coop or any other corporation. The anti-retaliation sections of both statutes also provide for individual liability with no exemption for corporate directors or officers (*see* Executive Law § 296[7]; Administrative Code of the City of NY § 8-107[7]).[1] Individual director and officer liability is also consistent with the limitations on the "business judgment" rule as enunciated by the Court of Appeals.

In *Matter of Levandusky v One Fifth Ave. Apt. Corp.* (75 NY2d 530[1990]), the Court of Appeals held that the "business judgment" rule was the correct standard of judicial review of the actions of the directors of a cooperative corporation. That rule

[1]The State HRL prohibits retaliation by "any person engaged in any activity to which this section applies" (Executive Law § 296[7]; "[p]erson" includes "one or more individuals" (Executive Law § 292[1]). The City HRL prohibits retaliation by "any person engaged in any activity to which this chapter applies" (Administrative Code § 8-107[7]); "[p]erson" includes "one or more natural persons" (Administrative Code § 8-102[1]).

prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*id.* at 537-538 [internal quotation marks omitted]). The Court, however, cautioned that "the broad powers of a cooperative board hold potential for abuse through arbitrary and malicious decision making, favoritism, discrimination and the like" (*id.* at 536). In *40 W. 67th St. v Pullman* (100 NY2d 147, 157 [2003]), the Court of Appeals "reaffirm[ed] [*Levandusky's*] admonition and stress[ed] that *those types of abuses are incompatible with good faith and the exercise of honest judgment*. While deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions" (emphasis added). Thus, arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule.

Nothing in the holding or reasoning of either *Levandusky* or *Pullman* suggests that there is a safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the business judgment rule. Moreover, there is no principle of corporate law that director liability arises only where the director commits a tort independent of the tort committed by the corporation itself. On the contrary, it has

long been held by this Court that "a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty* Corp., 58 AD3d 556 [2009] [internal quotation marks omitted], quoting *Espinosa v Rand,* 24 AD3d 102, 102 [2005], quoting *American Exp. Travel Related Services Co., Inc. v North Atlantic Resources, Inc.,* 261 AD 2d 310, 311 [1999]; *Savannah T & T Co., Inc. v Force One Express Inc.*, 58 AD3d 409 [2009]; *cf. Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001] ["In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally"]; *Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44 [1980], citing *Lippman Packing Corp. v Rose*, 203 Misc 1041, 1044 [1953], which noted, even then, that "a long list of cases . . . ha[d] . . . held that the officers, directors and agents of a corporation are jointly and severally liable for torts committed on behalf of a corporation and the fact that they also acted on behalf of the corporation does not relieve them from personal liability"]).

A leading treatise on corporations states that a director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else directed,

controlled, approved, or ratified the decision that led to the plaintiff's injury" (*see* 3A Fletcher Cyclopedia of the Law Corporations § 1135). This rule protects individual board members who did not participate or aid and abet the tortfeasors from being held vicariously liable for the tortfeasors' action.

Nevertheless, defendants contend that this Court's decision in *Pelton v 77 Park Ave. Condominium* (38 AD3d 1 [2006]) requires that the discrimination claims be dismissed as against Barnes. In *Pelton*, the plaintiff brought a disability discrimination claim, under the City HRL, against his condominium and the individual members of the board of managers based on their alleged failure to properly accommodate his disability. This Court granted summary judgment dismissing the action against the individual board members, reasoning that (1) the *Levandusky* standard was not satisfied, and (2) the plaintiff failed to allege "independent tortious conduct" by the individual defendants "in order to overcome the public policy that supports the business judgment rule" (*id*. at 10). However, there are two problems with this reasoning. First, as discussed above, the *Levandusky* rule will not protect a board member where he engages in discriminatory conduct. Second, *Pelton* takes a rule that applies where a cooperative or condominium board is alleged to have breached a contractual obligation, and incorrectly applies

it where a board allegedly engaged in the intentional tort of discrimination. That is, *Pelton* failed to disentangle the principles of individual corporate director liability in the breach of contract context (understood to provide a shield against liability) from the principles applicable to tort cases (where there is no such shield). As authority for our holding in *Pelton*, we cited *Murtha v Yonkers Child Care Assn.* (45 NY2d 913 [1978]). We now find, however, that our reliance on *Murtha* was misplaced, and we therefore decline to follow, and expressly overrule, the pleading rule articulated in *Pelton*.

Murtha is a breach of contract case in which the Court of Appeals stated that a corporate officer will not be held liable for inducing the breach of a contract between the corporation and a third party if he committed no "independent torts or predatory acts" (45 NY2d at 915). The Court had no occasion to hold, or even suggest that a director would not be held liable for a tort committed by the corporation if he had not committed a tort independent of that tort. In *Brasseur v Speranza* (21 AD3d 297 [2005]), which the *Pelton* Court cited as an example of a *Murtha* pleading failure, we dismissed a breach of fiduciary duty claim against individual board members because "there is no allegation that they breached a duty *other than, and independent of, those contractually imposed upon the board*" (*id.* at 298 [emphasis

added]). Moreover, we find that the *Pelton* pleading rule conflicts with Court of Appeals' warning that discrimination, among other abusive practices, is not protected by the business judgment rule (*see Levandusky*, 75 NY2d at 536; *Pullman*, 100 NY2d at 157). It also is inconsistent with the Court of Appeals' recent instruction that "we must construe Administrative Code § 8-107(7), like other provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v. City of New York,* 16 NY3d 472, 477-78 [2011]). Thus, we decline to dismiss the sixth, eighth and tenth causes of action as against defendant Barnes.

Defendants contend that the retaliation claims (the seventh and ninth causes of action) should be dismissed as against The Dakota and Barnes for failure to state a cause of action. The State HRL provides in, pertinent part, that "[i]t shall be . . . unlawful . . . to retaliate . . . against any person because he or she has opposed any practices forbidden under this article . . ." (Executive Law § 296[7]). To make out a claim of retaliation under the State HRL, the complaint must allege that (1) Fletcher engaged in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) he was subject to an adverse action; and (4) there was a causal

connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]).

The City HRL provides in, pertinent part, that "[i]t shall be . . . unlawful . . . to retaliate . . . in any manner against any person because such person has . . . opposed any practice forbidden under this chapter" (Administrative Code § 8-107[7]). "The retaliation . . . complained of under this subdivision need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity" (*id.*).

In interpreting the City HRL, we start from the premise that the Local Civil Rights Restoration Act requires that "we . . . construe Administrative Code § 8-107(7), like other provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-78 [2011]). "[I]t is important that the assessment [of a retaliation claim] be made with a keen sense of [the] realities [of the circumstances surrounding the plaintiff], of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those

realities" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 [2009], *lv denied* 13 NY3d 702 [2009] [in the context of a motion for summary judgment]).

Thus, to make out a retaliation claim under the City HRL, the complaint must allege that: (1) Fletcher participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action (*see Albunio v City of New York*, 67 AD3d 407, 413 [2009], *affd* 16 NY3d 472 [2011]).[2]

The complaint alleges that Fletcher began to oppose discrimination (or conduct that he perceived as discriminatory) after he was elected president of the coop board in May 2007. In or about September 2007, he complained to defendant Nitze that another board member's reference to certain applicants as "Jewish mafia" was "not appropriate." The applicants were initially rejected, although plaintiff and one other board member voted to approve. He further alleged that, "[a]lthough defendant Nitze

---

[2] While we rely upon *Forrest* in addressing plaintiff's State HRL claim (because that case continues to be binding upon us in the context of State HRL claims), we do not rely upon *Forrest* with respect to plaintiff's City HRL claim since the City Council expressly rejected Forrest's application to claims brought under the City HRL when it enacted the Restoration Act (*see Bennett*, 92 AD3d at 35 n.1, *citing, Williams*, 61 AD3d at 67).

tried to persuade Fletcher not to raise the issue again, Fletcher urged the Board to reconsider the couple's application 'on the record.'" The board granted the couple an interview, after which it approved the application.

Fletcher's protest that the "Jewish mafia" comment and the general tenor of the discussion about the Jewish couple's "ethnicity and religion" were inappropriate constitutes the kind of activity that is protected under the State HRL. Thus, the first element of a retaliation claim was alleged.

The second element was alleged with respect to defendant The Dakota. Since defendant Nitze was a director, his knowledge of Fletcher's activity is imputed to The Dakota (*see Baker v Latham Sparrowbush Associates*, 72 F3d 246, 255 [2d Cir 1995], citing, inter alia, *Matter of Brown,* 252 NY 366, 375-378 [1930]; *Keen v Keen*, 113 AD2d 964, 966 [1985]*, lv dismissed,* 67 NY2d 602 [1986]; *Texaco, Inc. v Weinberg*, 13 AD2d 1002 [1961]; *Richmond Hill Realty Co. v East Richmond Hill Land Co.,* 246 App Div 301, 305 [1936]). However, Barnes did not become a member of the board until May 2009, and plaintiffs do not allege that he was aware of Fletcher's protected activity. Thus, the seventh and ninth causes of action should be dismissed as against Barnes and the Dakota. However, since discovery may reveal that he was aware of Fletcher's protected activity, the dismissal as against Barnes

should be without prejudice.

Plaintiffs' allegations that defendants "denied Fletcher the benefit of having the Transfer Disclosure Policy govern his application to purchase Apartment 50; (b) denied Fletcher the impartial, fair, and unbiased review of his financial disclosures; [and] (c) recommended rejection of Fletcher's application" are sufficient to establish that Fletcher was subjected to an adverse action, and satisfy the third prong of a retaliation claim.

The fourth prong is satisfied by plaintiffs' allegation that defendants took the above mentioned adverse action in retaliation for his efforts to defend victims of discrimination by them (*Hicks v Baines*, 593 F.3d 159, 170 [2d Cir. 2010]). The fact that the alleged retaliation commenced a substantial period of time after the protected activity was engaged in does not defeat the claim: Fletcher's application for approval to purchase Apartment 50 in the early part of 2010 represented the first opportunity for retaliation (*see Bernhardt v Interbank of New York*, 2009 WL 255992, at *6, 2009 US Dist. LEXIS 8173, *20 [ED NY 2009]; *McKenzie v Nicholson*, 2009 WL 179253, *5 n5, 2009 US Dist. LEXIS 5285 [ED NY 2009]; *Batyreva v New York City Dep't of Education*, 2008 WL 4344583, *14; *Quinby v WestLB AG*, 2007 WL 1153994,*13, 2008 US Dist LEXIS 28657, *35-39 [SD NY 2007]).

Thus, we decline to dismiss as against The Dakota Fletcher's retaliation claims under the State and City HRLs to the extent they are based on his conduct with respect to the Jewish couple.

The complaint also alleges that Fletcher "made it clear" to the rest of the board that jokes about the number of times a certain shareholder would have to apply to fix her bathroom were inappropriate. Although the shareholder was African-American, the complaint does not allege that Fletcher made any reference to her race. Thus, it fails to state a cause of action under the State HRL for retaliation on the basis of Fletcher's conduct with respect to this shareholder (*see e.g. Forrest*, 3 NY3d at 313 [granting defendant summary judgment because "[a]lthough plaintiff filed numerous grievances claiming generalized 'harassment,' she never alleged that she was discriminated against because of race"]; *see Sullivan v Chappius*, 711 F Supp 2d 279, 287 [WD NY 2010] [dismissing complaint based on plaintiff's supervisor's extramarital affair]). Thus, the seventh and ninth causes of action should have been dismissed against the Dakota insofar as they are based on Fletcher's conduct with respect to the African-American shareholder. However, the dismissal is without prejudice, because following discovery, plaintiffs may be able to plead further details that would show that Fletcher was engaged in protected activity.

We note that under the City HRL, a jury may infer from other evidence that a plaintiff's activity is in fact opposition to discrimination even where the plaintiff does "not say so in so many words" (*see Albunio*, 16 NY3d at 479). However, even under the City HRL, a complaint drafted by counsel that contains 269 numbered paragraphs without alleging even on information and belief that defendants knew or should have known that Fletcher was opposing discrimination when he spoke to them about the African-American shareholder who intended to renovate her bathroom fails to state a cause of action for retaliation.

Because The Dakota is a corporation, it owes no fiduciary duty to its shareholders (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [2009]). Thus, although The Dakota sought to dismiss the first cause of action only to the extent it is based on defamation, we dismiss both the first and second causes of action in their entirety as against The Dakota, because the defectiveness of these claims is "apparent on the face of the record" (*see American Bldg. Contrs. Assoc., Inc. v Mica & Wood Creations, LLC.*, 23 AD3d 322, 323 [2005][internal quotation marks omitted]). Moreover, the dismissal is with prejudice.

As to Barnes and Nitze, they correctly argue that the first cause of action should be dismissed as against them because it fails to adequately plead violations of the individual directors'

fiduciary duty (*Brasseur v Speranza*, 21 AD3d 297, 298 [2005]). However, since discovery may reveal such violations, the dismissal of the first cause of action as against them should be without prejudice.

The fifth cause of action alleges defamation and the first cause of action, which alleges breach of fiduciary duty, is based, in part, on allegations of defamation. To the extent these causes of action rely on statements contained in affidavits submitted in opposition to plaintiffs' preliminary injunction motion, they should be dismissed, with prejudice, because the statements are protected by both the judicial proceedings and fair report privileges (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171 [2007]; *Fishof v Abady*, 280 AD2d 417 [2001]). However, the first cause of action alleges that defendants breached their fiduciary duty to Fletcher by "knowingly and maliciously spreading false statements and rumors to third parties, including the media, concerning Fletcher's financial condition" and the fifth cause of action refers to statements made "[b]egining in April 2010," i.e., long before this action was commenced. Thus, these causes of action do not rely exclusively on statements contained in affidavits.

Contrary to defendants' contention, the following allegedly

defamatory statements are pleaded with sufficient particularity (CPLR 3016[a]):

> "[At an April 14, 2010 board meeting,] one or more of the Individual Defendants told the other members of the Board that Fletcher had not fulfilled binding charitable commitments and pledges, that Fletcher's assets were all illiquid and difficult to value, and that FAM's business loans left it over-extended and at risk of collapse . . .
>
> "[On or before May 7, 2010, Nitze told Dakota shareholder Craig Hatkoff that Fletcher] "had not actually given the money he had promised to give [to charity] and 'he owes it'. . .
>
> "[At some point between June 24, 2010 and September 2010] one or more of the Individual Defendants falsely and maliciously stated to Hatkoff that Fletcher had 'checked out of his business' and was living on 'borrowed money' . . .
>
> "On September 14, 2010, . . . the Board sent a letter to certain Dakota shareholders . . . [It stated, inter alia,] '[b]ased on the financial information submitted by Fletcher, the Board concluded that approving such a purchase would not be in the best interest of The Dakota' . . . [The letter] also contained the false and misleading statement that Fletcher had declined the Board's request to provide additional financial information."

While some of these allegations do not specify exactly which of the defendants made a particular statement, that is not a fatal defect (*see Torres v Prime Realty Servs.*, 7 AD3d 343, 344 [2004]; *see also Herlihy v Metropolitan Museum of Art*, 214 AD2d

250, 260 [1995]).

Defendants further contend that the above-quoted statements are covered by a qualified privilege and that the complaint fails to allege malice sufficient to defeat the privilege (*see Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). Contrary to the latter contention, the complaint alleges malice. But, in any event, we would not "give conclusive effect to defendants' position of qualified privilege before any affirmative defense to that effect was raised in a responsive pleading" (*see Acosta v Vataj*, 170 AD2d 348, 348 [1991]). Thus, we decline to dismiss as against The Dakota the fifth cause of action and so much of the first cause of action as it is based on allegations of defamation to the extent they do not rely on statements contained in affidavits.

As to Barnes and Nitze, since we are dismissing the first cause of action in its entirety as against them, we need not address the defamation-based part of the claim. However, we decline to dismiss the fifth cause of action as against Nitze since he is alleged to have made defamatory statements about Fletcher to Hatkoff.

Contrary to defendants' contention, the tortious interference with contract claim states a cause of action by alleging tortious interference with Fletcher's contract to

purchase apartment 50 from Ruth Proskauer Smith's estate (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).[3] Thus, we decline to dismiss the eleventh cause of action as against The Dakota. However, it should be dismissed as against Barnes, because the complaint does not allege that Barnes committed independent tortious conduct outside of his role as a board member (*see American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171-172 [1996]). The dismissal is without prejudice since discovery may reveal evidence that would support a claim against Barnes in his individual capacity.

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered July 27, 2011, which, insofar as appealed from, denied defendants The Dakota, Inc., Bruce Barnes, and Peter Nitze's motion to dismiss the first, second and fifth through eleventh causes of action as against The Dakota, the first and sixth through eleventh causes of action as against Barnes in his individual capacity, and the first and fifth causes of action as against Nitze in his individual capacity, should be modified, on the law, to dismiss the first cause of action as

---

[3] We decline to consider defendants' argument that the cause of action fails because the Smith estate did not breached its contract with Fletcher, an element of the cause of action (the estate had the right to cancel the contract if the board refused to approve the sale), because it was raised for the first time in their reply brief.

against The Dakota, with prejudice, and as against Barnes and Nitze, without prejudice; the second cause of action as against The Dakota, with prejudice; so much of the fifth cause of action as is based on statements made in defendants' affidavits, with prejudice; so much of the seventh and ninth causes of action as are based on plaintiffs' conduct with respect to the African-American shareholder who wanted to renovate her apartment as against The Dakota, without prejudice; and the seventh, ninth and eleventh causes of action as against Barnes, without prejudice, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JULY 3, 2012

DEPUTY CLERK

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

6756 JFK Holding Company LLC, et al., Index 114577/09
Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants,

The Salvation Army,
Defendant-Respondent.

Kasowitz Benson Torres & Friedman LLP, New York (Jennifer S. Recine of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (Kathy H. Chin of counsel), for respondent.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 5, 2010, reversed, on the law, without costs, the judgment vacated, the third cause of action for breach of contract reinstated, and the matter remanded for further proceedings.

Opinion by Manzanet-Daniels, J. All concur except Friedman and Freedman, JJ. who dissent in an Opinion by Freedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
James M. Catterson
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

6756
Index 114577/09

_____x

JFK Holding Company LLC, et al.,
Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants,

The Salvation Army,
Defendant-Respondent.

_____x

Plaintiffs appeal from a judgment of the Supreme Court, New York County (Cynthia S. Kern, J.), entered November 5, 2010, insofar as appealed from as limited by the briefs, granting the motion of defendant The Salvation Army to dismiss the complaint as against it.

Kasowitz Benson Torres & Friedman LLP, New York (Jennifer S. Recine, Michael J. Bowe, Ronald R. Rossi and Benjamin S. Goldstein of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (Kathy H. Chin and Jared L. Facher of counsel), for respondent.

MANZANET DANIELS, J.

Defendant The Salvation Army entered into a lease agreement with plaintiffs landlords JFK Holding Company LLC and J.F.K. Acquisition Group (collectively, JFK) for use of the Carlton House Hotel, located at 138-10 North Conduit Avenue, Queens, New York, as a Tier II homeless facility pursuant to a parallel services agreement with the Department of Homeless Services (DHS) and the City of New York. The lease and the services agreement were negotiated together, and The Salvation Army's obligations under the lease were funded by and through the services agreement.

During its tenancy, The Salvation Army failed to take the most basic steps to maintain the facility in a safe and sanitary condition, as a result of which the property deteriorated precipitously. The City Comptroller's Office determined that maintenance of the property was so totally ignored that the property suffered extensive water infiltration and damage, peeling paint, contaminated carpeting, leaking fixtures, damaged appliances and infestations of roaches, mice, bedbugs and other vermin. When it vacated the property, in September 2005, The Salvation Army left an uninhabitable building, rife with code violations, structural problems, water damage and mold.

The lease provided that it was being entered into "solely in

order to enable Tenant to fulfill its obligations to [DHS] under the Services Agreement." The lease could be terminated in the event the City terminated the services agreement, provided that The Salvation Army gave 30 days written notice, paid JFK a $10 million early termination fee, and restored the Carlton House to "the same condition in which the leased premises was at the commencement of th[e] lease." In addition, paragraph 12 of the lease required The Salvation Army to maintain the premises in "good and safe condition and repair, and fit to be used for their intended use . . . except for ordinary wear and tear," and to "take every other action, at Tenant's sole cost and expense, reasonably necessary or appropriate for the preservation and safety of the leased premises."

Paragraph 31 further provided that in the event DHS failed to pay amounts owing pursuant to the services agreement, The Salvation Army would "use commercially reasonable efforts to enforce its rights against [DHS] under the Services Agreement or otherwise, and Landlord agrees to fully reimburse Tenant for all of its costs in any such enforcement action." The same provision limited The Salvation Army's liability to amounts paid pursuant to the services agreement.

On September 9, 2005, JFK notified The Salvation Army that the express conditions precedent to effective termination of the

lease had yet to be satisfied, including payment of the termination fee and repairs and restoration necessary to return Carlton House to its pre-lease condition. Yet, The Salvation Army did nothing to ensure that DHS or the City paid for the restoration of the property, as the City was obligated to do per the terms of the services agreement, prior to its expiration.[1] Indeed, The Salvation Army took no action to obtain the funding necessary from DHS or the City or otherwise to enforce or preserve its rights under the services agreement. As a result, DHS and the City are no longer obligated to repay The Salvation Army for expenses relating to the property's restoration, since the services agreement provides that any claim against the City or DHS must be interposed within six months after termination of the services agreement or accrual of the cause of action.

Carlton House is presently uninhabitable. Plaintiffs allege that it will cost approximately $200 million to restore the property to a usable and marketable condition.

Plaintiffs, in our view, have sufficiently pleaded a cause of action for breach of the lease. The Salvation Army does not dispute that it failed to return the property to its pre-lease

[1]The City, on September 28, 2005, paid the $10 million early termination fee to JFK as required by the lease and those amounts are accordingly no longer at issue.

condition upon termination, contrary to paragraph 23 of the lease. Further, paragraph 31 of the lease requires The Salvation Army to "use commercially reasonable efforts" to ensure that funds necessary to meet its obligations are provided by DHS and the City pursuant to the services agreement. The parties' intent, as reflected in the lease, was to impose on The Salvation Army the obligation to take all commercially reasonable steps, including seeking funds to which it was entitled under the services agreement (as incorporated by reference therein), to satisfy its obligation to restore the property to pre-lease condition. To read the lease in any other way would render meaningless paragraph 31's requirement that The Salvation Army "use commercially reasonable efforts" to ensure payment, contrary to established precepts of construction. It is a cardinal rule of contract construction that a "court should construe [an] agreement[] so as to give full meaning and effect to the material provisions" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]), and that "[a] reading of the contract should not render any portion meaningless." "[A] contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 [2007] [internal quotation marks

omitted]). Indeed, the clause requiring The Salvation Army to make commercially reasonable efforts to ensure that JFK received the benefit of its bargain was included for the evident purpose of ensuring that The Salvation Army would enforce its rights under the services agreement so as to meet its obligations to JFK under the lease.

The dissent, citing the provision of the lease which limited damages to amounts paid by DHS and the City pursuant to the services agreement, reasons that since no amounts had been so paid, The Salvation Army has no liability. Yet no amounts had been paid under the services agreement precisely because The Salvation Army failed to "use commercially reasonable efforts" as it was obligated to do under the terms of the parties' lease. The contractual limitation on liability was obviously predicated upon The Salvation Army's having fulfilled its contractual duty to use commercially reasonable efforts to secure payments from DHS pursuant to the services agreement. Indeed, the limitation of liability cited by the dissent appears *in the very same paragraph* of the contract. To "decouple" the limitation of liability from the provision requiring that The Salvation Army use commercially reasonable efforts would render the latter an illusory promise. The two clauses are intended to be read together; only if The Salvation Army used commercially reasonable

efforts to obtain payment pursuant to the services agreement would it be able to take advantage of the provision limiting its liability to such payments (*see MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 2012 WL 382921, *25, US Dist LEXIS 14974, *70-71 [SDNY 2012] [provision in agreement absolving party of liability under certain circumstances for failure to satisfy conditions with respect to Class B note obligations did not bar action where, inter alia, a factual issue existed as to whether that party used commercially reasonable efforts, as stipulated by the contract, to seek a rating on the Class B notes]). It is elementary that such exculpatory provisions are to be strictly construed against the party seeking exemption from liability, here, The Salvation Army. The dissent's proposed reading of the contract not only eviscerates the provision requiring The Salvation Army to use "commercially reasonable efforts," but grants The Salvation Army the benefit of the concurrent limitation on liability, frustrating the manifest purpose of the contract and essentially rewarding The Salvation Army for its bad behavior.

On this record, triable questions of fact exist as to whether The Salvation Army used commercially reasonable efforts to obtain the payments to which it was entitled under the services agreement. Until such questions are determined, The

Salvation Army cannot avail itself of a contractual limitation of liability intended for its benefit.

The dissent's reading of the lease is contrary to its plain language and improperly renders meaningless the provision requiring The Salvation Army to act in a commercially reasonable manner to ensure the City made payments owing pursuant to the services agreement. Further, the dissent's interpretation – absolving The Salvation Army from liability where it failed to take any steps, let alone commercially reasonable ones, to ensure it received monies from the City pursuant to the services agreement – allows The Salvation Army to breach its obligations under the lease with impunity.

Since the breach of the implied covenant of good faith and fair dealing is premised on the same allegations, i.e., that The Salvation Army failed to take commercially reasonable steps to ensure payment by the City pursuant to the services agreement, it is duplicative and thus was properly dismissed on that basis (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010], *lv denied* 15 NY3d 704 [2010]).

Accordingly, the judgment of the Supreme Court, New York County (Cynthia S. Kern, J.), entered November 5, 2010, insofar as appealed from as limited by the briefs, dismissing the complaint as against The Salvation Army, should be reversed, on

the law, without costs, the judgment vacated, the third cause of action for breach of contract reinstated, and the matter remanded for further proceedings.

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

FREEDMAN, J. (dissenting)

I respectfully dissent and would affirm the decision of the motion court because The Salvation Army has paid JFK the full amount that it is entitled to receive under the parties' lease agreement.

This lawsuit arises from The Salvation Army's operation, on behalf of the New York City Department of Homeless Services (DHS) and the City of New York, of a shelter for homeless families at the Carlton House Hotel in Queens, New York, between 2002 and 2005.

The operation was governed by a lease for the Hotel between The Salvation Army and JFK Acquisition and a services agreement between The Salvation Army and DHS, under which The Salvation Army operated the shelter for DHS. Acknowledging The Salvation Army's role as a conduit for DHS, plaintiffs aver that they and DHS "contemplated a 'pass through' agreement in which the City would assume responsibility for costs to The Salvation Army under the [l]ease through the [s]ervices [a]greement." Plaintiffs acknowledge that they directly negotiated the services agreement with DHS without any participation by The Salvation Army.

In relevant part, the two contracts provided as follows: in paragraph 31 of the lease, which is titled "Services Agreement," JFK Acquisition acknowledged that The Salvation Army had entered

into the lease solely to fulfill its obligations to DHS under the services agreement. Paragraph 31 also provided that, save for an inapplicable exception, the extent of The Salvation Army's liability to JFK Acquisition for, among other things, "damages for breaches of any [lease] covenant," was limited to the amounts that The Salvation Army received from DHS pursuant to the services agreement or otherwise in connection with the Hotel's use. The Salvation Army's other assets were "expressly [excluded]." If DHS failed to pay amounts that it owed The Salvation Army, paragraph 31 continued, The Salvation Army was obligated to "use commercially reasonable efforts to enforce its rights against [DHS] under the [s]ervices [a]greement or otherwise."

Finally, another lease provision stated that The Salvation Army could terminate the lease if DHS terminated the services agreement, provided that The Salvation Army paid JFK Acquisition a variable fee based on the date of termination and restored the Hotel to its pre-lease condition. While the lease contained a covenant by The Salvation Army to restore the Hotel to its pre-lease condition, paragraph 31 of the lease limits The Salvation Army's liability to monies received from DHS.

The relevant services agreement provisions concerned DHS's payment obligations to The Salvation Army. While the services

agreement was in effect, DHS only was required to pay The Salvation Army the monthly fixed amount that JFK Acquisition was due under the lease for rent, for taxes on and insurance for the Hotel, and for the performance of JFK Acquisition's maintenance obligations. The services agreement permitted DHS to terminate it without cause if termination was deemed to be in the City's best interest, and in that event the only payment DHS was required to make was the lease termination fee.

In August 2005, DHS terminated the services agreement, causing The Salvation Army to terminate the lease. DHS paid The Salvation Army $10 million, which was the specified termination fee under the lease, and The Salvation Army paid that amount to JFK Acquisition.

Plaintiffs base their breach of contract claim against The Salvation Army on the factual allegation that The Salvation Army left the Hotel in worse condition than it found the property when it took possession. Accordingly, plaintiffs argue, The Salvation Army is liable for breaching its covenant in the lease to restore the Hotel to its pre-lease condition. Plaintiffs also allege that The Salvation Army never tried to obtain the funds needed to restore the Hotel from DHS and thereby breached its covenant to use "commercially reasonable efforts to enforce its rights against [DHS]."

The claim was properly dismissed because plaintiffs do not allege any actionable breach. When read together, the limitations on both The Salvation Army's liability to JFK Acquisition pursuant to the lease and DHS's and the City's obligations under the services agreement preclude the cause of action. Even if we were to assume the truth of the allegation that conditions at the Hotel deteriorated while The Salvation Army was in possession, and that failure to restore breached a lease covenant to restore the Hotel, plaintiffs could not recover more for damages than the $10 million termination fee plaintiffs had already received because of the explicit limitation on damages contained in the lease.

Moreover, The Salvation Army cannot be held liable for not trying to obtain the cost of restoring the Hotel from DHS. While the lease may have required The Salvation Army to use "commercially reasonable efforts to enforce its rights against [DHS] under the [s]ervices [a]greement or otherwise," that provision does not apply here because The Salvation Army did not have any right to recover post-termination restoration costs from DHS. The services agreement, which plaintiffs themselves negotiated directly with DHS, explicitly limited DHS's payment obligations to the $10 million fee, and plaintiffs do not identify any other source of a right to recover from DHS. The

majority's statement that the City was "obligated" to pay for the Hotel restoration "per the terms of the services agreement" is factually incorrect as there is no such provision in that contract.

In contending that our reading of the lease "would render meaningless paragraph 31's requirement that The Salvation Army 'use commercially reasonable efforts' to ensure payment," the majority overlooks the plain language of the contracts. Under the lease, The Salvation Army only had to seek recovery from DHS if it had any right to recovery. If, for example, DHS had failed to pay The Salvation Army amounts due under the services agreement like the $10 million termination fee or the pre-termination rent, The Salvation Army would have been obligated to use commercially reasonable efforts to enforce its right against DHS to receive those payments.

Finally, I believe the cause of action alleging that the Salvation Army breached its implied covenant of good faith and fair dealing by failing to enforce its rights against DHS was properly dismissed because the implied obligation that plaintiffs

allege conflicts with the explicit terms of the contracts (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

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

ENTERED: JULY 3, 2012

DEPUTY CLERK