SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 17, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7427 The People of the State of New York, Respondent, Ind. 1790/09

-against-

O'Brian Perry, Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; Maxwell Wiley, J. at jury trial and sentencing), rendered January 20, 2010, convicting defendant of 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 reversed, on the law, the motion to suppress defendant's statement granted, and the matter remanded for a new trial.

Police entered defendant's family's apartment pursuant to a search warrant. The police detained and handcuffed defendant and his three family members. Defendant was led away from the others

and asked by the investigating sergeant, without any *Miranda* warnings, to reveal the location of a weapon so the police would not have to tear up the apartment looking for it. Defendant then provided them the location, and when an officer could not find it, defendant then directed him to the correct couch where the pistol was hidden.

Defendant was immediately taken to the precinct, and after being booked and processed for 20 to 30 minutes, was interrogated by the same investigating sergeant after being advised of and waiving his *Miranda* rights. Defendant then admitted that the pistol belonged to him and not his family members.

Although the People did not seek to introduce the apartment statement, defendant challenged the admissibility of the precinct statement on the ground that it was tainted by the earlier apartment statement that had been obtained in violation of his *Miranda* rights. The hearing court found that both statements were voluntarily made and denied defendant's motion to suppress the precinct statement.

The hearing court erred when it concluded that the first statement at the apartment was voluntarily made because defendant wanted to protect his family by helping the police conduct the search faster. *Miranda* warnings are required prior to custodial interrogation (*see People v Paulman*, 5 NY3d 122, 129 [2005]). A

suspect is in custody when "a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave" (*id*.). As defendant was handcuffed and surrounded by police at the time he gave the incriminating statement at the apartment, he was obviously in custody for *Miranda* purposes. Moreover, the sergeant's questioning amounted to interrogation as it was certainly designed and reasonably likely to elicit incriminating statements pertaining to the contraband that was the subject of the search warrant (*see id*.).

We also conclude that the later *Mirandized* statement made at the precinct should have been suppressed as it was obtained as part of a single continuous chain of events, so that the later warnings were insufficient to dissipate the taint of the initial violation (*see Paulman*, 5 NY3d at 131). The initial non-*Mirandized* statement was a result of a conversation initiated by the sergeant, defendant did not indicate a prior willingness to speak, the same sergeant conducted the later interrogation at the precinct only a short time later, and the sergeant used the same theme of protecting defendant's family to elicit both statements. Under these circumstances, there was no break in defendant's custodial circumstances and both statements were obtained under

circumstances indicating a single continuous chain of events (*see People v Kollar*, 305 AD2d 295, 299 [2003], *appeal dismissed* 1 NY3d 591 [2004]).

We do not find the error to be harmless.

Defendant did not preserve his argument that the pistol should have been suppressed, and we decline to review it in the interest of justice. As an alternate holding, we find that the pistol was admissible under the inevitable discovery doctrine, and we decline to consider any other issues.

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

ENTERED: JULY 17, 2012

DEPUTY CLERK

Andrias, J.P, Friedman, Sweeny, Renwick, Román, JJ.

5372-
5372A Guiseppe Romanello, Index 109314/09
Plaintiff-Appellant-Respondent,

-against-

Intesa Sanpaolo S.p.A.,
Defendant-Respondent-Appellant,

Ann Stefan,
Defendant-Respondent.

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Law Offices of Maury B. Josephson, P.C., Uniondale (Maury B. Josephson of counsel), for appellant-respondent.

Gilmartin, Poster & Shafto LLP, New York (Michael C. Lambert of counsel), for respondent-appellant and respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 24, 2010, as corrected October 20, 2010, which granted defendants' motion to dismiss the first through fifth and eighth and ninth causes of action, and denied the motion as to the seventh cause of action, modified, on the law, to grant the motion as to the seventh cause of action, and otherwise affirmed, with costs to defendants. Judgment, same court and Justice, entered June 8, 2010, severing and dismissing the complaint as against defendant Ann Stefan, affirmed, with costs to defendant.

The complaint alleges that plaintiff Giuseppe Romanello, an executive employed at the New York branch of defendant Intesa Sanpaolo S.p.A. (Intesa), became disabled on or about January 9

and 10, 2008, due to the onset of illness causing visual disturbances, inability to concentrate or read, and faintness. As a result of his alleged disability, plaintiff did not return to his office after January 10, 2008, with the exception of an unsuccessful attempt to resume work on January 22, 2008. Plaintiff alleges that he has been diagnosed as suffering from major depression, syncope and collapse, neurasthenia, and anxiety.

After plaintiff had been absent from work for more than four months, Intesa sent his counsel a letter, dated May 29, 2008, stating, among other things: "[Plaintiff's leave pursuant to the Family and Medical Leave Act] expires on June 3, 2008 and [Intesa] would appreciate knowing whether he intends to return to work or to abandon his position." In response, by letter dated June 2, 2008, plaintiff's counsel asserted, inter alia, that: (1) plaintiff "remains unable to return to work in any capacity because of his disabling conditions"; (2) plaintiff's "severe and disabling illnesses . . . have prevented him, and continue to prevent him, from working in any capacity, let alone in the capacity in which he had been serving"; (3) plaintiff had "an uncertain prognosis and a return to work date that is indeterminate at this time"; (4) "if there is to be any severance of the employment relationship between [plaintiff] and [Intesa],

it will be of [Intesa's] volition only and not an 'abandonment of position' by [plaintiff]"; and (5) Intesa "*will bear any related consequences and liabilities for its termination of [plaintiff's] employment in such circumstances*" (emphasis added). Immediately thereafter, however, the letter made another demand suggesting that plaintiff's true concern was not keeping his job but continuing to receive his salary until the next month: "Whether or not [Intesa] chooses to sever its employment relationship with [plaintiff] at this time, [plaintiff] remains entitled to continued payments pursuant to [Intesa's] salary continuation policy for a period of six months after his disability began." Thereafter, Intesa terminated plaintiff's employment as of June 4, 2008.

Plaintiff commenced this action against Intesa and its director of human resources in 2009, asserting nine causes of action. In lieu of answering, defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss all causes of action except the sixth (for breach of contract). The court granted the motion to the extent of dismissing the first through fifth, eighth and ninth causes of action. Plaintiff appeals the dismissal of these claims, while Intesa cross-appeals the denial of its motion with respect to the seventh cause of action. We modify to dismiss the seventh cause of action and affirm the dismissal of the remaining

causes of action at issue.

The first and second causes of action allege that Intesa, in terminating plaintiff's employment, discriminated against him on the basis of disability in violation of the New York State Human Rights Law (Executive Law § 296[1][a]) (the State HRL) and the New York City Human Rights Law (Administrative Code of the City of NY § 8-107[1][a]) (the City HRL), respectively. The State HRL prohibits discharging an employee because of a disability, with the term "disability" defined as "limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law § 292[21]). The City HRL similarly prohibits discharging an employee because of a disability, with the employer afforded an affirmative defense if the complainant "could not, with reasonable accommodation, satisfy the essential requisites of the job" (Administrative Code of City of NY § 8-107[15][b]).

In general, under both the State HRL and the City HRL, an employer is obligated to engage a disabled employee in a "good faith interactive process" to identify a reasonable accommodation

that will permit the employee to continue in the position (*see e.g. Phillips v City of New York*, 66 AD3d 170, 176 [2009]). In this case, the undisputed documentary evidence establishes that Intesa attempted to initiate a good faith interactive process by way of its letter of May 29, which asked plaintiff "whether he intend[ed] to return to work," a question that, by necessary implication, also sought the time frame within which plaintiff expected to be able to resume working, if that was his intention. In light of the undisputed documentary evidence establishing that Intesa made a good faith attempt to open an interactive process with plaintiff for the purpose of reaching a mutually acceptable accommodation, the dissent's suggestion that Intesa did not fulfill its duty to engage in such a process is simply inaccurate. On the contrary, the allegations of the complaint and the undisputed documentary evidence establish, as a matter of law, that it was plaintiff who abruptly cut off the interactive process that Intesa tried to initiate.

In a tone that can only be characterized as hostile, plaintiff's counsel's June 2 letter to Intesa went well beyond merely stating that plaintiff was then disabled for work in any capacity and that he would not be able to resume working for an "indeterminate" period of time. The letter suggested no time frame within which plaintiff's prognosis could be expected to be

better understood and a possible date for returning to work could be usefully discussed, nor did it invite Intesa to offer other options; to the contrary, the letter threatened litigation if its demands were not met. The letter essentially shut the door to any further discussion, instead delivering a demand that Intesa grant plaintiff an indefinite leave of absence or else be prepared to face a lawsuit. In other words, the letter from plaintiff's counsel confronted Intesa with an inflexible, categorical demand, with no room for negotiation and no suggestion of a time frame within which plaintiff would be open to revisiting the issue. By spurning in advance, and through counsel, any good faith attempt by Intesa to engage in a bilateral, interactive process to find a way to reconcile both parties' needs, plaintiff discharged Intesa, as a matter of law, of the obligation to continue its efforts to initiate such a process.

The dissent appears to labor under the misconception that the basis for our affirmance of the dismissal of plaintiff's discrimination claims is that "the employee did not come forward with a specific request for an accommodation at the inception of the process." On the contrary, the basis on which we affirm the dismissal of these claims is the unequivocal demand for indefinite leave, coupled with the threat of litigation, with

which plaintiff's counsel responded to Intesa's attempt to initiate a dialogue. Plaintiff's hostile and imperious response to Intesa's question foreclosed any possibility of negotiation and was unaccompanied by any suggestion of a future time at which the situation could be reassessed. Significantly, the demand for indefinite leave was made through counsel, indicating that there was no reason to expect a more cooperative disposition to emerge from plaintiff if Intesa made further efforts to pursue a dialogue. Hence, even assuming that an indefinite leave of absence might constitute a reasonable accommodation in a proper case, here, plaintiff's counsel's demand that Intesa either grant indefinite leave or face litigation excused Intesa from further efforts to seek agreement with plaintiff on a reasonable accommodation. The dissent, on the other hand, appears to believe that, notwithstanding plaintiff's counsel's unequivocal pronouncements, Intesa was obligated to importune plaintiff to engage in further discussion. We do not believe that, under these circumstances, the employer's duty extended so far.[1]

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[1]The *Phillips* case, on which plaintiff and the dissent rely, is not controlling. The cancer-stricken plaintiff in *Phillips* did not issue an ultimatum (through counsel) for an indefinite leave of absence, but merely "requested" a one-year extension of her medical leave (66 AD3d at 172). After that request was denied, she "ask[ed] . . . if she could obtain *any* further extension of her medical leave," which her employer also denied (*id.*).

The dissent does not dispute that an employee does not invite an "interactive process" by threatening to sue the employer if it fails to grant his initial, maximal demand. The dissent contends, however, that the June 2 letter of plaintiff's counsel "never" threatened litigation, and, for good measure, accuses us of basing our conclusion "upon a distorted interpretation of the facts." The dissent can maintain this position only by selectively quoting the June 2 letter and resolutely ignoring its key statement: "[Intesa] will bear any related consequences and liabilities for its termination of [plaintiff's] employment in such circumstances." Strikingly, nowhere does the dissent quote or refer to this language, which, even when viewed in the light most favorable to plaintiff, cannot reasonably be interpreted as anything other than a threat to sue in the event Intesa terminated plaintiff at any time before he either returned to work or announced that he was relinquishing the position. Such frankly hostile language in a letter from counsel is not reasonably susceptible to interpretation as an invitation to engage in a dialogue aimed at finding an accommodation acceptable to both parties — a point the dissent apparently concedes by pretending that the language does not exist. Accordingly, the motion court correctly dismissed the

first and second causes of action as legally insufficient.[2]

It is ironic that the dissent accuses the majority of "ignoring the context of plaintiff's counsel's statements" when it is the dissent that ignores the language of the June 2 letter that is inconvenient to its position. Meanwhile, the majority takes account of all pertinent contents of the letter, including the language on which the dissent focuses to the exclusion of the threat that immediately follows. Whether it is the majority or the dissent that gives an accurate account of plaintiff's counsel's June 2 letter may be judged from reading in their entirety the three relevant paragraphs of the letter, which are set forth in the margin.[3]

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[2]The logic of the dissent's assertion that our position is "internally inconsistent" eludes us. Intesa's May 29 letter was an attempt to open an interactive process between itself and plaintiff, to which plaintiff responded, through his counsel's June 2 letter, by threatening litigation unless Intesa met his maximal demand for indefinite leave. Contrary to the dissent's further contention, we are not applying different interpretative standards to the letters, but giving each one its only reasonable interpretation. By ignoring the language in plaintiff's counsel's June 2 letter that plainly threatens litigation, the dissent essentially concedes that, even when viewed in the light most favorable to plaintiff, this language cannot reasonably be interpreted as part of a good faith interactive process.

[3]"Notwithstanding my lack of additional information from Prudential, I note and reiterate certain things in response to your letter. First is that Mr. Romanello has, since on or about January 9, 2008, been suffering from severe and disabling illnesses that have prevented him, and continue to prevent him, from working in any capacity, let alone in the capacity in which

The motion court also correctly dismissed the third and

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he had been serving Intesa SanPaolo (the 'Bank') until that time. Mr. Romanello's illnesses are disabilities, both within the meaning of the Bank's long term disability benefits plan, sponsored by the Bank through the New York State Bankers Association and insured with Prudential, and pursuant to statute, including the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, the New York State Human Rights Law, Exec. L. § 290, *et seq.* and the New York City Human Rights Law, NYC Admin. Code § 8-101, *et seq.*

"Your letter states, presumably on the basis of Prudential's alleged determination that Mr. Romanello ceased to be eligible for short term disability benefits on April 3, 2008, that 'Mr. Romanello's FMLA expires on June 3, 2008 and the bank would appreciate knowing whether he intends to return to work or abandon his position.' In response, we advise you that Mr. Romanello remains unable to return to work in any capacity because of his disabling conditions, which have been amply documented.

"We do not know the content of or basis for Prudential's decision with respect to Mr. Romanello's short term disability benefits, but suggest you may be reading too much into whatever communication from Prudential you received. Prudential's website indicates Mr. Romanello has a long term disability insurance claim opened and pending as of May 19, 2008. For his part, Mr. Romanello has not at any time evidenced or expressed an intention to 'abandon his position' with the Bank. Rather, he has been sick and unable to work, with an uncertain prognosis and a return to work date that is indeterminate at this time. Accordingly, if there is to be any severance of the employment relationship between Mr. Romanello and the Bank, it will be of the Bank's volition only and not an 'abandonment of position' by Mr. Romanello; and the Bank will bear any related consequences and liabilities for its termination of Mr. Romanello's employment in such circumstances. Whether or not the Bank chooses to sever its employment relationship with Mr. Romanello at this time, Mr. Romanello remains entitled to continued payments pursuant to the Bank's salary continuation policy for a period of six months after his disability began. Your confirmation that this benefit will continued [*sic*] to be provided will be appreciated; if it will not be, a detailed explanation for the reasons why will also be appreciated."

fourth causes of action, which allege that Intesa retaliated against plaintiff in violation of the State HRL (Executive Law § 296[7]) and the City HRL (Administrative Code of City of NY § 8-107[7]), respectively. Each of these provisions, in pertinent part, makes it unlawful for an employer to retaliate against an employee for having "opposed" a discriminatory practice. While the insufficiency of the underlying discrimination claims does not necessarily mandate dismissal of the retaliation claims (*see Modiano v Elliman*, 262 AD2d 223 [1999]), plaintiff does not allege that Intesa terminated his employment because he somehow "opposed" a discriminatory practice (*see McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677-678 [2006]). Rather, he was terminated because he was unable to do his job for an indefinite period of time. Whether or not this termination constituted unlawful discrimination on the basis of disability, it did not constitute retaliation.

The fifth cause of action, for tortious interference with contract, was correctly dismissed. This claim is based on the allegation that Intesa induced Prudential, which provided disability insurance to Intesa employees, initially to deny plaintiff's claim for disability benefits. The complaint further alleges, however, that plaintiff subsequently persuaded Prudential to reverse this determination and to pay him benefits

for the full period of his alleged disability. Because Prudential ultimately approved plaintiff's claim and paid all the benefits he sought, it did not breach the contract, and, in the absence of an actual breach of a contract, no claim will lie against a third party (here, Intesa) for tortious interference with that contract (*see e.g. NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]). We note that the complaint, in alleging that Prudential initially denied the claim in reliance on information provided by Intesa, negates any inference that the initial denial, notwithstanding that it was subsequently corrected, was so lacking in good faith as to constitute a breach of contract by Prudential (*see Sukup v State of New York*, 19 NY2d 519, 522 [1967]).

The eighth cause of action, for defamation, was correctly dismissed. Plaintiff's allegations of "statements to the effect that" and "or other words synonymous therewith" were not sufficiently specific (CPLR 3016[a]; *see e.g. BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [2009]; *Gardner v Alexander Rent-A-Car*, 28 AD2d 667 [1967]), and he also failed to allege the time at which, the manner in which, and the persons to whom the publication was made (*Murphy v City of New York*, 59 AD3d 301 [2009]; *see also Seltzer v Fields*, 20 AD2d 60, 64 [1963], *affd* 14 NY2d 624 [1964]). Plaintiff is not entitled to discovery to

ascertain the particulars that are lacking (*BCRE*, 59 AD3d at 283; *see also Cerick v MTB Bank*, 240 AD2d 274 [1997]).

The ninth cause of action, for violation of medical privacy, was correctly dismissed, since defendants are neither physicians nor employees of a nursing home or a facility providing health-related services (*cf. Doe v Community Health Plan-Kaiser Corp.*, 268 AD2d 183, 187 [2000]; *Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 75, 82 [2007]). The Health Insurance Portability and Accountability Act and its regulations do not create a private right of action (*see Jurado v Kalache*, 29 Misc 3d 1005, 1009 [2010] [citing cases]), and the other statute plaintiff cites (42 USC § 12112[d][3][B] and [C]) is inapplicable here.

Finally, the seventh cause of action, for the withholding of wages in violation of article 6 of the Labor Law, should be dismissed. Article 6 of the Labor Law does not apply to plaintiff because he was an executive earning more than $900 per week (*see* Labor Law § 198-c[3]; *Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2010]).

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

RENWICK, J. (dissenting in part)

Plaintiff Giuseppe Romanello is a former executive of defendant Intesa Sanpaolo, S.p.A., an Italian bank. He worked there for 25 years, in the Bank's New York office, until his termination for not returning to work following medical leave. Plaintiff sued his former employer, claiming, inter alia, that he was a disabled person under the New York State and New York City Human Rights laws and that defendant violated those laws when it discharged him because of his disability. Unlike the majority, I would find that plaintiff has stated a cause of action for employment discrimination pursuant to the reasonable accommodations requirement of New York State Human Rights Law (Executive Law § 290 *et seq.*) (NYSHRL) and New York City Human Rights Law (Title 8 of the Administrative Code of the City of New York) (NYCHRL) that has not been refuted by the evidence adduced by defendants. Accordingly, I respectfully dissent to the extent the majority affirms the dismissal of the first and second causes of action, which alleged that defendants failed to comply with the reasonable accommodations requirement of NYSHRL and NYCHRL.

The undisputed facts relevant to the claim of failure to accommodate are as follows. In early January 2008, plaintiff became ill, which forced him to be absent from work. He suffered severe visual disturbances, the inability to read or concentrate

and a feeling that he was going to pass out. When he tried to return to work later that month, he also suffered from panic. He was ultimately diagnosed with major depression, syncope and collapse, neurasthenia, and anxiety. Four months later, on May 29, 2008, the bank's lawyer told plaintiff's lawyer, "Mr. Romanello's FMLA [i.e., leave pursuant to the Family and Medical Leave Act, 29 USC § 26012 *et seq.*] expires on June 3, 2008 and the bank would appreciate knowing whether he intends to return to work." On June 2, plaintiff's lawyer replied, "Mr. Romanello remains unable to return to work in any capacity because of his disabling conditions . . . [He has] an uncertain prognosis and a return to work date that is indeterminate at this time." Without engaging in any further communication with plaintiff, the bank immediately terminated plaintiff, effective June 4, 2008.

In order to state a prima facie case of employment discrimination due to a disability under both NYSHRL and NYCHRL, plaintiff must demonstrate that he suffered from a disability and that his employer failed to meet its statutory duty to "provide reasonable accommodations to [his] known disabilities . . . in connection with a job or occupation sought or held" (Executive Law § 296[3][a]*; see Pimentel v Citibank*, N.A., 29 AD3d 141 [2006], *lv denied* 7 NY3d 707 [2006]; *Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271, 273

[2003], lv denied 1 NY3d 507 [2004]).

The issue of whether plaintiff suffered a disability as defined by the NYSHRL and NYCHRL is not in contention. Nor can it be seriously disputed that an employee who cannot return to work after exhausting all available leave provided by law or company policy may be still be a qualified individual entitled to additional leave as a reasonable accommodation (*see e.g. Phillips v City of New York*, 66 AD3d 170, 177 [2009] [the City's policy of entertaining requests for extended medical leaves by permanent civil service employees only, and not by city employees with noncompetitive civil service titles, violated requirement of NYSHRL and NYCHRL that employers engage in individualized interactive process to try to find a reasonable accommodation for disabled employees]; *see also Picinich v United Parcel Serv.*, 321 F Supp 2d 485, 503-505 [ND NY 2004]). A leave of absence may qualify as a reasonable accommodation because it permits an employee to pursue or continue medical treatment until the employee can return to work to perform the normal functions of the job (*see e.g. Phillips,* 66 AD3d at 179 ["plaintiff needed the requested leave to be able to have and recover from cancer surgery, after which time she anticipated that she would be able to return to work]").

Nevertheless, the majority holds that the aforementioned

June 2nd letter from plaintiff's lawyer to his employer obviated the bank's obligation to offer some accommodation for plaintiff's disabilities, as a matter of law, because "[t]he letter essentially shut the door to any further discussion" since "the letter threatened litigation if its demands were not met." The majority, however, reaches this legal conclusion upon a gross distortion of the facts.

The majority states that "[t]he dissent does not dispute that an employee does not invite an 'interactive process' by threatening to sue the employer if it fails to grant his initial, maximal demand." Contrary to the majority's interpretation, however, the letter from plaintiff's counsel never "threatened litigation if its demands [for an accommodation] were not met." The majority reaches this incorrect factual determination, it appears, by ignoring the context of plaintiff's counsel's statements. As the majority is well aware, plaintiff's counsel's statements were made in response to his employer's explicit inquiry as to "whether he intend[ed] to return to work or to abandon his position." In response, counsel explicitly stated, inter alia, that "if there is to be any severance of the employment relationship between [plaintiff] and [Intesa], it will be of [Intesa's] volition only and not an 'abandonment of position' by [plaintiff]." Thus, it was in an effort to

emphasize that plaintiff had no intention to sever the employee/employer relation that the “threat” of litigation took place, and not, as the majority mis-characterizes it, as a “threat[] to sue the employer if it fails to grant his initial, maximal demand.”

Accordingly, the documentary evidence proffered by defendants does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law so as to compel the dismissal of the cause of action for employment discrimination for failure to provide a reasonable accommodation pursuant to NYSHRL and NYCHRL. Viewed in a light most favorable to plaintiff, the letter conveyed that plaintiff did not wish to “sever” the employee/employer relationship that had existed for 20 years. Rather, plaintiff wished to return to work, but he could not provide a return date because of his “uncertain prognosis.” Nor did defendants show that a material fact alleged by plaintiff was “not a fact at all” or “that no significant dispute exist[ed] regarding it” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Significantly, the majority’s position appears to be internally inconsistent. On the one hand, the majority argues that defendant did engage in an interactive process, albeit ”*by . . . implication*” (emphasis added), when it asked plaintiff

"whether [he] intend[ed] to return to work or to abandon his position." According to the majority, this question, "by necessary implication, also sought the time frame within which plaintiff expected to be able to resume working." On the other hand, the majority argues that defendant did not have to engage in an interactive process because plaintiff's counsel's response to the employer's question of when plaintiff was coming back was an "unequivocal demand for indefinitive leave, coupled with the threat of litigation." Either way, the majority cannot come to grips with the fact that it can only maintain these contradictory positions by treating the employer's letter in a light most favorable to the employer and paradoxically treating plaintiff's counsel's letter in a light least favorable to the employee. Of course, this may be a reasonable position for the jury to take at trial, but not for this Court to take when evaluating a motion to dismiss based on documentary evidence that is subject to reasonable interpretations.

Fundamentally, the majority's conclusions about the intent of the June 2nd letter arise from a misunderstanding of the key that opens the door to protection under NYSHRL and NYCHRL with respect to reasonable accommodation of disabilities. First, the majority misses the point that, while usually it is the employee who first raises the subject of a specific accommodation, no

request by the employee is required to trigger the employer's duty to provide reasonable accommodations to the employee's known disabilities. Rather, under NYSHRL and NYCHRL, the employer's duty is triggered once it knows of a disability and the employee's desire for an accommodation (see Executive Law § 296[3][3]; 9 NYCRR 466.11[j] and [k]) and Administrative Code of City of N.Y. § 8–107[1][a]). Thus, what matters under the human rights laws is not the manner in which the request for an accommodation is made, but whether the employee provided the employer with enough information under the circumstances that the employer can be said to know both of the disability and the desire for an accommodation. In this case, the majority cannot dispute that the letter from plaintiff's counsel put the employer on notice of the need for an accommodation by stating that plaintiff "remain[ed] unable to return to work in any capacity because of his disabling conditions."

The majority also seems oblivious to the fact that the first step in providing reasonable accommodations for a disabled employee is to engage in a good faith interactive process that assesses the employee's needs and the feasibility of a reasonable accommodation (*Phillips*, 66 AD3d at 176; *Pimentel,* 29 AD3d at 148 [2009]; *see also Parker v Columbia Picture Indust.*, 204 F3d 326, 337-338 [2nd Cir 2000]). "This interactive process continues

until, if possible, an accommodation reasonable to the employee and employer is reached" (*Phillips*, 66 AD3d at 176). Thus, an employer that receives proper notice that an employee suffers from a disability cannot escape its duty to engage in an interactive process simply because the employee did not come forward with a specific request for an accommodation at the inception of the process.

The interactive process is critical because the issue of the need for an accommodation raises highly "fact-specific" and individualized questions about the precise limits caused by a person's disability and the range of accommodations available for a disability that are consistent with the employer's business need and other appropriate considerations (see *e.g. Phillips*, 66 AD3d at 175-176). Accordingly, it would make little sense to insist that the employee must arrive at the end of the interactive process before the employer has a duty to participate in the process. That approach would effectively eliminate the requirement that employers participate in the process in good faith. It would unfairly exploit the employee's lack of information about the type of accommodation that the employer may be able to provide. It is also in the employer's interest to engage in the interactive process. If an employer fails to engage in the interactive process, it may fail to discover a

reasonable accommodation for the employee's disability.

Consistent with this legal framework, this Court's recent pronouncement on the subject, *Phillips v City of New York*, (66 AD3d 170 [2010]), makes clear that a claim of failure to accommodate a disability cannot be dismissed where the employer has failed to engage in an interactive process. *Phillips* involved a cancer-stricken employee terminated for not returning to work following medical leave. The City Department of Homeless Services (DHS) hired Phillips in 1988 to fill a non-competitive civil service title. In 2006, Phillips was diagnosed with cancer, and was granted 12 weeks of medical leave. Before she returned to work, Phillips requested additional time off, but this request was denied. DHS explained that the 12-week medical leave was granted under the Family and Medical Leave Act, and that she was ineligible for additional unpaid medical leave as an employee in a non-competitive title. DHS warned Phillips that she could be terminated if she failed to return to work after the 12-week period. Phillips did not return to work, and her employment and medical benefits were terminated. Phillips sued the City, claiming that she was a disabled person under NYSHRL and NYCHRL, and that the City violated those laws by denying her request for additional leave and terminating her employment. Supreme Court granted DHS's motion to dismiss the case, and

Phillips appealed.

This Court reversed, finding that the City should have evaluated the request for accommodation, instead of summarily denying it. This Court ruled that the City was wrong to deny the request without first engaging in a good faith interactive process that assessed Phillips's needs and the feasibility of an accommodation. The human rights laws required the City to participate in this process with employees holding non-competitive titles, as well as permanent employees (*Phillips*, 66 AD3d at 177). Similarly, in this case, the bank should have evaluated the feasibility of accommodating plaintiff's disabilities, rather than summarily terminating him upon the expiration of his medical leave.

I do not mean to suggest that an employer will be held liable under NYSHRL and NYCHRL for any failure whatsoever to engage in the interactive process. An employer may not be held liable for a failure to provide reasonable accommodation based on its failure to engage in an interactive process absent a showing that the breakdown of the process led to the employer's failure to accommodate (*see Hayes v Estee Lauder Cos., Inc.*, 34 AD3d 735 [2006]). Conversely, a claim of discrimination cannot be dismissed where, as here, the record does not establish that the interactive process would not have yielded a reasonable

accommodation.

In addition to ignoring the importance of the interactive process, the majority fails to take into account that the Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005), requires that a NYCHRL claim be evaluated under a more liberal approach and separately from its state and federal counterparts (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *see also Phillips*, 66 AD3d at 182-183; Administrative Code § 8–130). Specifically, as *Albunio* points out, “we must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the scope of New York City's Human Rights Law," which, the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of NY § 1)” (16 NY3d at 477).

Significantly, as it pertains to this case, pursuant to NYCHRL, the burden of establishing an inability to accommodate falls squarely upon the employer. “In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job” (Administrative Code § 8-107[15][b]). Moreover, “unlike the ADA, there are no

accommodations that may be 'unreasonable' if they do not cause undue hardship" (*Phillips*, 66 AD3d at 182). All accommodations are deemed reasonable unless the employer proves that an accommodation constitutes an undue hardship (id.).

In sum, plaintiff has provided enough facts to state a disability discrimination claim under both NYSHRL and NYCHRL. Accordingly, I would reinstate the employment discrimination claims because defendant has not established that it complied with the reasonable accommodations requirement of the laws.

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

ENTERED: JULY 17, 2012

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6789-
6790 John Burton, et al., Index 17566/07
86180/07
84101/09
Plaintiffs-Appellants-Respondents,

-against-

CW Equities, LLC,
Defendant-Respondent-Appellant,

T.F.N. Development Corp. doing
business as East Coast Construction Group,
Defendant-Respondent.

[And Other Third-Party Actions]

Pollack, Pollack Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants-respondents.

Baxter Smith & Shapiro, P.C., White Plains (Dennis S. Hefferman of counsel), for respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered October 22, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability on their Labor Law § 240(1) claim, and denied defendant CW Equities, LLC's motion for summary judgment dismissing the complaint as against it and for conditional summary judgment on its cross claim for indemnification against defendant T.F.N. Development Corp., unanimously modified, on the law, to grant plaintiffs' motion and to grant defendant CW

Equities' motion with respect to its cross claim, and otherwise affirmed, without costs.

Contrary to defendants' contention, the fact that the concrete walkway from which plaintiff John Burton fell was a permanent structure does not remove it from the coverage of Labor Law § 240(1). The walkway provided access to the rear yard of the building under construction, extending over an approximately 15-foot-deep vaulted area below grade level. However, it had no guard rails or other barriers. Thus, "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Since plaintiff's injury did not arise from the method he used to perform his work, but from a dangerous condition of the workplace, it is not dispositive of his Labor Law § 200 claim that CW Equities did not control the work at the building site (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [2009]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]). Whether CW Equities had the requisite notice of the dangerous condition is an issue of fact raised by its principal's testimony that he visited the site approximately every other day (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Similarly, as to plaintiff's common-law negligence claim, the record presents an issue of fact whether the dangerous condition should have been apparent upon visual inspection (*see Urban*, 62 AD3d at 555).

Although in his bill of particulars plaintiff did not allege a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1) as a predicate for his Labor Law § 241(6) claim, he identified it in opposition to CW Equities' motion, and CW Equities claims no prejudice from the late invocation of the provision (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560-561 [2010]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [2000]).

Notwithstanding the above-discussed issues of fact as to negligence on its part, CW Equities should have been granted summary judgment on its claim for indemnification, since the indemnification provision at issue does not require T.F.N. to indemnify CW Equities for CW Equities' own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [2010]; *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675-676 [2010]).

The Decision and Order of this Court entered herein on February 14, 2012 is hereby recalled and vacated (*see* M—1246 decided simultaneously herewith).

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

ENTERED: JULY 17, 2012

DEPUTY CLERK

Andrias, J.P., Saxe, Acosta, Freedman, Richter, JJ.

6868-
6869-
6870-
6871N New Media Holding Company LLC, Index 603742/09
Plaintiff-Respondent,

-against-

Konstantin Kagalovsky, et al.,
Defendants,

Aspida Ventures Ltd., et al.,
Defendants-Appellants,

-against-

Vladimir Gusinski, et al.,
Defendants.

_____

Salon Marrow Dyckman Newman & Broudy LLP, New York (John Paul Fulco of counsel), for appellants.

Covington & Burling LLP, New York (C. William Phillips of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 27, 2010, which granted plaintiff's motion for a default judgment as against defendants-appellants, unanimously reversed, on the law, and in the exercise of discretion, without costs, and the motion denied. Judgment, same court and Justice, entered February 14, 2011, against defendants-appellants in plaintiff's favor, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from orders, same court

and Justice, entered July 13, 2011, and August 1, 2011, which denied defendants-appellants' motion to vacate the default judgment against them, unanimously dismissed, without costs, as academic.

Plaintiff is a Delaware limited liability company headquartered in Connecticut. Defendant Iota LP is an Isle of Jersey partnership, allegedly owned and controlled by defendant Kagalovsky, a Russian citizen who resides in London.

Plaintiff and defendant Iota LP are equal partners in nonparty Iota Ventures LLC, a Delaware limited liability partnership (the Partnership). The Partnership was formed to own and operate a new television network in the Ukraine, named TVi. TVi was owned by nonparty TeleradiocompanyTeleRadioSvit LLC (TRS), a Ukranian entity, which in turn was held through a series of companies owned directly or indirectly by the Partnership.

Plaintiff alleges that defendants-appellants, Aspida Ventures Ltd. and Seragill Holdings Ltd., Cypriot entities, were used by defendant Kagalovsky as part of a conspiracy to effect the improper and surreptitious dilution of the Partnership’s interest in TRS and TVi, in order to deprive plaintiff of its 50% ownership interest therein. Plaintiff brings this action to restore its rights in TRS and TVi, to stop any further liquidation of its ownership interests, and for damages caused by

defendants' allegedly improper actions.

The court properly exercised jurisdiction over defendants-appellants pursuant to CPLR 302(a)(1). "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Contrary to defendants-appellants' contention, there was no need to establish a formal agency relationship between them and the other defendants, since it was shown that the other defendants acted purposely in New York for their benefit and with their knowledge and consent, and that defendants-appellants exercised "some control" over the other defendants in the matter (*id.*). Defendant Kagalovsky's negotiation of the partnership agreement in New York and defendant Iota LP's subsequent actions in New York, including its commencement of an action in federal court in New York based on the partnership agreement, are sufficient to show that defendants-appellants, "through an agent," transacted "any business within" the state (CPLR 302[a][1]; *see e.g. Soloman Ltd. v Biederman & Co.*, 177 AD2d 350 [1991]).

Moreover, for the purpose of these transactions,

defendants-appellants and the other defendants were alter egos (*see e.g. Holme v Global Mins. & Metals Corp.*, 63 AD3d 417 [2009]). Defendant Kagalovsky's deposition testimony explaining how and why he used defendants-appellants amply supports long-arm jurisdiction under an alter-ego theory.

The court also properly exercised long-arm jurisdiction under CPLR 302(a)(2) since defendants-appellants are alleged co-conspirators in the commission of a tort in New York State through an agent (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 98 [2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]; *see also Reeves v Phillips*, 54 AD2d 854 [1976]).

Having found that a basis for long-arm jurisdiction exists, we must now determine whether the court providently exercised its discretion in granting plaintiff's motion for the entry of a default judgment.

"In order to successfully oppose a [motion for a] default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense" (*ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239, 240 [2006]). "[W]hether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party,

whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Rickert v Chestara*, 56 AD3d 941, 942 [2008] [internal quotation marks omitted]; *see Finkelstein v Sunshine*, 47 AD3d 882 [2008]). Moreover, courts have the inherent power to forgive even an unexplained default "in the interest of justice" (*B.U.D. Sheetmetal v Massachusetts Bay Ins. Co.*, 248 AD2d 856, 856 [1998]). Applying these principles, this is not an appropriate case for departure from this State's preference for resolving controversies upon the merits and the interests of justice warrant an exercise of discretion in favor of excusing the delay in answering at issue (*see Zanelli v Jmm Raceway, LLC*, 83 AD3d 697 [2011]).

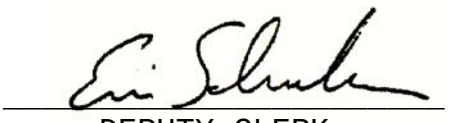
The complaint was served on defendants-appellants in Cyprus on December 15, 2009. On May 24, 2010, plaintiff moved for a default judgment. On June 7, 2010, defendants-appellants served their answers. When plaintiff rejected the answers, defendants-appellants timely opposed the motion for a default judgment, asserting a lack of jurisdiction. Alternatively, they averred that there was a reasonable excuse for their failure to timely answer based on "th[eir] good faith and substantiated belief" that there was no basis for personal jurisdiction. Defendants-appellants also demonstrated, for the purposes of the motion, a potentially meritorious defense that the subject ownership

transfers were for fair value, were not prohibited by any governing agreement or Ukrainian law, and were necessary to avoid bankruptcy (*see Poree v Bynum*, 56 AD3d 261, 262 [2008]*; Spira v New York City Tr. Auth.*, 49 AD3d 478 [2008])). Further, and significantly, the causes of action asserted against defendants-appellants are derivative of the claims against Kagalovsky and Iota LP, who are vigorously defending the action.

Under these circumstances, "given the questions of fact as to merit, the brief delay, the lack of intention on defendants' part to default, the failure of plaintiff to demonstrate any prejudice attributable to the delay and the policy preference in favor of resolving disputes on the merits, we conclude that defendants' untimeliness should have been excused in this instance" (*Cerrone v Fasulo*, 245 AD2d 793, 794 [1997]).

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

ENTERED: JULY 17, 2012



DEPUTY CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6900 Mia Plaza, an Infant by Her Mother and Natural Guardian, Claribel Rodriguez, Plaintiff-Appellant, Index 6004/07

-against-

New York Health and Hospitals Corporation (Jacobi Medical Center), Defendant-Respondent.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered March 11, 2010, which granted defendant New York Health and Hospital Corporation's (HHC) motion for summary judgment dismissing the complaint, affirmed, without costs.

We affirm dismissal of the complaint, but for reasons other than those stated by the motion court. Specifically, we find that the complaint should have been dismissed because plaintiff failed to comply with the 90-day time period specified in General Municipal Law § 50-e, which is a condition precedent to maintaining an action against HHC (*see Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 267 [2002]).

Initially, we note that plaintiff first served a notice of

claim without leave of court on June 5, 2006. Plaintiff's mother began her prenatal care with defendant in late 2002, and the infant was born on July 11, 2003. Plaintiff's bill of particulars states that the acts of alleged malpractice occurred between November 27, 2002 and July 16, 2003. Therefore, the time to file a notice of claim without leave of court expired on October 16, 2003, approximately two years and eight months prior to plaintiff's attempted filing of a late notice of claim.

On April 29, 2009, defendant moved for summary judgment dismissing the complaint. That motion raised, for the first time, plaintiff's failure to file a timely notice of claim. On August 17, 2009, plaintiff filed opposition to the motion and cross-moved for an order deeming the notice of claim timely served nunc pro tunc or, in the alternative, granting leave to serve a late notice of claim.

We have repeatedly held that service of a late notice of claim without leave of court is a nullity (*see e.g. McGarty v City of New York*, 44 AD3d 447, 448 [2007]; *Croce v City of New York*, 69 AD3d 448 [2010]). Moreover, the failure to seek a court order excusing such lateness within one year and 90 days after accrual of the claim requires dismissal of the action (*id.*). Therefore, the complaint should have been dismissed on this ground alone.

Contrary to the position of the dissent, however, plaintiff has failed to meet the basic criteria that would warrant the exercise of this Court's discretion to permit her to file a late notice of claim. General Municipal Law § 50-e(5) gives a court the discretion to grant leave to serve a late notice of claim after considering "whether the public corporation or its attorneys . . . acquired actual knowledge of the essential facts constituting a claim within the time specified in subdivision (1) or within a reasonable time thereafter" (*see Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 332 [2005]).

> "In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e(5), the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative'" (*Velazquez v City of N. Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [2010], *lv denied*, 15 NY3d 711 [2010] quoting *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]).

As discussed below, in applying these criteria to this case, we find that plaintiff failed to provide a reasonable excuse for the delay and to establish that HHC had actual notice of the

claim.

While we agree with the dissent that the statute is remedial in nature and should be liberally construed (*Camacho v City of New York*, 187 AD2d 262, 263 [1992]), such construction should not be taken as *carte blanche* to file a late notice of claim years after the incident which gave rise to the claim occurred. Such an interpretation would frustrate the purpose of the statute which is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*Matter of Porcaro v City of New York*, 20 AD3d 357, 357-358 [2005]).

Reasonable Excuse

As the dissent acknowledges, plaintiff failed to offer a reasonable excuse for the delay in moving for leave to serve a late notice of claim. The record shows that the delay is attributable to the fact that plaintiff's mother, while on notice of the infant's condition, lacked an understanding of the legal basis for the claim, and that she retained her current counsel in July 2005, almost two years after the infant's birth. However, ignorance of the law is not a reasonable excuse (*see Rodriguez v New York City Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 538-39 [2010], *lv denied* 17 NY3d 718 [2011]; *Harris v City of New York*, 297 AD2d 473, 473 [2002], *lv denied* 99 NY2d 503

[2002]). Significantly, it must be noted that counsel waited almost a year after being retained to file a notice of claim, albeit without leave of the court. Although, as the dissent points out, this factor, standing alone, does not require denial of the cross motion, it does not stand in plaintiff's favor.

Actual Knowledge of the Essential Facts

Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and should be accorded great weight (*Kaur v New York City Health & Hosps. Corp.,* 82 AD3d 891, 892 [2011]).

Contrary to the dissent's argument, plaintiff failed to demonstrate that defendant acquired actual notice of the facts constituting the claim from the medical record, as "the record alone did not put defendant on notice of alleged malpractice that might years later give rise to another condition" (*Velazquez,* 69 AD3d at 442; *Rodriguez,* 78 AD3d at 539).

Here, although plaintiff's experts seize on entries discussing "fetal distress" and view the delivery and the natal intensive care unit records with the hindsight of later developed medical conditions, they fail to address the simple fact that, from all appearances, the infant was a well baby post-delivery. Her Apgar scores were 8 at one minute, and 9 at five minutes,

with a perfect score being 10, and a normal range of 8-10. While the infant did experience respiratory distress when her oxygen saturation level decreased to 85%, after staff administered oxygen, the levels improved in short order to 92% and, afterwards to 100%. Moreover, the fetal heart rate fluctuations were not so dramatic as to give an indication that something was amiss. While in natal ICU to rule out sepsis, the infant was described as "alert, responsive, normal muscle tone, Moro reflex symmetric, strong suck, strong cry" and the chart noted that "respiratory distress subsided." At discharge, the infant was again described as alert and responsive, strong grasp and demonstrated no apparent issues. In fact, during well-baby checkups in July and September 2003, the baby was doing well and meeting developmental milestones. The records from those visits noted a genetic issue that was corrected and was unrelated to her later problems.

Simply put, despite plaintiff's experts' attempts to read into the records issues that developed beyond the time frame set forth in plaintiff's bill of particulars, the records do not, on their face, demonstrate a failure to provide proper prenatal and labor care, or that defendant departed from good and accepted medical practice during delivery (*see Perez v New York City Health & Hosps. Corp.,* 81 AD3d 448 [2011]; *Matter of Kelley v New York City Health & Hosps. Corp.,* 76 AD3d 824, 828 [2010]).

"Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process." (*Williams v Nassau County Med. Ctr.,* 6 NY3d 531, 537 [2006].

Although the dissent argues *that Williams* is distinguishable from the present case, its facts are quite similar. There, plaintiff claimed his epilepsy and developmental difficulties were the result of malpractice committed by doctors and staff during his birth in September 1993 (*id.* at 535-536). Ten years later, on September 5, 2003, plaintiff's counsel sent defendants a notice of claim (*id.* at 536). There, as here, there were difficulties encountered during the delivery. The Apgar scores of the infants in both cases were identical (*see id.*). The experts in both cases claimed that the records, on their face, gave the defendants actual notice of the essential facts constituting malpractice. Also of note is the fact that subsequent medical examinations did not reveal any abnormalities until years after the incidents giving rise to the claimed malpractice.

In affirming the dismissal of the complaint in *Williams*, the Court of Appeals made the following observation:

> "The hospital's records reveal that the delivery was difficult, but that when it was over there was scant reason to identify or predict any lasting harm to the child, let alone a developmental disorder or epilepsy. The infant's Apgar scores were satisfactory, and even two years later, his EEG was normal. Under these circumstances defendants could well have concluded that when plaintiff left the hospital there was nothing wrong with him beyond a broken clavicle" (*id.* at 537).

The Court when on to hold: "The relevant inquiry is whether the hospital had actual knowledge of the facts - as opposed to the legal theory - underlying the claim. Where . . . there is little to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying a claim" (*id*). Such is the situation here.

The dissent relies on *Perez* (81 AD3d 448), "a case factually and procedurally similar to this case," for the proposition that the medical records "on their face, evince[]defendant's failure to provide the infant's mother with proper prenatal and labor care" (*id.*). However, the only similarity between *Perez* and this case lies in the fact that both plaintiffs provided affirmations from experts that incorporated records and reports made well beyond the time frame of the claimed malpractice. Factually, the

present case could not be more different than *Perez*.

In *Perez*, the medical records before the court were replete with heartbeat irregularities and variable decelerations "denoting compression of head or umbilical cord." There was a noted fetal intestinal discharge which was another indication of severe in utero problems. Additionally, the records show that the fetus's growth rate was below normal. The baby was born with an Apgar score of 6, below the normal score, and was of small birth weight. Significantly, these records also revealed that the infant was born with respiratory distress, as well as possible ischemic brain injury due to blood loss from mechanical obstruction of blood vessels. While in the natal ICU, the records revealed, among other things, that the infant demonstrated diminished muscle tone, poor oxygen saturation which did not improve, a rapid heartbeat, concave abdomen, diaphragm abnormality diagnosed as possibly chromosomal, a short thorax, decreased muscle mass, and, most significantly, evident developmental delay. The infant spent his first 20 months of life on a ventilator and was transferred to a specialized facility for various forms of therapy. We found, not surprisingly, that under these circumstances, the medical records did in fact apprise defendants of the essential facts underlying

the claimed malpractice (81 AD3d at 449).

Although defendants in *Perez* did not submit expert affidavits in response to those submitted by plaintiff (*id.*), the case before us stands in a different procedural posture. *Perez* involved a motion to file a late notice of claim. Here, the application was made by a cross motion and plaintiff's experts were essentially responding to the affidavits of defendant's experts which were submitted in support of defendant's motion for summary judgment.

The dissent argues at great length that the medical records, as interpreted with the benefit of hindsight by plaintiff's expert, clearly showed departures from accepted medical practice and hence, gave defendant actual notice of the alleged malpractice. This fails to take into account the affidavits of defendant's experts which utilized those same records to support their conclusion that there was no departure from accepted medical procedures. In essence, the dissent is making a credibility determination that malpractice did, in fact, occur and that defendant was aware of such malpractice. This sidesteps the threshold issue in this case, i.e., whether plaintiff meets the criteria that would permit the filing of a late notice of

claim (*see Caminero,* 21 AD3d at 332; *Velazquez*, 69 AD3d at 442).

Simply put, the medical records in this case do not rise to the level required for a finding that defendant's own records "equate to knowledge of facts underlying a claim" (*Williams*, 6 NY3d at 537).

Substantial Prejudice

As previously discussed, defendant did not have actual knowledge of the facts underlying plaintiff's claims. Proof of actual knowledge, or lack thereof, "is an important factor in determining whether the defendant is substantially prejudiced by such a delay." (*Williams*, 6 NY3d at 539).

However, defendant has failed to show substantial prejudice beyond claiming unavailability of witnesses. No averment has been made that any witness is actually unavailable. Beyond a general claim that the delay has created prejudice, defendants have not shown this to be the case.

Infancy

Finally, as the dissent concedes, plaintiff's infancy carries little weight, because there is no connection between the infancy and the delay in moving to file the late notice of claim (*see Williams*, 6 NY3d at 538).

In applying all the factors which must be considered in determining whether permitting service of a late notice of claim would be a provident exercise of discretion, we conclude that plaintiff failed to meet the overall requirements and the complaint must therefore be dismissed.

In light of our decision, we need not address plaintiff’s remaining arguments.

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

MOSKOWITZ, J., (dissenting)

Plaintiff's mother, Claribel Rodriguez, alleges that defendant New York City Health and Hospitals Corporation (Jacobi Medical Center) (HHC) departed from accepted standards of medical practice while caring for her during the birth of her daughter, infant plaintiff Mia Plaza, resulting in the infant's developmental delays and seizures. In my view, the motion court should have denied defendant's motion for summary judgment based upon existing factual issues. Further, it is my view that the medical records provided defendant with actual knowledge of the facts constituting plaintiff's claim and that the motion court should have granted plaintiff's cross motion to deem her late notice of claim timely. Thus, I respectfully dissent.

On December 3, 2002, the mother, then 33, began her prenatal care at Jacobi. Her estimated due date was June 27, 2003. Her prenatal care was uncomplicated until July 3, 2003, at which time she was past her due date. During an examination on July 3, Jacobi conducted a sonogram and biophysical profile. The results were within normal limits, except that the amniotic fluid index (AFI) was a low 5.4 centimeters. Hospital staff asked the mother to return to the clinic in two days. At the July 5 examination, the resident obstetrician described the fetal status

as “reassuring” and recommended a follow-up appointment on July 7.

The mother returned to Jacobi on July 9. Staff told her that they would induce labor the next day. Accordingly, they admitted her at 6:30 P.M. on July 10, 2003. She was 42 weeks pregnant, or two weeks past her estimated due date.

At 7:00 P.M. Jacobi staff admitted the mother to the labor and delivery unit and attached her to a fetal heart monitor. During labor, the fetal monitor recorded fluctuations in the fetal heart rate (FHR). The monitor first recorded late decelerations[1] in the FHR at 7:53 P.M. on July 10. The next morning, July 11, at 10:10 A.M., staff administered Pitocin to induce labor. Between the time Jacobi staff admitted the mother and the time she gave birth to the infant, weighing 7 lbs., 15 oz., at 10:06 P.M. on July 11, 2003, the mother became increasingly dilated and the fetus moved progressively downward. Jacobi staff expected a normal delivery.

At birth, delivery room staff described infant plaintiff as “floppy” and “sluggish.” Thus, staff called a physician’s

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[1] Late decelerations: “any transient fetal bradycardia, with onset of d. at the peak of the uterine contraction and nadir as contraction finishes; may represent uteroplacental insufficiency” (Stedman’s Medical Dictionary 496 [28th ed 2007). Bradycardia: “Slowness of the heartbeat, usually defined (by convention) as a rate under 50 beats/minute” (*id.* at 208).

assistant (PA) from the Pediatrics Department. The PA arrived three to four minutes after birth, after staff had placed the infant on a radiant warmer and were administering blow-by oxygen.[2] In her affidavit, plaintiff mother noted that the infant was pale at birth and did not cry. The PA found that the infant had "good tone" and "normal resp[iratory] effort." Jacobi records attributed the infant's initial sluggish condition to the staff's administration of Demerol to plaintiff mother during labor. In general, the PA's "impression" was of a "well" female infant, and Jacobi staff transferred the infant to the well-baby nursery. An initial blood gas reading at four hours of life was within normal limits.

At about 5:00 A.M. on July 12, approximately seven hours after birth, the infant experienced respiratory distress, as her oxygen saturation level on room air decreased to 85%. The nursery staff promptly administered blow-by oxygen, and her oxygen saturation level increased to 92% and later to 100%. Around that time, staff transferred the infant to the Neonatal

[2] "Blow-by" oxygen is delivered by fitting the patient with a mask, as opposed to fitting a patient with a nasal cannula that fits into the nostrils.

Intensive Care Unit (NICU) to rule out sepsis[3] and for observation because of the respiratory distress.

After NICU staff admitted the infant at 5:57 A.M. and conducted a physical examination, they listed "fetal distress" as a complication of labor. Nonetheless, staff described the infant as "alert, responsive, normal muscle tone, Moro reflex symmetric, strong suck, strong cry." The NICU chart noted that the infant's "respiratory distress subsided." Staff started her on two antibiotics, pending the results of the sepsis work-up that subsequently came back negative. When plaintiff mother saw the infant in the NICU on July 12, she noticed that the infant's forehead was "indented, while the right side was bulging." By early afternoon, staff took the infant off oxygen, and she was breathing room air, with oxygen saturation levels over 95%. Over the next few days, staff noted that the infant had intermittent rapid breathing. On July 13, the infant developed mild jaundice. Staff treated her with phototherapy to decrease her bilirubin[4] level.

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[3] Sepsis: "The presence of various pathogenic organisms, or their toxins, in the blood or tissues" (Stedman's Medical Dictionary 1749 [28th ed 2007]).

[4] Bilirubin: "A yellow bile pigment found as sodium bilirubinate (soluble), or as an insoluble calcium salt in gallstones" (Stedman's Medical Dictionary 218 [28th ed 2007]).

By July 15, 2003, the infant showed no more signs of respiratory distress and maintained her body temperature. That day, when staff discharged the infant from the NICU, the jaundice was resolving. Staff described her as alert and responsive, normal muscle tone, strong cry and positive grasp. The Jacobi discharge summary listed "fetal distress" as a labor complication. Because the infant's bilirubin level was still somewhat high, staff asked plaintiff mother to bring the infant back within 24 hours. Plaintiff mother returned with the infant, and Jacobi staff found the bilirubin levels within the acceptable range.

At Jacobi well-baby checkups on July 28 and September 12, 2003, doctors found the infant's condition, including her developmental milestones, normal for her age. At the September 12 checkup, however, doctors noted ptosis, or drooping of the left eyelid, and recorded on her chart that a first cousin also had the condition. Doctors eventually surgically corrected the ptosis. Infant plaintiff's primary care physician at the Jacobi well-baby checkups found that her head was slightly smaller than normal and diagnosed her with microcephaly.[5]

On March 16, 2009, a pediatric neurologist found the infant's head circumference in the second percentile. Plaintiff

[5] Microcephaly: "Abnormal smallness of the head" (Stedman's Medical Dictionary 1205 [28th ed 2007]).

mother testified that the infant's head was misshapen for the first three months of her life. The mother testified that she corrected this condition by placing a cap on the infant's head overnight for about two months and that the infant had no significant medical history until she was five months old, other than the congenital ptosis and microcephaly.

On December 13, 2003, plaintiff mother found the infant lying in her crib with a vacant expression on her face. She was twitching and limp, and her eyes were staring to the left. She did not respond when her mother called to her, as the infant typically did. Plaintiff mother called an ambulance that transported the infant to the emergency room of Our Lady of Mercy Medical Center. While there, the infant had a seizure, and staff noted that she had a "bulging anterior fontanelle." A CT scan of her head was negative. Hospital staff diagnosed the infant with seizures and possible sepsis.

That same day, staff transferred the infant to Westchester County Medical Center (Westchester), where she remained until December 19, 2003. Staff treated her with Phenobarbital for the seizures. Doctors never determined the cause of the seizures. On December 14, 2003, Westchester staff performed tests, including a lumbar puncture, an MRI, a CT scan and blood tests, all of which were normal. An EEG, however, revealed that the left side of the

infant's brain was slower than the right.

The Westchester medical records show that plaintiff mother described the infant as previously healthy and stated that the infant had had no respiratory distress. The infant tested positive for a flu virus, and she had a fever. An attending neurologist described the infant's condition as "S/P [status post] encephalitis [secondary] to viral infection."[6] Staff eventually discharged the infant from Westchester on December 19, 2003, with a prescription for Phenobarbital.

Plaintiff mother testified that after the seizure, the infant regressed in her development and lost certain skills, including trying to roll over. Physicians at Jacobi and Westchester informed the mother that seizures could interfere with her mental development and learning ability, as could the anti-seizure medication.

On April 28, 2005, defendant Jacobi performed an MRI on the infant. Dr. Einat Blumfield, a pediatric radiologist/neurologist at Jacobi, reported that "the hippocampal formations are symmetric and normal in size[;] however, they both exhibit high FLAIR and T2 signals." He opined that "[b]ilateral symmetric abnormal signals within the hippocampal formations may represent

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[6] Encephalitis: "Inflammation of the brain" (Stedman's Medical Dictionary 633-634 [28th ed 2007]).

transient postictal [that is, post-seizure] changes."

On November 7, 2005, Dr. Alan Shanske, a pediatrician and clinical geneticist at Jacobi, evaluated the infant. Dr. Shanske noted that the infant's injuries were "[l]ikely secondary to hypoxic ischemic encephalopathy [HIE]"[7] and not genetic.

Jacobi doctors diagnosed the infant with global developmental delays, when she was approximately nine months of age, and her mother enrolled her in an early intervention program. She received services including speech, physical and occupational therapy. She eventually attended first grade at a public school, receiving special education and related services.

In July 2005, plaintiff retained counsel in connection with bringing a medical malpractice action. On June 5, 2006 (almost three years after infant plaintiff's birth), although the statutory deadline had passed (see General Municipal Law § 50-c), plaintiff served a late notice of claim on defendant without leave of court. On January 2, 2007, plaintiff filed the summons and complaint against defendant and two physicians. Plaintiff later discontinued the action against the individual defendants.

In its answer, defendant did not assert plaintiff's failure

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[7] Hypoxic ischemic encephalopathy: "generally permanent brain injury resulting from a lack of oxygen or inadequate blood flow to the brain" (Stedman's Medical Dictionary 636 [28th ed 2007]).

to serve a timely notice of claim as an affirmative defense. The parties engaged in discovery, including a General Municipal Law § 50-h hearing and the depositions of the mother and one of the physicians plaintiff had named as a defendant.

On April 29, 2009, almost three years after plaintiff served the notice of claim, defendant moved for summary judgment dismissing the complaint under CPLR 3212. Defendant argued that plaintiff could prove neither departure from the standard of care nor that defendant's treatment proximately caused infant plaintiff's injuries. Defendant further argued, in the alternative, that the court should dismiss the complaint because plaintiff failed to serve a timely notice of claim (General Municipal Law § 50-e).

In support of its motion, defendant submitted affirmations from the following physicians: Henry K. Prince, M.D., a board-certified OB/Gyn; Lance Parton, M.D., a board-certified pediatrician sub-certified in neonatology; Robert Zimmerman, M.D., a physician board-certified in diagnostic radiology, with a subspecialty certification in neuroradiology; and Kwame Anyane-Yeboa, M.D., a physician board-certified in clinical genetics and pediatrics, with a specialty in pediatric genetics.

Dr. Prince opined that defendant did not depart from the appropriate standard of care. He noted that defendant properly

induced plaintiff mother's labor at 42 weeks gestation, labor proceeded normally and testing ensured fetal well-being. Regarding the FHR, the occasional variable decelerations were of no moment in light of the overall reassuring FHR. As for the moderate to severe decelerations during the last half hour before the infant's birth, labor progressed normally, ruling out the need for a Caesarean section. Finally, Dr. Prince opined that the infant's excellent Apgar scores[8] at birth and her post-natal condition "effectively rule[d] out" hypoxic-ischemic injury.

Dr. Parton opined that, had the infant suffered a hypoxic event just before birth, blow-by oxygen would not have sufficiently treated her. Further, while the infant suffered mild respiratory distress, her oxygen saturation level decreased only to 85% and quickly recovered to 92% after she received blow-by oxygen. He concluded that this respiratory distress was not severe or prolonged enough to cause permanent injury. He further opined that the infant's Apgar scores at one minute and five minutes after birth established that the infant had not suffered hypoxic ischemic encephalopathy (HIE).

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[8] Apgar score: "evaluation of a newborn infant's physical status by assigning numerical values (0 to 2) to each of 5 criteria: heart rate, respiratory effort, muscle tone, response stimulation, and skin color; a score of 8-10 indicates the best possible condition" (Stedman's Medical Dictionary 1735 [28th ed 2007]).

After reviewing the December 2003, January 2004, April 2004 and April 2005 CT scans and MRIs of the infant's brain, Dr. Zimmerman opined that the films did not reveal any brain injury or abnormality or any indication of hypoxia. He reported that any hypoxic insult would manifest through damage to the white matter of the brain and would be visible on the films. He also opined that the studies effectively ruled out hypoxic-ischemic injury around the time of the infant's birth.

Finally, Dr. Yeboa agreed that the infant had suffered no hypoxic-ischemic injury at birth. If she had, she would have exhibited developmental delays before five months of age. Rather, Dr. Yeboa opined that the infant's various symptoms, including microcephaly, suggested a genetic disorder.

In opposition, plaintiff submitted the affirmations of Bruce Halbridge, M.D., a board-certified OB/Gyn; and Dr. Rosario Trifiletti, M.D., a physician board-certified in pediatrics and neurology. Dr. Halbridge reported that he disagreed with some of Dr. Prince's conclusions. He opined that the Jacobi staff departed from good and accepted practice by failing to properly respond to signs of fetal distress apparent from the fetal heart monitor tracings. Further, Dr. Halbridge noted, on July 3, 2003, plaintiff's AFI was only 5.4 centimeters (below the third

percentile), "constituting severe oligohydramnios,"[9] suggesting placental insufficiency. Dr. Halbridge opined that defendant departed from accepted practice simply by asking plaintiff to return in two days. Dr. Halbridge further opined that FHR decelerations indicated a C-section.

On November 11, 2006 and August 12, 2009, Dr. Trifiletti conducted neurological examinations of the infant. He opined that the infant's developmental delays and seizures were "the sequelae of perinatal HIE [hypoxic ischemic encephalopathy]." He reported that the infant "had typical clinical and radiologic findings of a child with perinatal HIE." Dr. Trifeletti further opined that the April 2005 MRI did show bilateral hippocampal abnormalities. This opinion conflicted with Dr. Zimmerman, who found no abnormalities on the film. Further, Dr. Trifeletti concluded that those abnormalities did not arise from the infant's then-recent seizure. Rather, he opined that they showed HIE caused actual permanent damage to the hippocampi at birth.

Dr. Trifeletti also disagreed with defendant's physicians' conclusions. For example, he disputed Dr. Parton's opinion that the sequelae of intrapartum HIE would have been apparent in the

[9] Oligohydramnios: "The presence of an insufficient amount of amniotic fluid (Stedman's Medical Dictionary 1362 [28th ed 2007]).

delivery room or NICU. Rather, Dr. Trifeletti stated, "[It is] well understood in pediatric neurology that injury to brain structures ... are frequently not detectable well beyond the neonatal period." Dr. Trifeletti also opined that, while umbilical cord blood was sent to the lab, no blood gas analysis appears in the records. Thus, there is no way to determine the level of blood gas values at birth.

By notice dated August 17, 2009, plaintiff cross-moved for an order pursuant to General Municipal Law § 50-e(5) deeming the late notice of claim timely served nunc pro tunc or, in the alternative, permitting her to serve and file a late notice of claim.

The motion court granted defendant's motion. Finding that defendant was entitled to summary dismissal of plaintiff's medical malpractice claim, the court did not reach the notice of claim issue. The court reasoned that the parties' papers demonstrated that plaintiff could not prove causation. The decision stated that "had the infant experienced brain damage as a result of [HIE], the CT scans and MRIs taken in December 2003, January 2004, April 2004 and April 2005 all would exhibit injury to the brain." The court concluded that "the infant's normal head scans taken in the months subsequent to her birth prove that the care and treatment rendered by [defendant] was not a

proximate cause of her injury." Relying on Dr. Zimmerman's opinion, the court also found that "[h]ad the hippocampi been damaged at or around the infant's birth, it would have exhibited atrophy in the April 2005 films."

Medical Malpractice

Plaintiff argues that defendant was not entitled to summary judgment because evidence in the record demonstrates that issues of fact preclude this relief. Indeed, plaintiff maintains that the motion court erred in resolving those issues of fact, rather than simply identifying them.

Defendant satisfied its prima facie burden on its motion. Thus, the burden shifted to plaintiff (*see Bacani v Rosenberg*, 74 AD3d 500, 502 [2010], *lv denied* 15 NY3d 708 [2010]). In opposition, plaintiff raised triable issues of fact related to defendant's departure from accepted standards of medical practice and causation (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). Although defendant disputes Dr. Trifeletti's findings and opinion, the doctor based his opinion on infant plaintiff's medical records. Thus, his opinion is not speculative simply because he has less experience than defendant's expert, Dr. Zimmerman (*see Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613, 614 [2009]; *Boston v Weissbart*, 62 AD3d 517, 518 [2009]).

However, in granting defendant's motion, the court appeared

to give more weight to Dr. Zimmerman's affirmation than to Dr. Trifeletti's, based on the physicians' years of experience ("According to the affirmation of Dr. Robert D. Zimmerman, an expert neuro-radiologist with over thirty seven years of medical experience, if the infant had experienced any sort of hypoxic brain damage at birth or during the neonatal period, the [CT/MRI] film would not have been normal"). For example, in addressing the dispute over atrophy in the infant's hippocampi, the court states:

> "[E]ven if, *arguendo*, the 2005 MRI indicates brain damage, which Dr. Zimmerman opines could have resulted from the electrical activity by the infant's recurrent seizures, the damage was so recent it had yet to cause atrophy to the infant's brain. Had the hippocampi been damaged at or around the infant's birth, it would have exhibited atrophy in the April 2005 films."

This conclusion by the court is an accurate rendition of Dr. Zimmerman's opinion. However, the motion court does not acknowledge that Dr. Trifiletti directly disputed this opinion, stating, "I [] disagree with the statements in [the] Zimmerman Reply [Affirmation] that imply that atrophy (not just signal intensity) is the *sine qua non* of a perinatal hypoxic-ischemic injury." Dr. Trifiletti, citing an article from a medical journal, reported that "hippocampal atrophy is a common but not a necessary feature of HIE seen on MRI two years after birth."

Thus, the record does not contain a proper basis for the motion court's conclusion that the absence of atrophy necessarily rules out hypoxic injury. To the contrary, that the parties' experts disagree on this issue precludes summary judgment (*see Florio v Kosimar*, 79 AD3d 625, 626 [2010]).

Similarly, both Drs. Halbridge and Trifiletti disagree with defendant's experts on other matters. For example, the significance of the infant's Apgar scores and the conclusions they drew from the absence of cord blood gas readings. Drs. Prince and Parton concluded that infant plaintiff's Apgar scores ruled out birth asphyxia. However, Dr. Trifiletti opined that they did not, as those scores did not measure higher cortical function, nor were satisfactory scores inconsistent with moderate hypoxic-ischemic insult. Further, defendant's experts noted that the infant did not evince brain injury immediately following birth, and therefore, could not have sustained hypoxic injury. Citing medical journal articles, Dr. Trifiletti disputed this conclusion, noting that a relatively benign newborn course is not inconsistent with intrapartum brain injury.

Moreover, the motion court accepted and incorporated into its decision Dr. Zimmerman's opinion, even though he disagreed with defendant's own medical staff interpretations. For example, the motion court accepted Dr. Zimmerman's opinion that brightness

on one of the infant's MRI's was simply normal brightness of a hippocampal MRI. In contrast, Jacobi's Dr. Blumfield found that "the hippocampal formations are symmetric and normal in size[;] however, they both exhibit high FLAIR and T2 signals" that might represent post-seizure changes.

In another example, while the motion court accepted Dr. Zimmerman's finding that the infant had not suffered a hypoxic ischemic injury at birth, it ignored a defendant treating doctor's report that the infant's "[n]eurological impairment ... [was] [l]ikely secondary to hypoxic ischemic encephalopathy." Thus, even one of defendant's own doctors supported plaintiff's contention that HIE caused the infant's injuries.

Accordingly, I would reverse on this issue.

Late Notice of Claim

As noted above, because the motion court granted defendant's motion for summary judgment, it did not reach plaintiff's cross motion for an order deeming timely her late service of the notice of claim or, alternatively, leave to serve a late notice of claim.

"All actions sounding in medical malpractice brought against HHC ... are subject to the notice of claim provision, and the notice of claim must be filed within 90 days after the claim arises" (*Plummer v New York City Health & Hosps. Corp.*, 98 NY2d

263, 267 [2002]; General Municipal Law § 50-e[1][a]). The statute's intent is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*see Matter of Porcaro v City of New York*, 20 AD3d 357, 357-358 [2005]). However, courts should liberally construe the statute because it is remedial in nature (*Camacho v City of New York*, 187 AD2d 262, 263 [1992]), as it is not intended to operate as a way to frustrate the rights of those with legitimate claims (*see Porcaro*, 20 AD3d at 357-358).

Under General Municipal Law § 50-e(5), a court has discretion to grant leave to serve a late notice of claim after considering, "in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter." That section further provides that the court must consider "all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated ... and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits" (General Municipal Law § 50-e[5]; *see also Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330,

332 [2005]).

The key factors in evaluating whether to permit a late notice of claim are:

> "(1) [W]hether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, (2) whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative"

(*Velazquez v City of New York Health & Hosps. Corp.*, 69 AD3d 441, 442 [2010], *lv denied* 15 NY3d 711 [2010], quoting *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003] [internal citations omitted]).

1. Actual Knowledge

Plaintiff argues that, based on the affirmations of Drs. Trifiletti and Halbridge, the medical records gave defendant actual notice of the essential facts constituting the claim within the statutory time frame, in spite of the almost three-year delay in serving the notice of claim. In response to plaintiff's cross motion, defendant's experts do not address the issue of whether the medical records provided defendant with actual notice. Instead, defendant contends that if its experts offer a plausible explanation for infant plaintiff's injuries other than malpractice, it has successfully "refuted" plaintiff's

claim of actual knowledge. This argument has no basis in law.

That defendant simply generated or possessed medical records surrounding the infant's delivery does not inexorably lead to the conclusion that it acquired actual knowledge of the facts underlying the claim, unless there is some basis on the face of the records that defendant had reason to believe that the treatment at issue would lead to a future condition arising from malpractice at the birth (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Velazquez*, 69 AD3d at 442-443 [2010]). Actual knowledge of the essential facts is an important factor in determining whether to grant an extension, and courts should accord it great weight (*see Kaur v New York City Health and Hosps. Corp.*, 82 AD3d 891, 892 [2011]).

In his affirmation, Dr. Trifiletti specifically opines that the "FHM [fetal heart monitor] strips," that show the heart monitor's recordings of "late decelerations and prolonged periods of severely diminished fetal heart rate variability[,] . . . reflect moderate HIE." He further opines that, "in the context of the labor complications" [Jacobi] staff listed in the medical records, the infant's "sluggishness and poor feeding . . . provide[] additional notice to [defendant] that the infant had sustained intrapartum injury."

In his report, dated February 1, 2007, that he incorporates

into his affirmation, Dr. Trifiletti states that the "[f]etal heart monitoring records ... show signs of prolonged and progressive fetal distress and persistent variable decelerations that should have been of some concern." He further states that, by the early afternoon of July 11, 2003, "there are late and variable decelerations which are of sufficient severity to warrant a Cesarean section." Finally, he opines that "peripartum brain damage could have been avoided in this case by the expeditious performance of a Cesarean section (at latest) in the early afternoon of [July 11, 2003]."

Dr. Halbridge opines in his affirmation that the Jacobi medical records "show that its staff first departed from good and accepted practice by delaying the plaintiff mother's admission for induction of labor and later, after labor was induced, by failing to deliver by cesarean section in the presence of clear signs of fetal compromise that appeared on the FHM tracings." He further opines that the "fetal heart monitor tracings plainly reveal fetal distress in the form of severely diminished variability and persistent late decelerations when there was no sound reason to continue labor induction rather than delivery by c-section." Referring to infant plaintiff's low AFI on July 3, 2003, Dr. Halbridge opines that defendant's

"plan simply to have the mother return for a repeat

> [biophysical profile] was a departure from accepted practice in the presence of oligohydramnios, a sign of deteriorating placental function and an increased risk factor for umbilical cord compression once labor commences. ... This analysis is not changed by the fact that the AFI subsequently increased. AFI's can fluctuate widely and oligohydramnios, particularly in a post dates pregnancy, should not be ignored. On July 3, 2003 accepted practice required admitting the mother for induction of labor."

Moreover, following his genetic evaluation of infant plaintiff on November 7, 2005, even Jacobi's Dr. Shanske reported that the infant's "[n]eurological impairment . . . [was] [l]ikely secondary to hypoxic ischemic encephalopathy." Thus, as Dr. Trifiletti described in his affirmation, "[Jacobi's] own treating physician concluded ... that perinatal HIE was the most probable cause of the infant's condition."

Defendant's expert affirmations, in support of defendant's motion for summary judgment, opine that no malpractice occurred. However, these affirmations do not address the import of the fetal distress records or counter plaintiff's experts and the treating physician's opinion as to notice. The majority's conclusion that I have made a credibility determination is therefore misplaced.

Here, unlike the *Williams* case, where the records did not "suggest injury attributable to malpractice during delivery" and the plaintiff's delay in filing the late notice of claim was a

far lengthier 10 years (6 NY3d at 537), the Jacobi medical records, as plaintiff's expert affirmations demonstrate, "on their face, evince[] defendant's failure to provide the infant's mother with proper prenatal and labor care" (*Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [2011]; *see Lisandro v New York City Health and Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304 [2008] ["plaintiff submitted affirmations from physicians establishing that the available medical records, on their face, evinced that defendants failed to provide the infant plaintiff with proper care"], *lv denied* 10 NY3d 715 [2008]; *Talavera v New York City Health and Hosps. Corp.*, 48 AD3d 276 [2008] ["Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evince that defendant failed to provide proper care to plaintiffs"]).

While the majority attempts to liken the case before us to *Williams*, in that case, the infant's seizures did not develop until the age of one or two. Here, infant plaintiff's seizures emerged a mere five months after her birth and, as the record demonstrates, while she was still under the care of defendant. Moreover, the Court of Appeals found "influential" the plaintiff's 10 year delay in filing a notice of claim (*Williams*, 6 NY3d at 538).

In *Perez*, a case factually and procedurally similar to this

case, the plaintiff submitted two expert affirmations and the "defendant did not submit any expert affirmations to challenge the conclusions of [the] plaintiff's medical experts" on this issue (81 AD3d at 449).

While the majority strives to distinguish *Perez* from the case before us, it is directly on point. The crux of the plaintiff's claim there was that, approximately one month before the infant's birth, the defendant failed to conduct tests, in light of indications of lack of growth, that resulted in the failure to diagnose the fetal problems and the consequent failure to induce delivery that may have prevented some of the infant's injuries. Similarly, here, one of plaintiff's central claims, as Dr. Halbridge opines in his affirmation, is that in light of the low AFI recorded eight days before the infant's birth, indicating severe oligohydramnios, defendant failed to immediately induce labor and later, after labor was induced, failed to perform a Cesarean section in response to the FHM tracings.

Moreover, contrary to the majority's position, the procedural posture of *Perez* is no different from that in the case before us. In *Perez* the plaintiff filed a motion for leave to serve a late notice of claim and, in this case, plaintiff filed a cross motion. In both cases, the defendant had the opportunity to respond to the plaintiff's experts on the issue of whether the

medical records provided the defendant with actual notice and, in both cases, the defendant failed to do so.

Consequently, as in *Perez*, the evidence in the record is sufficient to provide defendant with "'actual notice of the facts--as opposed to the legal theory--underlying [plaintiff's] claim'" (81 AD3d at 448, quoting *Williams*, 6 NY3d at 537).

2. Prejudice

Defendant claims that it was prejudiced as a result of plaintiff's delay in serving the notice of claim, in that its employees who had personal knowledge have left defendant, and their memories have substantially faded. Plaintiff contends that any prejudice is negligible, because the trial court will try the case primarily on the medical records.

A defendant's lack of actual knowledge of the facts underlying the claim is necessarily an aspect of prejudice. By this standard, defendant has not been prejudiced because its medical records provided it with actual notice, as previously discussed. Moreover, defendant has failed to show substantial prejudice as a result of the claimed unavailability of witnesses. Defendant neither avers nor shows that any physician is actually unavailable (*see Lisandro*, 50 AD3d at 304; *Greene v NYC Health and Hosps. Corp.*, 35 AD3d 206, 207 [2006]). Indeed, the parties already deposed the resident obstetrician in the matter. Thus,

while a long delay may give rise to an inference of prejudice, the almost three-year delay here, like that in *Perez*, was not especially long, and plaintiff carried the burden of showing that material witnesses are available.

3. Infancy

Plaintiff asserts that the child's infancy weighs in favor of granting her application. As the Court of Appeals held in *Williams*, infancy is one factor the court must consider. However, "[t]he lack of a causative nexus between the delay and plaintiff's infancy is not fatal by itself" (*Lisandro*, 50 AD3d at 304). Where there is no causal nexus between the infancy and plaintiff's late service, the factor lends little support for late filing. Here, as in *Williams*, the infancy has no such nexus. Thus, plaintiff's infancy has minimal impact on the determination to grant or deny the cross motion.

4. Reasonable Excuse

As plaintiff accurately notes, absence of an acceptable excuse for the delay alone does not compel denial of her application (*see Matter of Ansong v City of New York*, 308 AD2d 333, 334 [2003]). Here, plaintiff has not offered a reasonable excuse for her delay in serving the notice of claim. However, we have previously held that "the lack of a reasonable excuse is not, standing alone, sufficient to deny an application for leave

to serve and file a late notice of claim," where the public corporation had actual notice of the essential facts and was not prejudiced by the delay (*Renelique v New York City Hous. Auth.* 72 AD3d 595, 596 [2010]; *see also Bayo v Burnside Mews Assoc.*, 45 AD3d 495, 495 [2007] ["Although the stated ignorance of the law by infant plaintiff's mother is not a reasonable excuse . . . , infant plaintiff should not be deprived of a remedy, where, as here, the record evidence demonstrates that [defendants'] possession of the medical records sufficiently constituted actual notice of the pertinent facts, and that they would not be substantially prejudiced by the delay"]).

On balance and weighing all the key factors, had the motion court reached the issue, in my view, it should have granted plaintiff's cross motion.

Accordingly, I would also reverse on this issue.

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

ENTERED: JULY 17, 2012

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

7639 In re Jean Chin, Index 111748/10
Petitioner-Appellant,

-against-

New York City Board of Standards
and Appeals, et al.,
Respondents-Respondents.

Kirkland & Ellis LLP, New York (LeMar Moore of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for municipal respondents.

Law Offices of Marvin B. Mitzner, LLC, New York (Marvin B. Mitzner of counsel), for 516 East 6th Street, LLC and 514 East 6th Street, LLC, respondents.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 9, 2011, denying the petition to annul a determination of respondent Board of Standards and Appeals (BSA) dated August 3, 2010, which granted respondents 514 East 6th Street, LLC and 516 East 6th Street, LLC (collectively, the owners) certain variances to provisions of the Multiple Dwelling Law, and dismissing the proceeding, unanimously affirmed, without costs.

In this CPLR article 78 proceeding, petitioner challenges variances obtained in connection with the owners' application to enlarge two adjacent, five-story, non-fireproof tenements, which

were constructed some time prior to 1901. In or about October 2006, the owners filed an application with the New York City Department of Buildings (DOB) seeking a permit to add new sixth floors and seventh-floor penthouses to the buildings. Because the proposed expansion did not conform with certain provisions of the Multiple Dwelling Law (MDL), the owners sought waivers from DOB. In October 2007, DOB waived the MDL requirements and issued an alteration permit for the expansion; construction began shortly thereafter.

On November 25, 2008, BSA revoked the permit, finding that DOB did not have the authority to vary the application of the MDL. By the time the permit was revoked, the owners had already completed construction on the expansion of the buildings. In June 2009, in an effort to legalize the buildings, the owners sought the required variances from BSA. By resolution dated August 3, 2010, BSA granted the variance request with respect to the addition of the sixth floor.[1] BSA's approval was contingent on the owners' compliance with certain conditions, including the installation of an automatic wet sprinkler system in the common areas, cellar, and all apartment interiors, hard-wired smoke

[1] At BSA's direction, respondents eliminated the seventh floor from the plans and now seek to legalize only the sixth floor.

detectors and emergency lighting in all apartments and common areas, new fire escapes and ladders at the front and rear of the buildings, and replacement of wood apartment doors with self-closing metal doors.

In determining whether to grant the variances, BSA reviewed the owners' application under Multiple Dwelling Law § 310(2)(a), which applies to "buildings existing on" July 1, 1948. Since the buildings existed on that date, § 310(2)(a) is, on its face, applicable. Petitioner argues that BSA utilized the wrong statutory subdivision, and that the applications should have been reviewed under Multiple Dwelling Law § 310(2)(c). That section, which provides for more stringent criteria for variances, applies to "buildings erected or to be erected or altered pursuant to plans filed on or after" December 15, 1961. Since the alteration plans here were filed after that date, § 310(2)(c) is also, on its face, applicable.

Because both subdivision (a) and subdivision (c) could reasonably apply to the owners' request for variances, we find that the statute, when read as a whole, is ambiguous under the facts presented here. Although the correct interpretation of a statute is ordinarily an issue of law for the courts to decide, where the statutory language suffers from some fundamental ambiguity, courts should defer to the interpretation of the

agency charged with administering the statute (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 667 [1998]; *Matter of New York City Council v City of New York*, 4 AD3d 85, 97 [2004], *lv denied* 4 NY3d 701 [2004]). Thus, where the language of a statute is susceptible to conflicting interpretations, the agency's interpretation is entitled to great deference, and must be upheld as long as it is reasonable (*Golf*, 91 NY2d at 658; *Matter of Espada 2001 v New York City Campaign Fin. Bd.*, 59 AD3d 57, 64 [2008]; *Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161, 167 [2000], *lv denied* 95 NY2d 767 [2000]).

In light of the ambiguity, we defer to BSA's interpretation of the statute (*see Beekman Hill*, 274 AD2d at 167 [deferring to BSA's construction of ambiguous provisions in the Zoning Resolution]). BSA's decision to review the owners' variance application under subdivision (a) was reasonable under the circumstances. The language of subdivision (a) plainly applies on its face since the "buildings exist[ed]" on July 1, 1948. The original version of subdivision (a), which remains essentially the same today, was enacted to govern variances for buildings constructed prior to July 1, 1948. BSA reviewed the history of the statute and its subsequent amendments, and reasonably concluded, based on that history, that subdivision (a) applies to pre-1948 buildings, whenever they are altered.

Petitioner points to nothing in the legislative history that conclusively establishes that subdivision (c) should be applied here. Furthermore, BSA reasonably concluded that if one were to adopt petitioner's view that subdivision (c) applies to alterations of pre-1948 buildings, it would render subdivision (a) largely superfluous. Finally, there are rational policy reasons supporting BSA's interpretation of the statute, because subjecting owners wishing to alter pre-1948 buildings to the more stringent requirements of subdivision (c) could have a chilling effect on the making of improvements to those buildings most in need of renovation.

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

ENTERED: JULY 17, 2012

DEPUTY CLERK

Tom, J.P., DeGrasse, Freedman, Richter, Román, JJ.

7230-
7231 File No. 2604/08

In re Will of Rocky H. Aoki, etc.,
Deceased.
- - - - -
Keiko Ono Aoki,
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom, et al.,
Objectants-Appellants,

Jennifer Crumb,
Objectant,

Devon Aoki, et al.,
Respondents.
- - - - -
In re Estate of Rocky H. Aoki, etc.,
Deceased.
- - - - -
Keiko Ono Aoki,
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom, et al.,
Respondents-Appellants,

Devon Aoki, et al.,
Respondents.

_____

Holland & Knight LLP, New York (Brian P. Corrigan of counsel), for appellants.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for Keiko Ono Aoki, respondent.

_____

Decree, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 1, 2010, affirmed,

without costs. Order, same court and Surrogate, entered on or about August 20, 2010, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Leland G. DeGrasse
Helen E. Freedman
Rosalyn H. Richter
Nelson S. Román, JJ.

7230-7231
File No. 2604/08

_____x

In re Will of Rocky H. Aoki, etc.,
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Keiko Ono Aoki,
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom, et al.,
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- - - - -

In re Estate of Rocky H. Aoki, etc.,
Deceased.

- - - - -

Keiko Ono Aoki,
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom, et al.,
Respondents-Appellants,

Devon Aoki, et al.,
Respondents.

_____x

Objectants/Respondents Kana Aoki Nootenboom, Kevin Aoki, Echo Aoki, Kyle Aoki and Kenneth Podziba appeal from decree of the Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 1, 2010, inter alia, admitting the decedent's will to probate, and bringing up for review an order of the same court and Surrogate, entered on or about August 26, 2010, which granted petitioner's motion for summary judgment dismissing the objections to probate, and from the order, same court and Surrogate, entered on or about August 30, 2010, which, inter alia, granted petitioner's motion to direct the trustees of the Benihana Protective Trust to turn over the trust assets to her as estate fiduciary.

Holland & Knight LLP, New York (Brian P. Corrigan, Joseph P. Sullivan, Faith L. Carter and Charles F. Gibbs of counsel), for appellants.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman, Michael H. Smith and McKenzie A. Livingston of counsel), for Keiko Ono Aoki, respondent.

Tom, J.P.

Children of the late restauranteur Rocky Aoki contest those provisions of his will bequeathing to his wife, petitioner Keiko Ono Aoki, all of decedent's global interest in the Benihana restaurants and franchises held by his wholly-owned corporation, Benihana of Tokyo, Inc. (BOT), a major owner of the shares of the publicly-traded Benihana, Inc. Chiefly, Kana, Kevin, Echo and Kyle Aoki (objectants) contend that the will should not have been summarily admitted to probate because issues of fact exist with respect to both the testator's mental capacity and their stepmother's exertion of undue influence. Kana, Kevin and Kyle, in their capacity as trustees of the Benihana Protective Trust, which was created to hold decedent's interest in BOT, and their fellow trustee Kenneth Podziba, assert that they were improperly required to turn over the assets of the trust to Keiko. This Court concludes that the record contains no evidence that Rocky was cognitively impaired at any time remotely contemporaneous with the signing of the instrument and that his disposition of the property was an exercise of free will. Thus, we affirm the orders of the Surrogate in all respects.

In 1959, decedent Rocky Aoki, founder of the Benihana restaurant chain, came to the United States from Japan with the Japanese wrestling team. He enrolled in the School of Restaurant

Management at New York City Technical College in Manhattan. He made a living by washing dishes, driving an ice cream truck, and working as a tour guide. In 1963, Rocky took his savings of $10,000, borrowed $20,000 more, and opened the first Benihana restaurant on West 56th Street in Manhattan, which proved to be successful, and the rest is history.

Prior to June 1998, Rocky's wholly-owned company, BOT, owned 50.9% of the public restaurant company Benihana Inc., which owns an extensive chain of Japanese restaurants and franchises throughout the United States, the Honolulu Benihana restaurant, and joint interests in Benihana restaurants in foreign countries. Until mid-1998, Rocky was the CEO of BOT and the Chairman of the Board of Benihana Inc.

In 1998, Rocky was convicted of insider trading, a felony, which prompted the formation of the Benihana Protective Trust. State statutes prohibit felons from owning any entity with a liquor license or from serving as an officer, director or manager of a restaurant that holds a liquor license. As a result, Rocky was obligated to resign as CEO and Director of BOT, and as Director and Chairman of Benihana, Inc. and to transfer his interest in BOT (which then held 50.9% of the stock in Benihana, Inc.) to the trust. The value of the stock Rocky owned in Benihana Inc. through BOT and the trust was stated in 2006 to be

over $50 million. Rocky appointed three of his children to serve as trustees (objectants Kana, Kyle, and Kevin), together with his attorney and longtime friend, Darwin C. Dornbush, Esq. To remain involved with the business, Rocky entered into a consulting agreement with Benihana, Inc.

In addition to Kana, Kyle, and Kevin, Rocky's offspring included Steven, Devon, and Echo, whom he acknowledged, and a nonmarital child, objectant Jennifer Lynn Crumb. Rocky's children Kana, Kevin and Steven are from his first marriage to Chizuru Kobayashi, which ended in divorce in 1981. Kyle, Echo and Devon are from his second marriage to Pamela Jane Hillberger, which also ended in divorce in 1991. Until his death, Rocky and his six marital children were the income beneficiaries of the trust, receiving an annual income at the sole discretion of the nonfamily trustee, attorney Dornbush, who continued to serve in his long-standing role as Rocky's counsel. In that capacity, Dornbush (or his firm) drafted a 1998 will leaving Rocky's entire estate to his six marital children. There's a saying that "many men can make a fortune but very few can build a family." Thus, while Rocky's restaurant empire was flourishing, his problems within his family were beginning to mount and subsequently spiraled into an irreconcilable feud pitting Rocky and Keiko against Rocky's children from his two prior marriages in a

contentious struggle for control of the Benihana empire.

Keiko, a successful businessperson with her own company (Altesse Co., Ltd.), began to date Rocky in 2000, arousing considerable apprehension among his children. In July 2002, the couple were secretly married. Keiko was Rocky's third wife. Rocky informed a close friend, Ken Podziba, of his intention to seek a postnuptial agreement and purportedly instructed Kevin and Kana to obtain one from Keiko, but she refused to comply. Dornbush recalled that in approximately September 2002, Rocky met with Kevin and Kana to discuss, among other things, whether to plan his estate to pass the corpus of the trust to his six marital children. That same month, Rocky was presented with an action plan, drafted by Dornbush's partner, Norman Shaw, Esq. Rocky agreed to the plan and Shaw prepared an instrument — an irrevocable partial release of his power to designate the beneficiaries of the trust corpus upon his death, which limited the beneficiaries to his marital descendants. On or about September 24, 2002, Rocky signed his first partial release.

In 1998, Rocky made a will that left his entire estate to his six marital children. The will was drafted by Dornbush, or Dornbush's firm. A second partial release of his power of appointment over the trust was executed in December 2002 which, while maintaining the essential terms of the first partial

release, was more tax efficient. It further limited Rocky's power to designate the beneficiaries of the principal and income to those of his descendants who were lawful residents. Rocky did not inform Keiko that he had signed the second partial release.

In October 1998, Rocky executed a codicil to his 1998 will. Since the amended 1998 will did not exercise Rocky's power of appointment under the trust, its disposition left the division of the corpus in equal shares among his six marital children.

However, Rocky exercised his testamentary power of appointment under the trust agreement in a codicil dated August 4, 2003, which left Keiko 25% of the corpus in fee simple with the remainder to be held in trust and passed on to any of his offspring whom Keiko (in her discretion) might designate. Keiko maintained a life estate in the remainder, to be passed to Rocky's children. The codicil was drafted by Keiko's regular counsel, Joseph Manson of Piper Rudnick in Washington D.C., and the firm was recommended by her. Asked by Manson to review the August 2003 codicil, Dornbush drafted a legal opinion letter stating that it was invalid in light of the irrevocable partial releases Rocky had executed. It was at this time that Rocky, while acknowledging his awareness that the releases left the Benihana stock to his children, asserted he had no knowledge that the releases were "irrevocable." To this end, Rocky executed an

affidavit dated September 23, 2003 and appeared in a videotaped recording, in which he stated that he had never intended to irrevocably limit his power of appointment over the trust corpus and disavowed knowledge that the releases contained such language. While the validity of the releases remains unresolved, the controversy only exacerbated the rift between Rocky and his children.

Meanwhile, Keiko increased her involvement in Rocky's business affairs by providing consulting services through Altesse, prompting the move of BOT's offices, located in Miami for the past 20 years, to Keiko's New York City apartment. In response to her growing influence, Kevin is alleged to have informed management at Benihana, Inc. that, upon Rocky's death, Keiko would assume control of the company and current management would be terminated. Rocky blamed Kevin for initiating a series of transactions involving the issuance of additional shares, diluting BOT's controlling interest in the corporation from 50.9% to 36.5%. A July 2004 suit, brought at Rocky's insistence, challenging BOT's loss of control of the corporation's affairs was unsuccessful in rescinding the transactions (*see Benihana of Tokyo, Inc. v Benihana, Inc.*, 891 A2d 150 [Del 2005], *affd* 906 A2d 114 [Del 2006]). In a May 2005 letter to Kana, Rocky expressed his disappointment in Kevin, stating that his children,

in their capacity as trustees, were acting out of self-interest and against his interests and those of the trust and the business he had "struggled hard for 41 years to create." He explained that he would leave it to Keiko to decide which of his children would receive the other 75% of trust assets after his death, while adding that he would be "happy" to leave "seven equal shares to my wife and six kids after I die if everyone can get along." Kana responded by blaming Keiko for poisoning Rocky against his children and proposed that Rocky meet with his children alone. Following a July 2005 meeting, Rocky wrote to Kana reaffirming his confidence in Keiko to distribute the trust assets upon his death.

In February of the next year, Kevin, Kana and Kyle, as trustees, sold 100,000 shares of BOT's Benihana, Inc. stock, further diminishing the Aoki family holdings. Upon learning of the sale in early March 2006, Rocky asked the trustees to resign based on asserted conflicts of interest. That same month, Rocky executed a fourth codicil to his 1998 will, effectively disinheriting Kevin, Kana, Echo and Kyle. Also that month, the trustees amended the trust instrument to provide them with compensation for their services.

In the fall, Rocky advised his children in a letter that should the family fail to reach mutual terms by November 1, 2006,

he would commence an action to remove those children serving as trustees or as officers of BOT and "never" change his will. In late November, as settlor and beneficiary of the trust, Rocky commenced an action in New York State Supreme Court against his children and others, alleging breach of the defendants' fiduciary duties as trustees and as officers and directors. Manson, now with Baker Hostetler, signed the complaint. Objectants were represented by Holland & Knight.

In February 2007, Rocky was diagnosed with liver cancer. In an attempt to resolve his disputes with his children, Rocky requested his friend Hirohoto Kato to intervene on his behalf.[1] An August 2007 meeting was heated and unsuccessful, resulting in a letter in which Rocky chided his children for failing to understand or trust him, and for destroying his "baby," Benihana.

Through letters between Keiko and Manson, Rocky continued to explore changing his will because, among other things, Devon and Steven declined to settle their differences with him. Manson, who had drafted the two prior codicils, responded that his firm was suspending all work on Rocky's suit as a result of nonpayment of its fees, which had been billed to Altesse. Keiko then referred Rocky to the attorney who had drafted her will and he,

[1] Kato, who was working for Altesse at the time Rocky met him in 2000, had been president of BOT since 2003.

in turn, recommended Paul Karan, Esq. of Todtman, Nachamie, Spizz & Johns, P.C. Objectants note that office records maintained by Manson and Karan indicated that Keiko had participated in some 42 meetings between said counsel and Rocky from September 2003 through February 2007.

On September 7, 2007, Rocky executed a will drafted by Karan and witnessed by him and three other attorneys in the firm. Keiko was named as executor, and all of Rocky's real and personal property, including property jointly owned with Keiko, was bequeathed to her. The will exercised Rocky's power of appointment under the trust agreement so that the entire trust principal and accumulated income trust would be distributed 25% outright to Keiko with the 75% remainder to the "Keiko Aoki Trust." As the sole trustee of that entity, Keiko was to pay the net income to herself, as surviving spouse, with the trust principal to be distributed, in her discretion, among Rocky's issue, either outright or in trust. In the event Keiko failed to survive Rocky or failed to exercise her power to appoint the beneficiaries of the Keiko Aoki Trust, the will provided for distribution of the balance of the "Benihana Protective Trust or such unappointed portion of the Keiko Aoki Trust, as the case may be, to my then surviving issue, per stirpes." In the event that the trust agreement was invalidated due to the restrictions

contained in the 2002 partial releases that Rocky disavowed, the will also exercised an alternative power of appointment, effectively dividing the 75% remainder equally between Devon and Steven. An in terrorem clause treated any marital child challenging the will as having predeceased Rocky.

Following Rocky's death on July 10, 2008 at the age of 69, Keiko commenced this proceeding by filing a probate petition. His six children received approximately $1.2 million each from a separate life insurance trust. Among other matters, a petition to determine the validity of the partial releases was brought by Kana, Kevin, and Kyle Aoki, together with Kenneth Podziba (who had replaced Dornbush as a trustee). These petitioners also brought a proceeding for judicial settlement of their account as trustees of the Benihana Protective Trust. Meanwhile, Keiko petitioned for civil contempt against Podziba over an undisclosed distribution of shares of Benihana, Inc. All three cases were transferred to Surrogate's Court.

In April 2009, Keiko moved by order to show cause for an order directing the co-trustees to turn over the trust assets to her as fiduciary of Rocky's estate, arguing that upon Rocky's death, the trust instrument provided for its termination and distribution of the assets in accordance with the 2007 will. The trustees moved to dismiss the petition, contending that Keiko

lacked standing due to the pendency of proceedings contesting the validity of the will and, inter alia, the 2002 releases. In a preliminary order, the Surrogate held the turnover petition in abeyance pending resolution of the probate proceedings and continued a temporary order restraining distribution of trust assets other than payment of ordinary expenses.

Keiko moved for summary judgment dismissing the objections and admitting the will to probate. She maintained that the will and codicils, Rocky's testimony, and that of his attorneys provided ample evidence of his testamentary wishes. She noted that, at the outset, objectants had been unalterably opposed to her marriage to Rocky for fear of losing their inheritance and responded by attempting measures harmful to Rocky's interests, including: (1) excluding Rocky and her from control over the Benihana empire, (2) causing the Aoki family to lose control over Benihana Inc., and (3) depriving Rocky of distributions from the trust (resulting in his 2004 lawsuit against his children for breach of their fiduciary duties). Keiko asserted that the evidence demonstrated that Rocky had repeatedly attempted, by using his will and previous codicils as incentives, to make peace between his children and Keiko. She asserted that she was never present during discussions with counsel regarding Rocky's testamentary wishes and had only advised Rocky to protect his

business interests in the Benihana empire; thus her joint meetings with Manson and Rocky allegedly concerned business matters, not testamentary matters. Keiko averred that the self-interest demonstrated by objectants, including their willingness to enrich themselves at the expense of the Aoki name and the family's control of the Benihana empire, ultimately led Rocky to place his faith in her to preserve and maintain his legacy.

In opposition, objectants argued that factual issues precluded summary determination, particularly as to Rocky's testamentary capacity and Keiko's undue influence over him, noting that the disposition of his estate to his six marital children had been eliminated shortly after his marriage to Keiko. They claimed that Keiko had engineered an outright devise of the estate to herself, in addition to 25% of the trust assets and a life estate in the remainder. They contended that the evidence raises factual issues as to whether Keiko exercised her strong will over an increasingly sick and weakened Rocky to alienate him from his children, disinherit them and otherwise deprive them of the fortune Rocky had intended to leave them.

Objectants submitted nine affidavits from friends and family members attesting to Keiko's dominance over Rocky, including observations that since their 2002 marriage, he had become more isolated and had been the recipient of verbal abuse from his

wife. Also submitted was a November 1999 presentence report prepared in connection with Rocky's felony conviction, which states that

> "as a result of Interferon therapy [as treatment of his Hepatitis C condition and corresponding immunological deficits] [Rocky] has had a progressive loss of cognition. A Magnetic Resonance Imaging (MRI) scan of the brain revealed atrophy involving the posterior fossa and the supra tentorial portions of the brain as well as the cerebellar folia. According to neurological and cognitive evaluations, this neurological degeneration has markedly reduced [Rocky's] ability to understand information, and impairs his memory and judgment."

In a July 27, 2001 letter addressed to the probation department, Rocky's treating physician stated that while he lacked the "expertise" necessary to evaluate Rocky's competence to stand trial, a "side effect of the interferon," administered in weekly injections to treat chronic hepatitis C, "is impaired concentration leading to lapses in memory," inhibiting his ability "to learn quickly new information."

The first order appealed from granted Keiko's motion to direct the trustees to turn over the trust assets to her as estate fiduciary. However, the Surrogate specifically noted that there could be no distribution of trust assets until the validity of the 2002 releases was decided at trial.

The second order appealed from granted Keiko's motion for

summary judgment, dismissing the objections of Kana, Kevin, Echo and Kyle Aoki and Jennifer Crumb. By decree entered September 1, 2010, the Surrogate ordered that the will offered by Keiko be admitted to probate, and that letters testamentary and letters of trusteeship be issued to the executor and trustee.

The Surrogate observed that objectants had failed to raise a challenge to the due execution of the will, and Keiko had met her initial burden on that issue. Notably, the three attesting witnesses were attorneys, and a "self-proving affidavit" was included, giving rise to a presumption of compliance (citing *Matter of Korn*, 25 AD3d 379 [2006]). The Surrogate noted that objectants' challenge to testamentary capacity was based on their contention that Rocky was too weak and ill to withstand Keiko's strong will and influence. The court found that Keiko, as proponent of the 2007 will, had met her initial burden to demonstrate that Rocky possessed the requisite legal capacity to execute the will. In particular, the attestation clause of the 2007 will constituted prima facie evidence of Rocky's sound mind, memory and understanding at the time of execution (citing *Matter of Clapper*, 279 AD2d 730, 731 [2001]). The burden having shifted to objectants, their evidence of mental capacity was "too distant in time," dating back to 1999 and 2001 when Rocky was facing criminal charges and receiving interferon for hepatitis C and

immunological deficiencies. The Surrogate noted the lack of recent medical evidence from either a treating physician or one who had examined Rocky recently to provide evidence probative of Rocky's mental health in 2007. The record indicated that Rocky ceased the use of interferon prior to 2002, and other evidence — including videos, Rocky's 2007 in depth deposition testimony concerning his restaurant business, and his letters — demonstrated that he was cognitively aware and of sound mind and was regarded as such. The court further found that three medical affidavits submitted by Rocky's nonmarital child, objectant Jennifer Crumb, were inadmissible because they were not disclosed in response to a demand for expert witnesses under CPLR 3101(d) and submitted in opposition to a summary judgment motion (*see Salzo v Bedding Showcase*, 238 AD2d 180 [1997], *lv denied* 90 NY2d 806 [1997]). The court further found Jennifer's medical affidavits to be premised solely on speculative assumptions, inasmuch as her expert physicians had relied on outdated medical records and did not personally examine Rocky.

As to undue influence, the court found that "abundant" evidence — including legal agreements, Rocky's letters, deposition testimony and videos, together with statements by persons who would not gain under the will — supplied the requisite "contrary inference" to objectants' evidence that Keiko

allegedly orchestrated a transfer of the assets in Rocky's estate to herself. The Surrogate noted Rocky's expressed "overwhelming desire to preserve the Aoki legacy through control of the Benihana empire," and his belief that, in light of his children's behavior, Keiko was best suited to ensure that his testamentary wishes were respected. The Surrogate also noted that the heavy tax consequences of a division of Rocky's assets among the children upon his death would have virtually ensured liquidation of the Aoki holdings in Benihana to meet the tax burden. The Surrogate found that the "friend" affidavits submitted by objectants to demonstrate undue influence, when "[r]ead collectively," were "filled with hearsay, speculation and surmise." The court noted that many of the individuals who supplied affidavits lived in areas affording only limited opportunity for observing Rocky following his marriage to Keiko. Further, the court found that even assuming the truth of the affidavits, undue influence would not be established since there was no evidence that Keiko forced Rocky to execute the 2007 will against his wishes. Also found unavailing was objectants' argument that the liaison between Rocky and Keiko was more akin to a confidential relationship than a marital one such that an inference of undue influence might be drawn, noting objectants' burden to establish disparate power and control by Keiko over

Rocky and the ultimate futility in overcoming the "contrary inference" where the evidence is equally consistent with the exercise of free will.

On appeal, objectants contend that factual issues exist as to Rocky's capacity at the time he executed the 2007 will and as to Keiko's undue influence on their father, precluding summary disposition. Objectants further argue that the Surrogate erred in applying the "dual inference" standard in granting Keiko's motion for summary judgment dismissing the objections.

As this Court stated in *Matter of Halpern* (76 AD3d 429, 431 [2010], *affd* 16 NY3d 777 [2011]), "[t]he determination whether to dismiss objections and admit a will to probate is within the discretion of the Surrogate's Court, and its determination will not be overturned absent a showing of an abuse thereof." While the burden to establish due execution rests on the proponent (*id.*), as the Surrogate noted, objectants never contended that the will was not duly executed. Further, the attestation clause fulfilled Keiko's initial burden, as proponent, to show that Rocky possessed the requisite capacity to execute the instrument (*see generally Matter of Doody*, 79 AD3d 1380, 1381 [2010]). A supporting affidavit was submitted by the drafting attorney, who was present at the signing, attesting that Rocky appeared to be rational and of sound mind and memory at that time (*see Matter of*

Korn, 25 AD3d 379 [2006], *supra*). Upon this prima facie showing of the will's validity, the burden shifted to objectants to submit proof to support their claims that Rocky lacked testamentary capacity and executed the will only as a consequence of the proponent's exertion of undue influence.

Objectants' submission of the 1999 presentence report and the 2001 medical letter from Rocky's then-treating physician are not sufficiently contemporaneous to be accorded probative value regarding Rocky's competency in 2007. The evidence indicated that Rocky had cognitive issues as a result of side effects of medication (interferon) that he was taking; but Rocky discontinued using interferon before 2002. Since that time, the record strongly indicates that Rocky was indeed of sound mind and memory, and remained so at the time he signed the will in 2007 (*see Matter of Bryer*, 72 AD3d 532, 532-533 [2010], *lv dismissed* 15 NY3d 815 [2010]).

Objectants argue that Rocky's illnesses, which included diabetes and hepatitis C, weakened him, rendering him susceptible to Keiko's strong will and influence. Consequently, they contend that he was coerced to make testamentary dispositions of his property that he would not otherwise have made. However, the record is devoid of direct evidence of coercion to warrant the conclusion that signing the will was contrary to Rocky's own

wishes. While objectants correctly argue that circumstantial evidence is normally sufficient to establish undue influence, such evidence must be "substantial [in] nature" (*Matter of Walther*, 6 NY2d 49, 54 [1959]; *Matter of Ryan*, 34 AD3d 212, 213 [2006], *lv denied* 8 NY3d 804 [2007]).

Objectants maintain that undue influence is suggested by the timing of changes in Rocky's testamentary intentions. Before 2002, all Rocky's property was willed to his marital children, in equal shares. Less than a year after his marriage to Keiko, the 1998 will was amended to bequeath Rocky's estate and 25% of the trust to Keiko outright, with income on the remainder for life.[2] Objectants argue that Keiko's dominance over Rocky may be inferred from her ability to secure consulting contracts for Altesse from BOT, to effect the transfer of BOT offices from Miami to her New York City apartment and to participate in discussions concerning Rocky's testamentary intentions by referring Rocky to her own attorneys.

While "undue influence" is not a term that lends itself to a precise definition, criteria have been devised upon which a determination of undue influence may be predicated:

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[2] Keiko could elect not to receive life income by designating one or more of Rocky's marital children to receive the balance of the corpus.

> "'It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear . . . [L]awful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation'" (*Walther*, 6 NY2d at 53-54, quoting *Children's Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394-395 [1877]; *see also Ryan*, 34 AD3d at 213-214).

The record portrays Rocky Aoki as a man whose primary preoccupation was the preservation of the business he founded and nurtured, his "baby," the Benihana empire, in all its various manifestations. What also emerges is the image of a man deeply disappointed by the actions of his children, which divided the family and divested it of control over what Rocky clearly regarded as the family business. In response to the divisiveness that Rocky perceived as a threat to Benihana's integrity, he took

measures to consolidate control of its operations, and the person he believed can carry out that function was his wife, Keiko, a choice further prompted by the tax advantages afforded by the marital deduction.

While Rocky's ongoing attempts to make peace within the fractious family evince a loving and caring parent, the initial passing of control over his business to his children was motivated not so much by his desire to relinquish his position of authority but by the need to address the immediate consequences of his felony conviction. The family harmony was severely disrupted, however, by Rocky's unannounced marriage to Keiko, whom the children perceived as a threat to their own financial interests in the Benihana enterprise. Ironically, it was their logical reaction to that perceived menace — to prevent Keiko, through Rocky, from obtaining influence and control in the business by diluting his controlling interest in the shares of Benihana, Inc. — that caused Rocky to view their actions as divisive and injurious (by ceding family control over Benihana's operation). Rocky's wish to devise his estate in equal shares to his children and Keiko, as expressed in many of his letters, was overcome by his desire to consolidate management and control over the business entities that comprised the corpus of that estate. Since his faith in the children's capacity to run the enterprise

was eroded by what Rocky regarded as their self-interest, the only remaining family member to assume his former role as head of the business was Keiko.

Keiko's increasing involvement with the Benihana enterprise was reflected by the consulting services that her company, Altesse, had provided to BOT since 2003, according to Rocky's deposition testimony in the 2006 action. The children viewed this involvement as an attempt by Keiko to gain influence and control over the affairs of the family business. Keiko's appointment, in the August 2003 codicil, as trustee with discretionary power to designate which of the children would receive the remaining 75% of the corpus upon Rocky's death, likewise caused much concern among the children. As the Surrogate properly concluded, the terms of the 2007 will are at least as attributable to the confluence of factors arising out of the dissension within the family as to any undue influence by Keiko (*see Walther*, 6 NY2d at 55-56 [record failed to raise a question of fact as to undue influence to permit the question to go to the jury]; *Ryan*, 34 AD3d at 213-214).

Objectants' contention that *Walther* is inapposite because it involved a decision after trial is specious. They argue that where the record suggests the opportunity for the exercise of undue influence, a question of fact is presented requiring

resolution at trial because a court has no power to resolve factual issues on a summary judgment motion. Objectants term the evidentiary standard enunciated in *Walther* "the dual inference rule," maintaining that the Surrogate improperly resolved the factual issue of undue influence against them by applying the inference that the evidence is equally supportive of the exercise of free will, which otherwise presents a clear question of fact. In contending that *Walther* should be limited to trial motions, they effectively propose that a finding of whether the evidence is insufficient to warrant submission to a jury can only be made in the context of a trial conducted before a jury, a particularly unsatisfactory result from the standpoint of judicial economy.

Objectants confuse an issue of fact and a question of law. Whether the evidence is sufficient to warrant submission to a jury is a question of law, irrespective of whether the issue is raised before or during trial (*Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978], citing *Middleton v Whitridge*, 213 NY 499, 506-508 [1915]). It is perfectly proper for a court to dismiss a proceeding on the ground that the litigant has failed to adduce sufficient evidence to establish a prima facie case, even where such a decision requires extensive factual analysis (see *e.g. Britt v State of New York*, 260 AD2d 6 [1999], *lv denied* 95 NY2d 753 [2000]). Like the claimant in *Britt*, who was subject to an

enhanced evidentiary showing of a likelihood of success at trial, objectants are subject to the requirement to adduce substantial evidence of undue influence (*see Matter of Kumstar*, 66 NY2d 691, 693 [1985]), not merely equivocal evidence, as normally deemed sufficient to withstand a motion for summary judgment dismissing a complaint (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Also unavailing is objectants' argument that summary judgment is precluded because the evidence supports a finding that Keiko had a confidential relationship with Rocky, having recommended her attorneys to him and taken part in discussions concerning the will (*see Matter of Neenan*, 35 AD3d 475, 476 [2006]). Even assuming, for the sake of argument, the existence of such a confidential relationship, it is counterbalanced by the closeness of the marital relationship, evidence of which is unrefuted (*see Matter of Zirinsky*, 43 AD3d 946, 948 [2007], *lv denied* 9 NY3d 815 [2007] [son]). Thus, it is unnecessary to reach the factual question of whether evidence that Rocky sought to protect his legacy, the Benihana empire, by placing his assets in trust with Keiko, an experienced businessperson and confidant, provides an adequate explanation for the bequest (*see Neenan*, 35 AD3d at 476).

The trustees contend that the Surrogate, in the turnover

order, erred in denying them reasonable funds to pay the trust's expenses, including settling their accounts as trustees. Having failed to request affirmative relief in the form of monetary reserves from the trust assets to meet their expenses, this argument is unpreserved (*see Lyons v Salamone*, 32 AD3d 757, 759 [2006]). In a June 3, 2009 order, the Surrogate authorized the trustees to pay ordinary expenses pending the outcome of the probate proceeding, at which time the trustees did not request affirmative relief in the form of a reserve of reasonable funds from the trust. The grant of such relief is best left to the discretion of the Surrogate. In any event, as noted by Keiko, the trustees made an application for such relief by way of a cross motion in October 2010, and a decision on that order has been appealed.

It should be noted that the Surrogate, in the order directing the trustees to turn over the trust assets to Keiko as estate fiduciary, correctly held that there could be no distribution of the trust assets until a determination as to the validity of the 2002 releases since the determination may affect the probate of this will.

Accordingly, the decree of the Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 1, 2010, inter alia, admitting the decedent's will to probate, and

bringing up for review an order of the same court and Surrogate, entered on or about August 26, 2010, which granted petitioner's motion for summary judgment dismissing the objections to probate, should be affirmed, without costs. The order of the same court and Surrogate, entered on or about August 30, 2010, which, inter alia, granted petitioner's motion to direct the trustees of the Benihana Protective Trust to turn over the trust assets to her as estate fiduciary, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 17, 2012

DEPUTY CLERK