SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 7, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7762 & M-2045 B.N. Realty Associates, Plaintiff-Appellant-Respondent, Index 6614/94

-against-

Ben Lichtenstein, Defendant-Respondent-Appellant,

Naomi Lichtenstein, Defendant.

Jeffrey F. Cohen, Bronx, for appellant-respondent.

Bruce A. Young, New York, for respondent-appellant.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 8, 2011, to the extent appealed from, after a nonjury trial, dismissing plaintiff landlord's complaint against defendant-respondent tenant (defendant) with prejudice, and dismissing defendant's counterclaims, unanimously reversed, on the law, without costs, the judgment vacated, the complaint and the counterclaims reinstated, except for the counterclaims for sanctions and attorneys' fees, and the matter remanded for

further proceedings consistent herewith.

The IAS court properly denied plaintiff's motion in limine. On a prior appeal (21 AD3d 793 [2005]), this Court affirmed the denial without prejudice of that branch of plaintiff's motion for summary judgment awarding plaintiff back rent in the amount of $42,544.32. Accordingly, contrary to plaintiff's contention, this Court's decision did not mandate the preclusion at trial of evidence that contradicts plaintiff's claim to back rent.

The IAS court correctly found that plaintiff did not qualify for the exception to the best evidence rule that applies to lost or destroyed documents, given plaintiff's failure to provide any excuse for nonproduction of the lease at issue (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644 [1994]). However, given that defendant based his counterclaim for attorneys' fees on the terms of the same written lease, and that he admitted the amount of rent due under the lease on the stand, among other places, the court should have allowed proof of the lease and rent amount through those secondary sources (*see East Egg Assoc. v Diraffaele*, 158 Misc 2d 364, 366 [1993], *affd* 160 Misc 2d 667 [1994]).

As plaintiff concedes, its failure to cash the rent checks tendered by defendant acts as a waiver of any claim to

prejudgment interest or attorneys' fees (*San-Dar Assoc. v Toro*, 213 AD2d 233, 234-235 [1995]). It was undisputed that plaintiff failed to tender renewal leases to defendant, a rent-stabilized tenant. However, that does not constitute a waiver of rent; it simply requires that plaintiff prove the rent through quantum meruit, or some subsequent agreement of the parties (*see Sacchetti v Rogers*, 12 Misc 3d 131[A], 2006 NY Slip Op 51114[U] [2006]). Here, given defendant's numerous admissions of the rent term and the amount tendered, plaintiff met that burden. Because plaintiff established its prima facie entitlement to $42,544.32 in back rent, we remand for a trial on defendant's counterclaims, setoffs and affirmative defenses, except for the counterclaims for sanctions and attorneys' fees and the affirmative defense of laches. Defendant is not entitled to sanctions and attorneys' fees, as plaintiff is the prevailing party and entitled to back rent. Further, this Court previously dismissed defendant's

affirmative defense of laches (*see* 21 AD3d at 794, 799).

M-2045 ***B.N. Realty Associates v Ben Lichtenstein, et al.***

Motion seeking, inter alia, to dismiss cross appeal denied.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7851 The People of the State of New York, Ind. 556/04
Respondent,

-against-

Donald O'Toole,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 14, 2008, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously reversed, on the law, and the matter remanded for a new trial.

At defendant's first trial, which resulted in a reversal by this Court (39 AD3d 419 [2007]), defendant was convicted of second-degree robbery but acquitted of first-degree robbery and two counts of second-degree attempted grand larceny. Therefore, under the facts presented, the People were barred by collateral estoppel from presenting evidence at the retrial that defendant's accomplice pointed what appeared to be a pistol at the

complaining witness during the alleged robbery, and that defendant also attempted to extort regular payments of protection money from the complaining witness on the day of the robbery and on a later occasion. The court erred in allowing the introduction of this evidence.

"The doctrine of collateral estoppel, or issue preclusion, operates in a criminal prosecution to bar relitigation of issues necessarily resolved in [a] defendant's favor at an earlier trial" (*People v Acevedo*, 69 NY2d 478, 484 [1987]). "[C]ourts considering such claims must give a practical, rational reading to the record of the first trial" (*id*. at 487).

Characterizing the acquittals as resulting from inadequate corroboration of the complaining witness's testimony, the People urge this Court to treat this scenario in the same manner as cases in which a defendant is acquitted of crimes subject to the statutory requirement that the testimony of an accomplice be corroborated. This argument is unavailing. When a statutory corroboration requirement governs, the possibility exists that an acquittal flows not from a factual issue being resolved in the defendant's favor as a purely factual matter, but "merely [because] the People had not met the requirement of

corroboration" (*People v Goodman*, 69 NY2d 32, 42 [1986]). The same cannot be said here, where no statutory corroboration requirement was applicable.

In view of this disposition, we do not reach defendant's other contentions.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7852 Brodie L. Etheridge, Index 307669/09
Plaintiff-Respondent,

-against-

Marion A. Daniels & Sons, Inc., et al.,
Defendants-Appellants.

_____

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for appellants.

Burns & Harris, New York (Judith F. Stempler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 22, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants established prima facie that they had no notice of the alleged slippery condition of the painted ramp or driveway on which plaintiff slipped while helping to move a casket into a garage (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). They also established, via their expert engineer's affidavit, that the ramp did not violate any applicable building codes or industry standards.

In opposition, plaintiff failed to raise an issue of fact.

She presented no evidence that defendants had notice of the allegedly slippery condition of the ramp. As to building code violations, plaintiff's expert cited code provisions that were inapplicable to the ramp, which was not an "exit" from the combined buildings (*see* Administrative Code of City of NY § 27-377 [ramps]; §§ 27-375 [interior stairs]; 27-376 [exterior stairs]; *Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [2010]). Her expert also failed to support his opinion "by nonconclusory reference to specific, currently applicable safety standards or practices" (*see Contreras v Zabar's*, 293 AD2d 362 [2002]; *Hotaling v City of New York*, 55 AD3d 396, 398 [2008], *affd* 12 NY3d 862 [2009]; *Jones v City of New York*, 32 AD3d 706 [2006]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7853 Otolino Machado, Index 302692/09
Plaintiff-Appellant,

-against-

Roman Henry,
Defendant,

Thomas Karl Wiesehof, et al.,
Defendants-Respondents.

_____

Bergman, Bergman, Goldberg & Lamonsoff, LLP, Mineola (Allen Goldberg of counsel), for appellant.

Faust Goetz Schenker & Blee, New York (Danielle Goldstone of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 26, 2011, which granted the motion of defendants Wiesehof, Lufthansa Airlines and Lufthansa German Airlines for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action arising out of a three-car collision. Wiesehof testified that he was operating his vehicle in the furthest right lane of the expressway, when he was suddenly struck by another vehicle coming from his left. Moreover, the drivers of the other two cars involved (plaintiff

and defendant Henry) blamed each other, but not Wiesehof, for causing the accident (*see Cascante v Kakay*, 88 AD3d 588 [2011]; *Neryaev v Solon*, 6 AD3d 510 [2004]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that Wiesehof may have been changing lanes or merging at the moment of the accident in violation of Vehicle and Traffic Law 1128, is a feigned issue of fact, insufficient to defeat the motion (*see Fernandez v Laret*, 43 AD3d 347 [2007]). Plaintiff testified that Wiesehof did not cut off Henry, was not merging at the moment of the accident, and that it was Henry who hit Wiesehof. Plaintiff also signed an accident report stating that Henry was the cause of the accident.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7854 Ornela Cere, Index 111998/10
Petitioner-Appellant,

-against-

Subway International BV,
Respondent-Respondent.

_____

Ornela Cere, appellant pro se.

Wiggin and Dana LLP, New York (Michael L. Kenny Jr. of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Martin Schoenfeld, J.), entered August 25, 2011, granting respondent's motion to vacate a default judgment against it, and dismissing the petition to vacate an arbitration award, unanimously affirmed, without costs.

Contrary to petitioner's argument, respondent timely served its motion papers by mailing them more than nine days before the return date, using an overnight delivery service (*see* CPLR 2103[b][6]; 2214[b]).

Petitioner failed to show that the petition was served on a person authorized to receive service of process pursuant to CPLR 311(a)(1). The provision of the parties' franchise agreement on which petitioner relies concerns only service of a notice

required by the agreements, not service of process required by the CPLR. Moreover, commencement of the proceeding was untimely, since the purported service occurred more than 90 days after the award was received (*see Werner Enters. Co. v New York City Law Dept.*, 281 AD2d 253 [2001], *lv denied* 97 NY2d 601 [2001]).

In any event, the petition fails to present a basis for vacating the arbitration award. The omission of a reference to a tax withholding requirement does not create an explicit conflict with any law or public policy requiring tax withholding (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). Petitioner's argument that the award is barred by res judicata is without merit, since it relies on a proceeding to which petitioner was not a party (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7855 Aracelis Polanco, Index 309653/10
Plaintiff-Appellant,

-against-

Greenstein & Milbauer, LLP,
Defendant-Respondent.

Robert G. Spevack, New York, for appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (Kenneth A. McLellan of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 27, 2011, which, to the extent appealed from, granted defendant law firm's motion to dismiss the amended complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the motion denied.

In her amended complaint, plaintiff alleged, among other things, that she was injured when she was struck in the neck by a piece of lumber; that defendant was negligent in urging her to settle the underlying personal injury action and in advising her that an MRI was not necessary and that its results would not lead to a more favorable outcome of her case; that, after settling the case for $20,000, she obtained an MRI showing a disc herniation

that required surgical intervention; that she remains permanently disabled; that defendant's negligence proximately caused her to sustain damages by not gaining the fair value for her case; and that she would have been successful in the underlying action had defendants exercised due care. These allegations are sufficient to state a claim for legal malpractice (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 435 [2011]; *see generally Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2005], *lv denied* 6 NY3d 701 [2005]). Plaintiff was not required to show a likelihood of success in the underlying action, but was "required only to plead facts from which it could reasonably be inferred that defendant's negligence caused [her] loss" (*Garnett*, 82 AD3d at 436). Plaintiff plead such facts.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7856 In re Susan A.,
Petitioner-Respondent,

-against-

Ibrahim A.,
Respondent-Appellant.

Leslie S. Lowenstein, Woodmere, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the children.

Order, Family Court, Bronx County (Sarah P. Cooper, Special Referee), entered on or about June 17, 2011, which, after a trial, granted petitioner mother's petition to modify a prior custody order, entered on or about August 20, 2009, and awarded her sole legal and physical custody of the parties' two children, with liberal visitation to respondent father, unanimously affirmed, without costs.

The Family Court properly modified the prior custody order, since a "change of circumstances" (*see Santiago v Halbal*, 88 AD3d 616, 617 [2011]) occurred when respondent was arrested and incarcerated, and was unavailable to care for the children. The totality of the circumstances supported the conclusion that returning the children to respondent's custody, twenty-one months

later, when they had bonded with the mother and thrived in her care, was not in their best interests (*see Gant v Higgins*, 203 AD2d 23, 24-25 [1994]).

We find no merit to respondent's argument that the court failed to adequately consider the children's preference to reside with him, since a child's preference for a particular parent, while a factor to be considered, is not determinative and the court was not bound to abide by their wishes (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). This is particularly true since there is overwhelming evidence that the children's feelings were fostered by respondent's hostility towards petitioner (*see Muller v Muller*, 221 AD2d 635, 637 [1995).

Respondent's claim that an updated forensic evaluation should have been ordered is unpreserved for appellate review (*see Hezekiah L. v Pamela A.L.*, 92 AD3d 506 [2012]). In any event, since the "decision whether to obtain forensic evaluations to assist in reaching a custody determination (Family Court Act § 251) rests within the sound discretion of the trial court" (*Matter James Joseph M.*, 32 AD3d 725, 727 [2006], *lv denied* 7 NY3d 717 [2006]), and the court's initial custody determination was only rendered one month prior to the father's arrest, the

court was not required to order a new evaluation. The court was possessed sufficient information to make a comprehensive and independent review of the children's best interests (*see B.G. v A.M.O.*, 57 AD3d 246, 247 [2008], *lv denied* 12 NY3d 705 [2009]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7857 Mary Olsen, et al., Index 107800/10
Plaintiffs-Appellants,

-against-

Stellar West 110, LLC,
Defendant-Respondent.

_____

Grad and Weinraub, LLP, New York (David Weinraub of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs moved into an apartment in a building owned by defendant's predecessor on December 15, 2001. The previous rent-controlled tenant, who was paying $846.66 at end of her tenancy, had vacated the apartment on December 10, 2001. The rent amount was omitted from plaintiffs' November 20, 2001 lease. Defendant's predecessor told plaintiffs that the monthly rent was $2,800, and plaintiffs apparently agreed to the amount. They remained in the apartment pursuant to a series of month-to-month and longer-term leases; plaintiff Haridopolos moved out in 2008. All these leases indicate that the tenancy was non-stabilized.

Defendant's predecessor never notified plaintiffs of the change in the status of the apartment, the initial registered legal regulated rent, or their right to file a fair market rental appeal (FMRA) with DHCR – all in violation of the Rent Stabilization Law and Rent Stabilization Code (*see* Administrative Code of the City of New York § 26-513[d]; 9 NYCRR 2523.1). Nor did defendant's predecessor ever file a report of vacancy decontrol, or the initial registration documents with DHCR. It had registered the apartment as rent-controlled, with a monthly rental rate of $413, in April 1984, but it filed no annual registration statements with DHCR at least from 1986 through 2007.

Plaintiffs commenced this action in 2010 against defendant, who acquired the building in 2007, seeking a declaration that their tenancy was subject to the Rent Stabilization Law, that defendant must offer plaintiff Olsen a regulated rent, and that the base rent should be calculated using DHCR's default formula for establishing a legal regulated rent where reliable rent records are unavailable (*see Thornton v Baron*, 5 NY3d 175 [2005]). They argued that defendant's failure to notify them of the apartment's rent-stabilized status and of their right to challenge the initial regulated rent constituted fraud, which

prevented them from timely filing an FMRA within the four years after their tenancy began (*see* 9 NYCRR 2523.1; *see also* 9 NYCRR 2522.3[c]), and that this fraud warranted the court's retention of jurisdiction over this matter.

We agree with Supreme Court that the complaint should be dismissed, although for different reasons. The time to file an FMRA expired in December 2005 (*see* 9 NYCRR 2523.1). Thus, as plaintiffs were the first-rent stabilized tenants, the adjustment of the rent was not governed by provisions applicable to an FMRA (*see Wasserman v Gordon*, 24 AD3d 201 [2005]; *Levinson v 390 W. End Assoc., LLC*, 22 AD3d 397, 401 [2005]). Rather, plaintiffs may seek only to "recover rent overcharges paid during the four years immediately preceding the filing of [the] complaint, and to set a legal rent prospectively" (*Levinson*, 22 AD3d at 401 n 5).

The court has jurisdiction over this rent overcharge matter (*see Wolfisch v Mailman*, 182 AD2d 533 [1992]; *see also Thornton*, 5 NY3d at 175; *Levinson*, 22 AD2d at 397; *Wasserman*, 24 AD3d at 201). However, pursuant to the doctrine of primary jurisdiction, we believe that the matter should be determined by DHCR, given its expertise in rent regulation (*Sohn v Calderon*, 78 NY2d 755, 768 [1991]; *Davis v Waterside Hous. Co.*, 274 AD2d 318 [2000], *lv denied* 95 NY2d 770 [2000]). DHCR can investigate plaintiffs'

fraud allegations, determine the regulatory status of the apartment, and, if warranted, apply the default formula adopted in *Thornton* to determine the base rate (*see Matter of Grimm v State of New York*, 15 NY3d 358 [2010]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7859 Panayota Bletas, et al., Index 116156/10
Petitioners-Appellants,

-against-

Subway International BV,
Respondent-Respondent.

_____

Panayota Bletas, appellant pro se.

John Bletas, appellant pro se.

Wiggin and Dana LLP, New York (Michael L. Kenny Jr. of counsel), for respondent.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered September 9, 2011, denying the petition to vacate two arbitration awards, denying petitioners' motions to renew a prior petition, to disqualify respondent's counsel, and to stay the proceeding, and dismissing the proceeding, unanimously affirmed, without costs.

Petitioners failed to show that the petition was served on a person authorized to receive service of process pursuant to CPLR 311(a)(1). The provision of the parties' franchise agreements on which petitioners rely concerns only service of a notice required by the agreements, not service of process required by the CPLR. Moreover, commencement of the proceeding was untimely, since the

purported service occurred more than 90 days after the awards were received (*see Werner Enters. Co. v New York City Law Dept.*, 281 AD2d 253 [2001], *lv denied* 97 NY2d 601 [2001]).

In any event, the petition fails to present a basis for vacating the arbitration awards. The omission of a reference to a tax withholding requirement from one of the awards does not create an explicit conflict with any law or public policy requiring tax withholding (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]).

We have reviewed petitioners' remaining contentions and find them without merit.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7861 Park Towers South Company, LLC, Index 117080/05
Plaintiff-Appellant,

-against-

57 W. Operating Co., Inc., et al.,
Defendants-Respondents.

_____

Michael R. Koenig, New Rochelle, for appellant.

Law Offices of Leonard A. Sclafani, P.C., New York (Leonard A. Sclafani of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 24, 2011, which, upon granting plaintiff-landlord's motion for reargument, adhered to the original order, same court and Justice, entered June 29, 2010, which denied plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Plaintiff landlord correctly asserts that the guarantees and the leases are entirely separate documents, the former imposing obligations on the guarantors and the latter imposing obligations on landlord and tenant. Thus, landlord correctly further asserts that the fact that the guarantors' liability may have been "cut off" by virtue of their giving "vacate date" notice under the "good guy" provisions of the respective guaranties, and the

tenant's subsequent vacatur of the premises, do not limit tenant's exposure for unpaid rent. As such the motion court erred in finding that the noticed vacate dates terminated landlord's ability to apply security deposits to rent thereafter. However, defendants established as a matter of law that no rent was due from tenant, at least for any period after the undisputed February 16, 2006 eviction of tenant by the City Marshal. "Eviction as a defense to a claim for rent does not depend upon a covenant for quiet enjoyment . . . It suspends the obligation of payment either in whole or in part, because it involves a failure of consideration for which rent is paid" (*Fifth Ave. Bldg. Co. v Kernochan*, 221 NY 370, 372 [1917]). The issuance of the warrant terminated the landlord-tenant relationship and tenant's obligation to pay rent (*see Licini v Graceland Florist, Inc.*, 32 AD3d 825, 826 [2006]). Accordingly, landlord erroneously applied the security deposit to the months of March through June 2006, because no rent was due from tenant.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7862-
M-1745 &
M-2072

Elizabeth A. Spielfogel,
Plaintiff-Respondent-Appellant,

Index 350249/07

-against-

Larry R. Spielfogel,
Defendant-Appellant-Respondent.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Deborah E. Lans of counsel), for appellant-respondent.

Myrna Felder, New York, for respondent-appellant.

Judgment, Supreme Court, New York County (Laura Drager, J.), entered May 20, 2011, to the extent appealed from as limited by the briefs, awarding plaintiff an interest in Bambu Sales, Inc., maintenance including $5,000 per month for life, to begin in 2018, and counsel and expert fees, unanimously modified, on the law and the facts, to delete the decretal paragraph directing defendant to transfer shares of Bambu to plaintiff, and to remand for a hearing on the issue of the jewelry as provided herein and otherwise affirmed, without costs.

Contrary to the trial court's finding, defendant rebutted the presumption that the shares of Bambu that he acquired in 1994 were marital property. The uncontradicted testimony of two witnesses established that defendant's mother paid for the shares

that were transferred to defendant. The court did not call into question the credibility of this testimony, but erroneously concluded that the testimony was not sufficient to meet defendant's burden of proving that the acquired shares were a gift resulting in separate property (*see Fields v Fields*, 15 NY3d 158, 163 [2010]). There is no basis in the record to disturb the court's crediting of defendant's mother's testimony explaining that the 1991 transfer of shares was a gift resulting in separate property (*see Winter v Winter*, 50 AD3d 431, 432 [2008]). In addition, given the credited testimony as to defendant's minimal involvement in Bambu, the court correctly found that plaintiff failed to meet her burden of showing that she is entitled to a portion of any appreciation in the value of defendant's shares in Bambu (*see Hartog v Hartog*, 85 NY2d 36, 46 [1995]).

There is no basis for disturbing the maintenance award, including the award of lifetime maintenance in the amount of $5,000 per month, to commence in 2018. The court properly took into account, among other things, the duration of the marriage, the distribution of marital assets, the parties' comfortable standard of living during the marriage, their respective income potentials, property, and future earning capacities, and plaintiff's reasonable needs and ability to become

self-supporting (*see* Domestic Relations Law § 236[B][6]; *Bayer v Bayer*, 80 AD3d 492, 492-493 [2011]; *Pickard v Pickard*, 33 AD3d 202, 204 [2006], *appeal dismissed* 7 NY3d 897 [2006]). Nor is there a basis for disturbing the award of counsel and expert fees to plaintiff (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]; *Finkelson v Finkelson*, 239 AD2d 174 [1997]).

We remand to Supreme Court to make a determination on the issue of which items of jewelry are plaintiff's separate property.

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

M-1745 - *Spielfogel v Spielfogel*
M-2072

Motions for sanctions and to strike a portion of reply brief denied.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7863 The People of the State of New York, Ind. 9370/98
Respondent,

-against-

Taiwu Jenkins, etc.,
Defendant-Appellant.

_____

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

Taiwu Jenkins, appellant pro se.

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

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Judgment of resentence, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 2, 2010, resentencing defendant, as a second felony offender, to two consecutive terms of 25 years, with an aggregate period of 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). Defendant's argument regarding the calculation of his PRS term does not require any action by this court. Defendant's pro se claims are both procedurally defective and without merit.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7864 H&H Custom Homes, Inc., Index 651119/10
Plaintiff-Respondent,

-against-

Mitchell H. Kossoff, et al.,
Defendants-Appellants.

Kossoff & Unger, New York (Ranakdevi Londoner of counsel), for appellants.

Stanley N. Futterman, New York, for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about February 18, 2011, which, to the extent appealed from, granted plaintiff's motion for summary judgment against defendants in the principal amounts due under a promissory note and an amended letter of investment to plaintiff's president, and denied defendants' cross motion for summary judgment on their counterclaim, unanimously modified, on the law, to deny plaintiff's motion insofar as it sought to hold defendant Kossoff personally liable for the principal amount due under the amended letter, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of its entitlement to judgment as a matter of law in the principal sum of $200,000 as against defendant Farmview by submitting the promissory note and

the amended letter, as well as evidence of Farmview's default under those documents (*see Grand Pac. Fin. Corp. v 97-111 Hale, LLC*, 90 AD3d 534 [2011]; *IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637 [2011]). In opposition, defendants failed to raise a triable issue of fact.

However, as against defendant Kossoff, plaintiff only established its entitlement to recover the principal sum of $180,000 pursuant to Kossoff's personal guaranty. Plaintiff failed to make a prima facie showing that Kossoff personally guaranteed Farmview's obligation, set forth in the amended letter, to return plaintiff's $20,000 investment at plaintiff's option, or that Kossoff agreed to add his personal liability to Farmview's (*see Salzman Sign Co. v Beck*, 10 NY2d 63 [1961]; *cf. Paribas Props. v Benson*, 146 AD2d 522, 525 [1989]). Indeed, Kossoff's personal guaranty is expressly limited to the $180,000 promised in the note (*see Wesselman v Engel Co.*, 309 NY 27, 30-31 [1955]; *665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1999]), and his initials on the amended letter on his firm's letterhead does not constitute "clear and explicit evidence" of his intent to be personally bound by the handwritten promise on the letter (*Salzman*, 10 NY2d at 67).

We have considered defendants' remaining contentions, including their arguments regarding their counterclaim, and find them unavailing.

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7865 Vittorio Antonini, etc., et al., Index 652070/10
Plaintiffs-Appellants,

-against-

Orazio Petito, et al.,
Defendants-Respondents.

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David J. Aronstam, New York, for appellants.

Law Offices of Bart J. Eagle, PLLC, New York (Bart J. Eagle of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 8, 2011, which denied plaintiff's motion for summary judgment on his first cause of action for a declaration that he is entitled to terminate defendants' membership interests, unanimously reversed, on the law, with costs, the motion granted, and it is so declared.

In this dispute among members of a limited liability company, plaintiff seeks to have defendants declared in breach of the operating agreement based on their failure to make mortgage payments for more than one year on the LLC's sole asset and to invoke the remedies of either forfeiture or diminution of their interests. In light of the circumstances in which it was executed and the reasonable expectations of the parties, the

operating agreement unambiguously entitles plaintiff to invoke these remedies. The language in the agreement tracks the authorizing provision of Limited Liability Company Law § 502(c) as a penalty for defendants' failure to make "any required contribution" (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]; *Goldman Sachs Group, Inc. v Almah LLC*, 85 AD3d 424, 426-427 [2011], *lv dismissed* 18 NY3d 877 [2012]). The penalties under the negotiated agreement would not effect a forfeiture (*see generally 1029 Sixth v Riniv Corp.*, 9 AD3d 142 [2004], *appeal dismissed* 4 NY3d 795 [2005]).

There is no merit to defendants' waiver and estoppel arguments in view of the "no waiver" provision in the operating agreement and their failure to show detrimental reliance on anything plaintiff said or did (*see Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 532 [2010]). Nor is there an implied right to

cure defaults under the operating agreement (*see Fesseha v TD Waterhouse Inv. Servs.*, 193 Misc2d 253, 255 [2002], *affd* 305 AD2d 268 [2003]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7866 Trev Alberts, Index 113081/09
Plaintiff-Appellant,

-against-

CSTV Networks, Inc.,
Defendant-Respondent.

_____

Altman & Company, P.C., New York (Matthew H. Ehrlich of counsel), for appellant.

CBS Law Department, New York (Mary Catherine Tischler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered March 9, 2011, which granted defendant broadcasting network's motion for summary judgment dismissing the complaint for breach of contract, unanimously affirmed, without costs.

The motion court correctly concluded that plaintiff materially breached his contract with defendant by accepting the position of Athletics Director at the University of Nebraska-Omaha, while still under contract with defendant. The agreement between the parties plainly contemplated that plaintiff would be available to defendant on a full-time basis for the entire term of the agreement, an obligation he could not fulfill while running a university athletics program 1500 miles away from

defendant's New York studios. Moreover, plaintiff's media appearances were to be exclusive to defendant, an agreement he breached by making media appearances as the head of the University's Athletics Department. Plaintiff's breaches were material as a matter of law, as they were substantial enough to defeat the parties' objectives in making the contract (*see Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389 [2009]). Accordingly, defendant was entitled to terminate the agreement and to withhold further payments due thereunder (*see e.g. Legend Artists Mgt. v Blackmore*, 273 AD2d 91 [2000]).

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

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7867-
7868 D.B. Zwirn Special Opportunities Fund, L.P., Plaintiff-Respondent, Index 604074/06 590094/08 604452/06

-against-

Brin Investment Corp., Defendant-Appellant.

- - - - -

Brin Investment Corp., Third-Party Plaintiff-Appellant,

-against-

Brin Management LLC, Third-Party Defendant-Respondent.

- - - - -

Brin Investment Corp., Plaintiff-Appellant,

-against-

D.B. Zwirn Special Opportunities Fund, L.P., Defendant-Respondent.

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LeClairRyan, P.C., New York (Michael T. Conway of counsel), for appellant.

Vinson & Elkins L.L.P., Houston, TX (Gwen J. Samora, of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

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Amended judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered February 7, 2011, upon a jury verdict in favor of D.B. Zwirn Special Opportunities Fund, L.P. and Brin

Management LLC against Brin Investment Corp., unanimously affirmed, with costs. Appeal from judgment, same court and Justice, entered February 7, 2011, unanimously dismissed, without costs, as moot.

The trial court correctly instructed the jury on the alternative legal theories, ratification and novation, by which Brin Investment, a non-signatory to the agreement, could be bound by the agreement. To the extent Brin Investment argues that the evidence was insufficient to support a finding of novation, its claim is unpreserved since it did not move for a directed verdict at the close of the evidence (*see Santiago v New York City Hous. Auth.*, 268 AD2d 203 [2000]). In any event, the jury could rationally have concluded that Brin Management's obligations under the agreement were extinguished and that Brin Investment was substituted as the manager under the agreement (*see Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 954 [1985]).

The court properly excluded from evidence a spreadsheet prepared for settlement discussions (*see* CPLR 4547). It properly admitted into evidence as a business record an annotated e-mail exchange made during negotiations of the agreement (*see* CPLR

4518[a]), and admitted as an admission of fact Brin Investment's letter claiming indemnity rights under the agreement at issue (*see e.g. Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165 [1986], *lv dismissed* 68 NY2d 807 [1986]).

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7869-
7869A

In re Jules S., and Another,

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

Julio S.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

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

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child Tatiana S.

_____

Order, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about June 28, 2011, which, after a hearing, determined that the consent of respondent father was not required for the placement of his daughter for adoption and, in the alternative, determined that he permanently neglected the child and terminated his parental rights, and transferred custody and guardianship of the child to petitioner agency for the purpose of adoption, unanimously affirmed, without costs. Order (same court

and Judge), entered on or about June 28, 2011, which, after a hearing, determined that although respondent's consent was required for the placement of his son for adoption, he permanently neglected the child, and terminated his parental rights, and transferred custody and guardianship of the child to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that respondent's consent for the adoption of his daughter was not required since the child was born out of wedlock and he failed to pay an appropriate sum towards her support (Domestic Relations Law § 111; *Matter of Maxamillian*, 6 AD3d 349 [2004]). As the court further found, in the alternative, clear and convincing evidence established that respondent permanently neglected his daughter, as well as his son, for whom his consent was required, since the agency made diligent efforts to encourage and strengthen the parental relationship (Social Services Law § 384-b[7][a]), but respondent failed to plan for their future by, inter alia, failing to remain drug free and complete his service plan (*see Matter of Matter of Robert Calvin R.,* 59 AD3d 265, 266 [2009]).

Respondent's request for a suspended judgment is improperly raised for the first time on appeal (*see Matter of Matthew Niko M. [Niko M.]*, 85 AD3d 544 [2011), and, in any event, is not warranted since the children have been in foster care for several years during which time respondent never completed any of the requirements of his service plan and was, in fact, incarcerated, demonstrating his failure to plan for their future.

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

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

ENTERED: JUNE 7, 2012

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7870N Stephen McGhee, Index 113614/10
Plaintiff-Appellant,

-against-

Nancy Brensson Odell, etc.,
Defendant-Respondent.

_____

Lynn & Cahill LLP, New York (John R. Cahill of counsel), for appellant.

Wells, Jaworski & Liebman, LLP, New York (Sylvia Hall of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on February 2, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint, unanimously modified, on the law, to grant plaintiff leave to file the proposed amended complaint except insofar as it asserts the cause of action for breach of contract against defendant individually, and otherwise affirmed, without costs.

During the administration of decedents Juris and Baiba Brensson's estates, plaintiff informed defendant executrix of his claim to co-ownership of the bottom portion of a rare cello located among the estates' assets. Although defendant informed plaintiff that efforts would be made to locate the cello upon

some proof of his claim, which he subsequently provided, the cello was not produced. Accordingly, plaintiff brought suit alleging breach of fiduciary duty and conversion. During discovery, it was revealed that the Surrogate's Court had been informed that plaintiff's claim to the cello was without foundation, and that thereafter, the cello was sold at a Christie's auction for $21,500. Plaintiff then sought leave to amend his complaint to add claims for fraud and breach of contract, which Supreme Court denied.

Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is "prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]), or if the proposed amendment "is palpably improper or insufficient as a matter of law" (*Shepherd v New York City Tr. Auth.*, 129 AD2d 574, 574 [1987]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (*Otis El. Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 307, 307 [1990]). Prejudice to warrant denial of leave to amend requires "'some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking

some measure in support of [their] position'" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [2011] [citation omitted]).

Plaintiff's amended complaint and the documents submitted in support of his motion, which include Christie's records documenting the cello's sale subsequent to the making of plaintiff's claim, allege facts which reasonably infer the existence of a fraud action's requisite elements, i.e., a false representation concerning a material fact, scienter, reliance, and damages (*see Stuart Silver Assoc. v. Baco Dev. Corp.*, 245 AD2d 96, 98 [1997]). Likewise, the complaint and supporting documents allege facts of plaintiff's performance under an agreement with the decedents to co-own the cello, the breach of that agreement by the decedents or by defendant in her capacity as representative of their respective estates, and resulting damages, so as to support a claim for breach of contract against defendant as executrix of the estates (*JP Morgan Chase v JH Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2010]).

We discern no cognizable prejudice to defendant by allowing the amendment. Defendant's argument that plaintiff's action is

time-barred under the laws of New Jersey, where the estates were administered, having not been raised below, is unpreserved for our consideration on this appeal (*Geron v DeSantis*, 89 AD3d 603, 604 [2011]).

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

ENTERED: JUNE 7, 2012

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5187 Mt. McKinley Insurance Company, formerly known as Gibraltar Casualty Company, et al., Plaintiffs-Appellants, Index 602454/02

-against-

Corning Incorporated, et al., Defendants-Respondents,

Kemper Insurance Company, etc., et al., Defendants-Appellants,

AIU Insurance Company, et al., Defendants.

Walker Wilcox Matousek LLP, Chicago, IL (Fred L. Alvarez of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Mt. McKinley Insurance Company and Everest Reinsurance Company, appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), and Charlston, Revich & Wollitz LLP, Los Angeles, CA (Stephen P. Soskin, of the bar of the State of California, admitted pro hac vice, of counsel, for Kemper Insurance Company, appellant.

Dickstein Shapiro LLP, New York (Edward Tessler of counsel), for Corning Incorporated, respondent.

O'Melveny & Myers LLP, New York (Tancred V. Schiavoni, III and Gary Svirsky of counsel), for Century Indemnity Company and Westchester Fire Insurance Company, respondents.

Mendes & Mount, LLP, New York (Stephen Thomas Roberts of counsel), for Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies and North River Insurance Company, respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 15, 2010, which denied the motions by plaintiffs and certain defendant insurers for partial summary judgment declaring that each of the asbestos-related claims at issue constituted a separate occurrence under the applicable insurance policies, unanimously affirmed, with costs.

The insurers that are parties to this action provided primary, excess and umbrella comprehensive general liability coverage to defendant Corning Incorporated during the period from 1962 through 1985. At issue in this declaratory judgment action are the coverage obligations of the insurers to cover Corning for claims against it arising from the distribution and/or manufacture of two asbestos-containing products by Corning subsidiaries or divisions. One product was a paper-like spacer material sometimes distributed (but not manufactured) by Corhart (originally 50% owned by Corning, later a Corning division) with Corhart's refractory bricks and mortar, which were used in the construction of open-hearth steel mills. The other product was Unibestos, an asbestos-containing piping insulation manufactured by Pittsburgh Corning Corporation, an entity that was 50% owned by Corning. Before the completion of discovery, all but two of the insurers moved for partial summary judgment declaring that

each of the many thousands of subject claims constitutes a separate "occurrence" under the subject policy and is therefore individually subject to a deductible before the moving insurers' coverage is implicated. Corning and the two nonmoving insurers opposed the motion. Supreme Court denied the motion (28 Misc 3d 893 [2010]), and we affirm.

In the absence of contractual language in a policy of liability insurance resolving the issue, New York courts apply the unfortunate-event test to determine whether a set of circumstances amounts to one occurrence or multiple occurrences (*see Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162 [2007]; *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d 222 [1959]). However, parties are free "to define occurrence in a manner that group[s] incidents based on [other] approaches" (*Appalachian*, 8 NY3d at 173). Each of the policies at issue here contains similar language addressing the definition of what constitutes a single "occurrence" for purposes of bodily injury resulting from "exposure" to "conditions." The following provision is representative: "For purposes of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as

arising out of one occurrence."[1] The Court of Appeals recognized in *Appalachian* that this language is one "way[] that parties to an insurance contract can provide for the grouping of claims" and that such a provision "indicat[es] an intent that certain types of similar claims be combined" (*id.* at 173 n 3).

On the present record, and taking into account that discovery was not complete at the time the motions were made, Supreme Court correctly determined that the moving insurers failed to make out a prima facie case that each of the thousands of claims constitutes a separate "occurrence" under the relevant policy language as a matter of law. Courts have interpreted identical or similar grouping provisions as combining into a single occurrence exposures emanating from the same location at a substantially similar time (*see Ramirez v Allstate Ins. Co.*, 26 AD3d 266 [2006]; *see also Fina, Inc. v Travelers Indem. Co.*, 184 F Supp 2d 547, 551 [ND Tex 2002]; *Metropolitan Life Ins. Co. v Aetna Cas. & Sur. Co.*, 255 Conn 295, 308–309, 765 A2d 891, 898 [2001]). Thus, while all of the thousands of claims apparently cannot be said to have arisen from a single occurrence, any group

[1]The relevant provisions of the subject policies are set forth as an appendix to the decision and order appealed from (28 Misc 3d at 911-919).

of claims arising from exposure to an asbestos condition at a common location, at approximately the same time (for example, at the same steel mill or factory), may be found to have arisen from the same occurrence (*cf. Bausch & Lomb Inc. v Lexington Ins. Co.*, 414 Fed Appx 366, 369 [2d Cir 2011] [holding that a grouping provision using substantially similar language did not apply to claims arising from consumer use of a defective product, which claims "involv(ed) differing times, locations, and circumstances"]). A more fully developed evidentiary record is required before the number of "occurrences" into which the underlying claims can be grouped may be determined. The parties may also pursue discovery concerning the intended meaning of the relevant policy language and the insurers' underwriting guidelines and procedures insofar as there is any ambiguity concerning the application of the grouping provision to the circumstances of the underlying claims.

Distinguishable are cases in which the policy or policies, although including "exposure" to "conditions" in the definition of "occurrence," did not contain the aggregating language "shall be considered as arising out of one occurrence" (*see Appalachian*, 8 NY3d at 173 n 3 [while a provision "allow(ing) 'continuous or repeated exposure to substantially the same general conditions

(to) *be considered as arising out of one occurrence*' . . . indicat(es) an intent that certain types of claims be combined," the default unfortunate-event test was applied because "(t)here is no such language in the (subject) policies"] [emphasis added]; *International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 229-231 [2007] [in finding that the subject policies did not aggregate claims arising from exposure to a toxin at one plant, this Court distinguished *Ramirez v Allstate Ins. Co.* (26 AD3d 266 [2006], *supra*) as involving policies that contained grouping provisions similar to those at issue here]). Even further afield from this case is *In re Prudential Lines Inc.* (158 F3d 65 [2d Cir 1998]), in which the subject policies did not even define the term "occurrence" (*id.* at 76). The *Prudential* court also expressly noted that its decision "may have limited application" to cases involving policies that contain grouping provisions such as those at issue here (*id.* at 82 n 9).

Also inapposite is this Court's decision in *ExxonMobil Corp. v Certain Underwriters at Lloyd's, London* (50 AD3d 434 [2008], *lv denied* 11 NY3d 710 [2008]), which involved claims arising from the use of two allegedly defective industrial products manufactured by the policyholder. Although the *ExxonMobil* policies did contain a grouping provision, that provision

differed significantly from those at issue here. The *ExxonMobil* policies provided that "all damages arising out of . . . exposure to substantially the same conditions *existing at or emanating from each premises location of the Assured* shall be considered as arising from out of one occurrence" (*id.* at 434 [emphasis added]). Thus, the *ExxonMobil* provision aggregated only claims arising from exposure to a condition *at the policyholder's premises*. Claims arising from exposure to a condition at a location where the policyholder was not conducting operations, such as the premises of a customer of the policyholder, were not grouped into one occurrence by this provision. Since it appears that the claims at issue in *ExxonMobil* arose from exposure created by the use of the product by the policyholder's customers (*see id.* at 435), the grouping provision did not apply.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6196-
6197-
6198 In re Michael H. Koegler,
Petitioner-Respondent,

-against-

Pamela D. Woodard,
Respondent-Appellant.

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

Wisselman, Harounian & Associates, P.C., Great Neck (Jacqueline Harounian of counsel), for respondent.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about December 23, 2010, which denied respondent mother's petition for custody of the parties' child and permission to relocate to Texas with the child, and awarded the parties joint custody, affirmed, without costs.

The parties, unwed parents of a daughter born in December 2005, became involved in a romantic relationship in March 2005. At that time, the mother lived in California and was employed at Citigroup. The father lived in New York and worked for Bear Stearns. After their child was born, the mother filed an action in California seeking custody and child support from the father. In or around June 2006, the parties resolved to work on their

relationship. Towards that end, the mother transferred to a new position with Citigroup in Manhattan and moved into an apartment in Manhattan with the child. It was understood that if the mother decided after two years that she did not wish to remain in New York, she and the child could return to California. The maternal grandmother, who lived in Seattle, moved to New York to help with childcare, and the father had regular visitation with his daughter.

The relationship between the parties did not work out, and in or about December 2006, the mother told the father that she wished to relocate to Texas, where she had been raised and where she had family. He objected, and the mother remained in New York. In 2007, the father began dating a woman whom he later married. In early 2008, the mother learned that her job with Citigroup was to be dissolved, and she once again told the father of her desire to relocate to Texas. The father filed an emergency application in Family Court to prevent the mother from leaving New York City and sought joint legal custody and decision making regarding their daughter.

As found by the Family Court, the mother was unemployed for 18 months, during which time she searched for a job in both the New York metropolitan area and Texas. She started a job with

First American Bank in Dallas, Texas in July 2009, but did not inform the father or the court that she was working in Texas. This came to light after the father noticed that the mother was often not at her home, and was told by the child's grandmother that she did not know when the mother would return. The father made a motion to the court in August 2009 for more visitation time with the child. The parties entered into a stipulation that the father could have additional visitation with his daughter when the mother was in Texas.

By order dated December 23, 2010, the Family Court denied the mother's request to relocate the child to Texas, granted the parties joint custody and appointed a parent coordinator. The mother was awarded residential custody, provided that she maintained adequate housing in New York. The father was awarded parenting time with the child on alternate weekends from Friday at 6 p.m. to Sunday at 6 p.m., every Tuesday overnight from 6 p.m. to Wednesday morning before school, and a dinner visit every Thursday from 6 p.m. to 7:30 p.m. While the mother was in Texas working, the father had residential custody of the child and the mother had residential custody while she was in New York, subject to the father's weekend parenting time. This arrangement has apparently been ongoing for the past year while this appeal has

been pending; thus, the child has been spending a substantial amount of time with her father since the Family Court issued its order.

There is a sound and substantial basis in the record for the Family Court's determination to deny the mother's request to relocate to Texas, and there is no reason to disturb the findings of the court (*see generally Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 220 [2011]). The court gave due consideration to the *Tropea* factors (*Matter of Tropea v Tropea*, 87 NY2d 727 [1996]) in concluding that the best interests of the now six-year-old girl would not be served by relocation to Texas.

Regarding the mother's dealings with the father, the court found that she had not been honest with him when she first obtained the Texas job and was out of town for extended periods, and that with respect to her work schedule in Texas, she had been "either misleading or not forthright in giving [the father] information to which he was entitled," it appearing that the mother "has been trying to hinder [the father] from having the additional visits to which he is entitled by virtue of the Court order." The court concluded that it is hard to imagine that the mother would be truthful and forthcoming with the father as to the child's activities and general well-being if she lived in

Texas. As this Court held in *Matter of James Joseph M. v Rosana R.* (32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2006]), "The custodial parent must be able to place the child's needs first while fostering a continued relationship between the child and the noncustodial parent" (citation omitted). The dissent downplays that the mother was dishonest with the father when she did not inform him that she had started a job in Texas and was out of town for extended periods, leaving the child in the care of the grandmother, noting that the father was also untruthful with respect to the child's activities. The dissent points out that the appropriate standard in assessing the desirability of relocation is the best interests of the child, not the supposed misdeeds of the parties. However, the important point here is that the Family Court had a sound basis for concluding that, were the mother and child to live in Texas, the mother would not foster and facilitate a relationship with the father, and that is a relevant factor when assessing the best interests of the child. Despite the court order requiring the mother to inform the father of her schedule regarding her time in Texas and her time in New York, which order provided that the father was to have additional visitation with the child when the mother was in Texas, the record shows a pattern of deception by the mother, who admittedly

lied to the father that she was in New York when she was actually in Texas, thus depriving him of the visitation time to which he was entitled by court order.

With respect to the mother's employment, the court indicated that its decision on the relocation petition was based, in part, on the bona fides of the request. The court credited the testimony of a vocational and employability expert that the mother's job search in 2008 and 2009 could have been more thorough, including more networking and internet tools, and that with the mother's credentials and a "robust" job search, she could expect to find a job in the financial industry in the New York area within six to eight months. Although the dissent believes that relocation is warranted as a matter of economic necessity, we note that in 2006, years before she lost her Citigroup job in New York, the mother expressed her desire to relocate to Texas. It is clear from the mother's testimony that she does not want to live in New York. As was observed by the Family Court, during the year and a half that this matter was pending, while she was employed in Texas, the mother did not seek a job in New York. When asked by the father's attorney during a September 2010 hearing why she had not continued to look for a position in New York, the mother responded that she does not want

to live in New York, and further stated that if a New York job were now offered to her, she would not accept it. Thus, there is a sound basis for the Family Court's determination that relocation is not required by economic necessity.

Additionally, as a practical matter, the record indicates that respondent may no longer be employed in Texas. When the Family Court issued its order on December 23, 2010 denying the relocation petition, it noted that respondent had stated that her job in Texas would be terminated by the end of the year if she could not commit to living full time in that state. The dissent is simply incorrect in stating that there is no evidence to substantiate or even suggest that respondent is no longer employed in Texas. The mother testified in October 2010 that her employer knew of her current situation and had worked with her, but that December would be her last month at that job if she did not relocate to Texas. Her attorney also argued in summation that, if relocation is denied, the mother will be forced to forfeit her position in Texas as her company has indicated that it will no longer allow her to split her time between New York and Texas. Thus, our observation at this point, over a year after the Family Court issued its decision, that the mother may no longer be employed in Texas, is based on her representation to

the Family Court.

The court found that the child is happy and well-adjusted, and has a “good solid nurturing relationship with both parents.” While the court considered that the mother was currently employed in Texas, has numerous relatives in Texas who could provide a support system that is lacking for her in New York, and that the maternal grandmother had moved to Texas, the court also noted that the child has paternal aunts and cousins who live in the metropolitan area, with whom she has close relationships.

The court considered the reports of the psychologist who was appointed to conduct a forensic evaluation of the family, observing that he had engaged in a risk-benefit analysis, and that although he had not made a recommendation, he had leaned in favor of relocation. The psychologist reported that the benefits to the child were less exposure to parental conflict, and the mother’s improved emotional well-being, and the disadvantage was the loss connected with the alteration of the child’s relationship with her father. The Family Court found that the father is an excellent father and that he has a “substantial and significant relationship” with the child, that he is the primary male figure in the child’s life, and that a relocation to Texas would, as a practical matter, limit their contact to school

breaks and an extended summer visit. The court noted that the psychologist had acknowledged that the loss of the close relationship the child now has with her father could have a lasting impact on the child's future relationships as well as her success in life, and concluded that based upon the entirety of the circumstances, the child's life would not be enhanced by relocation to Texas. Contrary to the dissent's position, the Family Court did not discount the appointed psychologist's finding that relocation would be beneficial to the child. The Family Court gave serious consideration to the expert's reports, noting that he had not made a recommendation as to relocation, but was instead leaning towards relocation. The relocation issue was evidently a very close call for the expert, and the Family Court adequately weighed all of the *Tropea* factors when making its determination.

As for the parties' understanding reached years earlier that the mother could leave New York if she wished, the Family Court found the agreement nonbinding, observing that the agreement was made when the child was just a few months old, when the consequences of such a move once the father had become an integral part of the child's life may not have been foreseen. This finding has a sound basis, as any such agreement could not

trump the central issue here, which is the best interests of the child. Thus, the court appropriately held that "[w]hile the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered, it is the rights and needs of the child that must be accorded the greatest weight." The Family Court's findings are to be accorded great deference on appeal (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2006], *supra*).

On our review of the record, we conclude that the mother has not met her burden of establishing that it would be in the child's best interests to relocate to Texas. Furthermore, while the record shows that there is a degree of mistrust and resentment between the parents, there is support in the record for the Family Court's conclusion that a parent coordinator would be useful in minimizing conflicts between the parents and that joint custody is a viable arrangement (*compare Lubit v Lubit*, 65

AD3d 954 [2009], *lv denied* 13 NY3d 716 [2010], *cert denied* __ US __, 130 S Ct 3362 [2010] [parties unable to coparent as they were openly hostile to each other, and, without drawn-out negotiations, could not reach agreement on any decisions]).

All concur except Tom, J.P. and Román, J. who dissent in a memorandum by Tom, J.P. as follows:

Tom, J.P. (dissenting)

Respondent mother applied to Family Court for sole custody and permission to relocate to Texas with the parties' child in connection with her employment in that state. The court denied the petition and instead awarded the parties joint custody. Under the circumstances, neither the award of joint custody nor the denial of permission to relocate promotes the child's best interests.

Respondent met petitioner father in a Las Vegas airport in early 2005 while she was returning home to California after a business trip and petitioner was returning home to New York City. This serendipitous meeting culminated in a brief romantic relationship when respondent spent four days visiting petitioner in New York City and, as a result, respondent became pregnant. Although petitioner initially denied being the child's father, paternity was confirmed by genetic testing performed in California. Due to complications with the pregnancy and the need to take a short term disability leave from her job, respondent's salary declined, and she was obliged to borrow funds from her 401(k) account to support herself.

Following the child's birth in December 2005, respondent began an action in California seeking custody and child support,

after which the parties engaged in mediation in an attempt to resolve their differences. In mid-2006, however, respondent testified that she withdrew the California action and moved to New York based on petitioner's assurances that the parties would work on their relationship and that he would not prevent her from leaving New York in two years' time. Respondent and child resided in Battery Park City under a two-year lease guaranteed by petitioner, who had his own key to the apartment. Although respondent was able to transfer to another position within Citibank in New York, she was no longer eligible for a bonus, and her income declined by some $100,000. Petitioner, who earned a substantial income from his employment with an investment bank, paid respondent $8,000 a month, which was the amount of the rent for the Battery Park City apartment.

In December 2006, respondent testified that she expressed her desire to relocate to Texas, where her family resides, but petitioner would not accede to her wishes. In early 2008, respondent learned that her job at Citibank was going to be eliminated and again raised the issue of relocating outside New York City. Petitioner responded by filing an emergency application in Family Court for joint custody and decision-making authority, resulting in the issuance of an injunction preventing

respondent from leaving the jurisdiction with the child. Two months later, respondent brought a cross motion to vacate the ex parte order, for permission to relocate to Austin, Texas with the child and for sole legal and physical custody.

Respondent's employment with Citibank officially ended in the spring of 2008, around which time petitioner also lost his job at the brokerage firm and reduced respondent's monthly payments to $4,000. Since her only other income was a severance package and unemployment benefits, respondent gave up her apartment. She was able to sublet another apartment in Battery Park City, but was required to seek financial assistance from her mother.

Respondent testified to her many attempts to find other employment in New York City. She undertook an extensive internal search and joined several networking groups within Citigroup, utilized the services of various outplacement counselors and employment agencies, hand-delivered her resume to temporary employment agencies and job fairs, posted her resume online on sites including CareerBuilder and LinkedIn and networked through social organizations and temporary agencies. She received only one interview and was not offered the job. She then expanded her search to include more varied types of work and positions outside

New York City, including New Jersey and Texas, with the expectation that petitioner would honor his promise to allow her to relocate with the child. In late spring 2009, she was offered a job in Texas at an insurance company at a salary of $140,000, with the potential for a bonus.

Respondent testified that in addition to her need for employment, she wished to relocate to shield the child from the conflict and acrimony that exists between the parties. She stated that their differences include decisions regarding the child's schooling, extracurricular activities, medical treatment, religion and discipline. Respondent further stated that petitioner was not punctual for pickups and drop-offs, and would not tell her when he would be returning the child from visits. She testified that petitioner called her names including "liar," "bitch," and "crazy" in front of the child.

As to relocation, respondent testified that she would be better able to support herself and the child due to the lower cost of living and lack of state taxes in Texas and would have the support of her family and their assistance with child care. She noted the excellent preschool options there, as well as an opportunity for free higher education for college or graduate school. She testified that if permitted to move to Texas, she

would foster the child's relationship with petitioner and travel to New York to enable him to have access to the child.

Steven Demby, Ph.D., a court-appointed forensic custody expert, characterized the acrimony between the parties as "fairly intense" and stated that relocation would be beneficial in that it would provide fewer opportunities for day-to-day conflict in the presence of the child. He noted that both parties had recounted instances where the child was exposed to heated exchanges between them and that the situation between the parties left the child "feeling like she's going back and forth between . . . enemy camps." Dr. Demby stated that respondent was the primary caretaker and "better parent" and believed that even if she relocated to Texas, the child "could maintain her relationship with her father." He noted that while respondent seemed less angry at the time of his latest evaluation, petitioner remained angry, and "had one negative, critical thing after another to say about [respondent]."

Petitioner testified that he was very involved in respondent's pregnancy, visiting her in California "several times" during the pregnancy. He was present at the child's birth in December 2005 and during the first week of her life. During the ensuing six months, he visited the child for long weekends

every few weeks becoming “very involved” in her care, and following respondent’s move to New York City, he saw the child “frequently.”

Petitioner, who is now married, stated that he began a relationship with his wife during 2007, whereupon respondent informed him that she was upset by the relationship and no longer wanted to live in New York. He added that in September 2008, respondent hired a moving company to move her furniture to Dallas without informing him. Prior to the commencement of this proceeding, the parties could not agree on an access schedule for the child. He now sees the child “Tuesdays and Thursdays during the week and every other weekend from Friday at 5:30 P.M. until Sunday at 6:00 P.M.,” and nearly every other day when respondent is out of town on business. He accused respondent of making it difficult for him to have a relationship with the child by misleading him and trying to create conflict, for example, by deliberately misinforming him about the date of her four-year medical checkup, which he missed. He asserted that if the child lived in Texas, “it would be difficult to impossible to have any involvement in her life,” although he acknowledged that he has sufficient resources to facilitate transportation between New York and Texas. He added that his family has been very involved

in the child's life, and that she is very close to his mother, siblings, cousins and nephews.

The child attends school five days a week, which she "adores," and to date petitioner has paid 100% of the cost. Although the parties did not agree on where the child should be enrolled for the fall 2009 semester, petitioner, without informing respondent, enrolled her in school in the belief that respondent would be supportive. The parties also disagreed about the number of hours the child should attend school, what activities she should be enrolled in, how her religious education should be handled and how medical and dental appointments should be scheduled.

A vocational evaluator and employability expert, who did not meet with respondent prior to giving testimony, considered her job search, which was conducted primarily online, to have been inconsistent and less than diligent. However, she conceded that many alternative strategies she suggested had a cost associated with them and that by summer 2008, when respondent was newly unemployed, the job market was in "pretty tough shape," and by year end, had come to a "dead halt" and has remained "one of the most difficult" in her experience.

By an order of custody and visitation issued after a 19-day

trial, Family Court denied respondent permission to relocate outside the New York metropolitan area with the child and awarded joint custody, with physical custody to respondent. The court found respondent to have been untruthful to petitioner concerning a number of matters — when she obtained the job in Texas and when she would be in Texas, the flight time between Dallas and New York and the scheduling of the child's annual doctor's visit. Nor had respondent been truthful with the court regarding her income. The court reasoned that respondent was therefore unlikely to be truthful about the child's activities and general well-being if she were living in Texas. Since petitioner was "an important figure" in the child's life and respondent "minimized the importance of the father's relationship with [her]," it concluded that if permission to relocate were to be granted, the child "would suffer loss and may feel that she did something wrong" and that the child's contact with petitioner would be limited to school breaks and an extended summer visit. The court also doubted that relocation would minimize the conflict between the parties because much of it occurred during telephone communications, which would only be more necessary if relocation were permitted.

I am unpersuaded that this disposition is in the best

interests of the child (*Matter of Tropea v Tropea*, 87 NY2d 727 [1996]). There is merit in respondent's contention that the court discounted its own forensic custody expert's determination that relocation to Texas would be beneficial to the child and accorded excessive weight to the impact of the move on petitioner's current access schedule. I am particularly swayed by the argument that the move is warranted as a matter of economic necessity.

Respondent has found employment in Texas, for which she receives a substantial income that permits her to support herself and her daughter (*see Amato v Amato*, 202 AD2d 458 [1994], *lv denied* 83 NY2d 759 [1994] [mother permitted to relocate to Idaho to be closer to her family and reduce living expenses and child care costs, which were unaffordable in New York]). The record supports the fact that respondent was unable to find employment in New York since 2009. To stay in this jurisdiction respondent would remain unemployed and unable to support herself or her child. In addition, she can look to her family located in Texas for assistance with child care (*see Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658 [2010] [request for relocation granted where the mother and child would benefit from supportive relationships with the mother's family, who lived nearby]).

The Family Court's evaluation of the circumstances is generally accorded great weight because the court is best positioned to assess the credibility of witnesses (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), "unless it lacks a sound and substantial basis in the record" (*Yolanda R. v Eugene I. G.*, 38 AD3d 288, 289 [2007]; *see also Matter of David J.B. v Monique H.*, 52 AD3d 414, 415 [2008]). Here, contrary to the majority's contention, the court's decision does not find substantiated support in the record. While testimony was received suggesting that respondent could find a job in New York City if only she invested sufficient resources in the search, the expert also conceded that the local financial job market remains very difficult (*see Miller v Pipia*, 297 AD2d 362, 366 [2002] [mother permitted to remain in Florida where she relocated when she was unable to find work in New York that would have provided sufficient compensation to permit renting an apartment and providing child care]). Since respondent has been awarded physical custody and works in Texas, it is only logical to require petitioner to travel to see his daughter — which he does not deny having the resources to do — rather than require respondent to travel to maintain her employment. It is clear from the award of physical custody that Family Court found

respondent to be the primary caregiver, a role that is greatly complicated by the need to travel between New York and Texas to earn an income. Since respondent has been the primary caregiver of the child and was found to be the "better parent" by Dr. Demby, she would better serve the rights and needs of the child. To disrupt and deprive the child of the continued care and nurture from her primary caregiver since birth, who is also the better parent, due to the need to maintain employment, will not serve the best interests of the child. The majority's ruling has placed the father's need to be involved with his daughter over the need of the child for the love and nurture of her primary caregiver. In fact, petitioner testified that he has adequate financial means to visit the child in Texas and respondent testified that she would have the child visit and establish a relationship with petitioner in New York.

Further, the court did not follow the advice of its appointed forensic custody expert. It should be noted that "the evaluation by an independent expert should not be readily set aside" (*Rentschler v Rentschler*, 204 AD2d 60, 60 [1994] [court's determination of custody was not warranted by the evidence because there was much support in the record for the opinion of the court-appointed expert], *lv dismissed* 84 NY2d 1027 [1995]).

Here, Dr. Demby spent more than 22 hours with the parties and their child and concluded that his concerns over the child losing "frequent contact with her father" were outweighed by "serious" concerns about how the ongoing hostile and acrimonious battle between the parties would affect the child if respondent were to remain in New York. Although the court speculated that since most of the parties' communication would remain telephonic, it could not foresee how such a move would minimize conflict, the court did not give a sound basis for disregarding Dr. Demby's opinions (*see id.*). Dr. Demby expressed the belief that if petitioner made a "concerted effort" and "demonstrated his interest in her, and was able to spend time with her on a consistent basis," that would "mitigate" the "loss that it would mean to her" (*see Tropea*, 87 NY2d at 738 [the father's regular and meaningful contact with the child, while important, is not dispositive and should not be given disproportionate weight to predetermine the outcome]).

As the trial progressed, Dr. Demby testified that he observed a change in respondent's demeanor, leading him to conclude that she would foster a relationship between petitioner and his daughter. Significantly, petitioner acknowledged that he has the means to travel to Texas for visits with the child

(*compare Matter of Helen H. v Christopher T.*, 47 AD3d 590 [2008] [affirming a denial of relocation, this Court found that the mother's move to Australia was unjustified and that she had attempted to thwart the child's relationship with his father], *with Ritz v Ritz*, 36 AD3d 437 [2007], *lv dismissed* 8 NY3d 1005 [2007] [affirming denial of relocation to Israel where, inter alia, it was highly doubtful that the family's finances would facilitate meaningful visitations between the father and child]).

As to credibility, the court's finding that respondent was not a credible witness is based primarily on her repeatedly misleading petitioner by failing to inform him of important matters regarding the child, leading the court to discount respondent's assertion that she would foster a relationship between father and daughter. Even granting that respondent misrepresented the scheduling of the child's annual doctor's visit, the record shows that petitioner similarly was not truthful and forthcoming with respect to the child's activities and well-being by, for example, registering her for school without respondent's knowledge and consent. Petitioner's contention that respondent's real reason for wanting to leave New York was due to his relationship with his current wife, which began in August or September of 2007, was contradicted by

respondent's testimony that she raised the issue of relocation with petitioner for the first time at the end of 2006 and again in early 2008. Moreover, it was petitioner's misrepresentation in 2006 that the parties would work on restoring their relationship and that he would not prevent respondent from leaving New York, which persuaded respondent to withdraw her California custody action and to move to this state. Petitioner dishonored the promise by bringing an action to prevent respondent from leaving this jurisdiction and for joint legal custody of the child and by starting a relationship with his present wife approximately two years after respondent relocated to New York.

It is apparent that the parties have been less than candid and cooperative with each other as a consequence of the well-documented animosity between them. Because the animosity is mutual, the record does not support the court's reasoning that it is respondent who thereby lacks credibility. The trial court primarily focused on the inaccuracies of respondent's testimony to make its determination of credibility. Moreover, it is largely the need to remove the child from such acrimony that led the court's own expert to recommend relocating respondent and the child to Texas. The appropriate standard in assessing the award

of custody and the desirability of relocation remains the best interests of the child, not the supposed misdeeds of the parties.

The majority's conjecture that "respondent may no longer be employed in Texas" because "her job in Texas would be terminated . . . if she could not commit to living full time in that state," is without support in the record. There is no evidence to substantiate or even suggest that respondent is no longer employed in Texas. In fact, it is more likely that respondent continued her employment there since it took approximately a year and much effort and resources to obtain the job in Texas after exhausting much time and energy to locate a job in New York and the surrounding areas, which proved futile. To leave the Texas job and return to New York would again cause respondent to be unemployed and unable to provide for her child, a position in which respondent would unlikely place herself.

Vesting the parties with joint decision-making authority suffers from the same infirmity as requiring mother and child to remain in New York: it is simply not practical, particularly in the absence of a stable and amicable relationship. Requiring respondent to reside in New York and spend half of each month in Texas to pursue employment amounts to an award of joint physical custody. This Court has observed that where the evidence

demonstrated that the parties' relationship was marked by acrimony and mistrust, joint custody was a nonviable option (*Lubit v Lubit*, 65 AD3d 954 [2009], *lv denied* 13 NY3d 716 [2010], *cert denied* __ US __, 130 S Ct 3362 [2010]). The record in this matter amply demonstrates that the parties have been unable to agree on elementary issues regarding the child's upbringing, and it is essential that the authority to make such decisions be vested in one parent.

Accordingly, the order should be reversed and the petition granted.

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

ENTERED: JUNE 7, 2012

CLERK

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

6234 Manuel Moses, Index 603042/06
Plaintiff-Respondent,

-against-

Laurence M. Savedoff,
Defendant-Appellant.

Laurence M. Savedoff, P.L.L.C., Bronx (Laurence M. Savedoff of counsel), for appellant.

Bridget Butler, New York, for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered September 3, 2010, which denied defendant's motion to dismiss the complaint or, in the alternative, for summary judgment dismissing the complaint, unanimously modified, on the law, to grant partial summary judgment to defendant to the extent of dismissing the complaint save for plaintiff's cause of action for quantum meruit, and otherwise affirmed, without costs.

The following facts are undisputed: In 2002, plaintiff, a newly admitted attorney, placed an advertisement in the New York Law Journal seeking a mentorship opportunity with an experienced solo practitioner in order to gain trial experience. Defendant responded to the advertisement and the parties met. Subsequently, plaintiff saw an advertisement in the Journal

placed by a Bronx solo practitioner looking to refer cases out to other experienced attorneys. Defendant met with the Bronx practitioner and agreed to act as trial counsel for the Bronx attorney's clients with a 40% referral fee payable to the Bronx attorney. It is further undisputed that plaintiff referred at least two cases to defendant's law office, and that he conducted some depositions for cases on which defendant was working, and drafted some bills of particulars -- even though plaintiff had not litigated any personal injury cases prior to meeting defendant. Plaintiff received some payments from defendant which defendant characterized as mostly for per diem work. Eventually, however, according to plaintiff, the payments ceased.

In August 2006, plaintiff filed a summons and complaint alleging 10 causes of action as follows: (1) breach of an oral partnership agreement; (2) breach of an oral agreement; (3) fraud; (4) an accounting; (5) unjust enrichment; (6) fraud in the inducement; (7) breach of fiduciary duty; (8) estoppel; (9) contract implied in the law based on past performance; and (10) quantum meruit.

Plaintiff alleged, inter alia, that defendant had proposed that they should work together as partners in a personal injury law practice with each having an equal share of the profits

gained from the cases they worked on jointly. Plaintiff further alleged that between 2002 and 2005 he worked on more than 100 personal injury cases for defendant, expended approximately 500 hours in connection with these cases, and contributed $5,000 in capital to the partnership.

In September 2006, defendant served a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (4). Defendant argued that no sustainable cause of action exists because no partnership agreement, oral or written, existed between him and plaintiff; that defendant did not intend to enter into a partnership; and "there is no evidence whether in the form of sharing losses, tax returns, written agreement or actions demonstrating that the parties held themselves out as a partnership."

Plaintiff opposed, and on November 30, 2006, the motion court heard oral argument. The court declined to convert the motion into one for summary judgment, and found that the factual allegations of plaintiff sufficiently stated a cognizable cause of action. In May and June 2008, discovery was conducted, and the parties were deposed.

In June 2009, defendant again moved to dismiss the action pursuant to CPLR 3211(a)(1) and (4). Alternatively, defendant requested summary judgment dismissing the complaint. While

defendant raised arguments similar to those in his pre-answer motion seeking dismissal of the complaint, this time, on the basis of plaintiff's deposition transcript, he argued that plaintiff's proof failed to raise a triable issue as to the existence of an oral partnership.

Defendant noted that there was no evidence or testimony offered to indicate that the parties had shared earnings 50/50 in accordance with the alleged oral partnership arrangement, or that plaintiff shared in law firm losses and/or expenses, or that plaintiff contributed capital to the law firm. Defendant further offered evidence that, in conducting depositions, plaintiff had deemed himself to be "of counsel" or working independently. Defendant affirmed that the referred cases from the Bronx litigator comprised only 10% of his law firm practice.

Defendant referenced plaintiff's testimony at deposition where plaintiff conceded, inter alia, that he had full-time employment with another law firm during the relevant time period; that the "overhead" in defendant's office was "no concern of his"; that there was no letterhead evidencing a partnership; and that he did not know the name of the staff in defendant's law office. In opposition, plaintiff produced, inter alia, a bank account statement to show that he had paid defendant $750 which

he claimed was part of a $5,000 contribution to the partnership.

On September 3, 2010, the court denied defendant's motion for summary judgment upon finding that the motion was precluded by the law of the case doctrine. The court found that the argument was identical to the prior motion, and defendant had a full and fair opportunity to argue the identical motion to dismiss.

On appeal, defendant argues that the motion court erred in summarily denying his motion for summary judgment based on the law of the case doctrine. Defendant also argues that the statute of frauds (General Obligations Law § 5-701) precludes plaintiff's claim for compensation predicated on an alleged partnership agreement absent a writing, or evidence demonstrating a partnership agreement. Finally, defendant argues that there are no triable issues of fact as to any kind of partnership agreement with plaintiff.

As a threshold matter, we note that the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion, as is the case here (*see 191 Chrystie LLC v Ledoux*, 82 AD3d 681 [2011]; *Riddick v City of New York*, 4 AD3d 242, 245 [2004]). Defendant's first motion was to dismiss under CPLR 3211; the court declined to convert that pre-answer

motion to a summary judgment motion. Thus, the law of the case doctrine was inapplicable to defendant's subsequent summary judgment motion pursuant to CPLR 3212.

Defendant's statute of frauds argument, however, has no merit. The statute of frauds is inapplicable to an agreement to create a joint venture or partnership because an oral agreement for an indefinite period creates a partnership or joint venture at will (*see Foster v Kovner*, 44 AD3d 23, 27 [2007]; *Prince v O'Brien*, 234 AD2d 12 [1996]). Additionally, the parties' alleged agreement to share in the profits of certain cases, when reasonably interpreted, could have been performed within one year (*Foster*, 44 AD3d at 26).

Nevertheless, for the reasons set forth below, we grant partial summary judgment to defendant dismissing plaintiff's claims as to the existence of an oral partnership. We agree with defendant that there are no triable issues of fact as to the existence of such a partnership with plaintiff, or even of a partnership limited to a select group of clients.

Initially, we note that plaintiff has engendered confusion with his allegations: While he invokes New York partnership law in the summons and complaint, and refers to an alleged "partnership/joint venture" agreement throughout papers submitted

in this action, he also argues that the parties had a partnership only to the extent of an agreement to equally share profits arising out of the legal representation of a select group of clients.

At deposition, plaintiff testified as follows:

"Q: Now [defendant] gave you the impression that you were in a partnership for the share of the entire practice?

"A: No.

"Q: What was this a partnership for, as you understood it?

"A: This was a partnership for specifically the cases that I would bring into the business."

On plaintiff's own admission therefore, there was no oral partnership agreement with defendant such that would establish a bona fide law practice partnership. As to plaintiff's allegation that he and defendant had an oral agreement to equally share the fees from cases plaintiff brought in, the record reflects that there was a 50% fee split in only one of two referrals (a slip and fall action involving plaintiff's aunt) acknowledged by defendant. In the other, plaintiff received one-third of the fee.

Moreover, at deposition, plaintiff was unable to quantify, even approximately, how many cases he had brought in over and

above the two referrals. Instead, plaintiff testified that they included "in the main," cases referred to defendant by the Bronx practitioner whose ad plaintiff had shown to defendant. However, plaintiff conceded that after setting up a meeting between defendant and the practitioner, he had nothing more to do with that practitioner. Indeed, plaintiff testified that it was defendant who met every week with the Bronx practitioner to discuss cases, and to meet with prospective clients in order for defendant to determine which clients he would represent.

More significantly, we find that no triable issues of fact exist as to the traditional indicia of a valid oral partnership agreement. It is well established that in determining whether parties forged such an oral partnership agreement, a court will consider the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution (*see Baytree Assoc. v Foster*, 240 AD2d 305 [1997], *lv denied* 90 NY2d 810 [1997], *lv denied* 90 NY2d 810 [1997]; *Prince v O'Brien*, 256 AD2d 208, 212 [1998] ["traditional indicia" of a partnership include joint control and sharing losses], citing *Chanler v Roberts*, 200 AD2d 489 [1994], *lv dismissed in part, denied in part* 84 NY2d 903 [1994]). In *Chanler*, this Court

held that "[i]t is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits" (*id.* at 491).

Here, plaintiff does not allege joint control or any agreement to share in any of the losses either of the law practice in general, or appertaining just to the cases plaintiff brought in. Moreover, while the record reflects a $750 payment by plaintiff to defendant (characterized by defendant as contribution towards an expert fee in plaintiff's aunt's case), the record is essentially devoid of any admissible evidence supporting plaintiff's assertion that he contributed $5,000 in capital to the law firm.

Plaintiff testified that the capital contribution was in the form of cash payments which he recorded in a "logbook" or "ledger," but he did not produce any such logbook or ledger. Rather, in opposition to defendant's summary judgment motion, plaintiff attempted to shift the burden to defendant by incomprehensibly arguing: "This is a fact in dispute where [p]laintiff acknowledges the contribution and [d]efendant denies it. This is a material fact in dispute for which [d]efendant has no documentary evidence to back up his defensive denial." It is difficult to imagine precisely what type of documentary evidence

defendant could produce to establish a negative, namely plaintiff's *non*-contribution -- even were it defendant's burden to do so. Thus, plaintiff failed to raise a triable issue of fact as to his capital contributions.

In the absence of a valid contract, plaintiff, however, does set forth a prima facie case for recovery in quantum meruit. It is hornbook law that in order to establish a claim in quantum meruit, a claimant must establish "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]; *see* 22A NY Jur2d Contracts § 610;). Defendant agreed that plaintiff worked for him in some capacity on a certain number of cases. Further, plaintiff points to two e-mails purportedly sent by defendant to plaintiff in August 2005 acknowledging that defendant owes plaintiff certain fees on cases after they "come to trial." Thus, plaintiff may recover based on quantum meruit

for work he performed without compensation on behalf of defendant.

We have considered plaintiff's other claims, and find them to be without merit.

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

ENTERED: JUNE 7, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6512 In re Anthony Agnelli, Index 103357/09
Petitioner-Respondent,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (David R. Priddy of counsel), for appellants.

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

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Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered October 27, 2010, which granted the CPLR article 78 petition to annul respondent Board of Trustees' determination denying petitioner's application for accident disability retirement (ADR) benefits, remanded the matter to respondent and directed it to grant petitioner ADR benefits retroactive to the time that he retired from his service in the Police Department, unanimously modified, on the law, to vacate that portion of the order and judgment that directs respondent to grant petitioner ADR benefits, and otherwise affirmed, without costs.

Although the Medical Board is entitled to resolve conflicts

in the medical evidence and rely on its own physical examinations of the applicant (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Goffred v Kelly*, 13 AD3d 72, 73 [2004]), fairness demands that the Medical Board and the Board of Trustees consider all of the relevant medical evidence submitted by petitioner and that the Medical Board clearly state the reasons for its recommendations (*see Matter of Kiess v Kelly*, 75 AD3d 416, 417 [2010]). Here, after the court directed the Medical Board to consider whether petitioner's line of duty neck and back injuries were the proximate and natural causes of his vertigo, the Board failed to adequately explain its conclusion that petitioner's disabling vertigo was not caused by his line of duty injuries. The Board stated that it had reviewed all of the line of duty injury reports and had not found one in which the injuries would contribute to vertigo. However, the Board's conclusory statement completely fails to address that petitioner initially experienced vertigo after a line of duty injury in December 2000 when he injured his head and neck. He subsequently suffered from intermittent episodes of vertigo, including an episode in August 2003 when he experienced such dizziness that he drove off the road, and suffered severe head and neck injuries. Significantly,

after the 2003 incident, the Board determined that petitioner was disabled and authorized vestibular rehabilitation, indicating that it found that the vertigo was associated with the line of duty injury.

Upon remand, while the Board cited one doctor's statement that there is no obvious explanation for petitioner's complaints of vertigo, the Board utterly failed to address and apparently completely disregarded the opinion of petitioner's otolaryngologist that the vertigo may be of cervical origin, concluding instead to the contrary - - that "the vertigo sounds to be more from an otolaryngologic, rather than a neurologic basis." The Board did not provide an explanation for its finding, notwithstanding the otolaryngologist's opinion that the vertigo may be related to cervical injuries, that the vertigo is of otolaryngologic origin. Nor has the Board addressed the July 2003 report of petitioner's treating neurologist reflecting that petitioner had an episode of dizziness upon hyperextension of the neck during physical therapy. In that report, the neurologist states that "given the amount of cervical spine disease he has, it is not surprising that hyperextension of the head will cause some symptoms, which may be due to some compression of the vertebral artery." The Board has not considered all of the

medical evidence or adequately explained its reasoning, but rather has simply gone through a pro forma exercise in response to the remand. Accordingly, the Board of Trustees' determination was properly annulled (*Matter of Kiess*, 75 AD3d at 417).

However, because the record remains unclear as to the cause of petitioner's vertigo, the court should not have directed respondent to grant petitioner retroactive benefits (*see generally Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]). Rather, the matter should have been remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees (*see Kiess*, 75 AD3d at 417).

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

ENTERED: JUNE 7, 2012

CLERK

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

7197-
7198 Public Service Mutual Insurance Company, etc., Plaintiff-Respondent, Index 105886/09

-against-

341-347 Broadway, LLC, et al., Defendants-Appellants,

Leviev Boymelgreen Developers LLC, et al., Defendants.

Bennett, Giuliano, McDonnell & Perrone LLP, New York (William Bennett of counsel), for 341-347 Broadway, LLC, 343 Broadway Properties, LLC and Tishman Construction Corporation, appellants.

London Fischer LLP, New York (Daniel London of counsel), for Urban Foundation/Engineering, LLC, appellant.

Law Offices of Michael E. Pressman, New York (Steve Byoun of counsel), for respondent.

Orders, Supreme Court, New York County (Paul Wooten, J.), entered June 27, 2011 and June 28, 2011, which, to the extent appealed from, denied defendants-appellants' motions for summary judgment dismissing the complaint based on the statute of limitations, unanimously modified, on the law, to the extent of granting the motions with respect to the claims for damages to the ground floor, cellar and subcellar that occurred prior to April 27, 2006, and otherwise affirmed, without costs.

During 2004 and 2005, appellants were involved in a construction project on property adjoining a building owned by plaintiff's subrogor, Leonard Associates (Leonard). In 2005, Leonard became aware of damage to the ground floor, cellar, and subcellar of its building, resulting from flooding caused by appellants' construction work adjacent to the building's east wall. Defendant Tishman paid for the necessary repairs. In August 2006, Leonard notified plaintiff, its insurer, that in June 2006, it had become aware of property damage, including structural damage to the front and rear facades, the residential upper floors, and the roof of the designated landmark building and filed an insurance claim for such damage. Plaintiff paid Leonard over $400,000, pursuant to its insurance contract for repair of that damage. In April 2009, plaintiff, as subrogee of Leonard, commenced this action seeking to recover that amount from appellants, alleging that the damage was caused by their negligent construction activities.

Appellants moved for summary judgment dismissing the complaint on the ground, inter alia, that the damages alleged in plaintiff's pleadings were apparent and visible more than three years prior to the commencement of the action and was thus barred by the three-year statute of limitations for injury to property

(CPLR 214[4]). These motions were denied.

The motion court correctly found that appellants failed to demonstrate that the physical damage for which plaintiff provided coverage became visible and apparent more than three years before plaintiff commenced the instant action. None of the documents submitted by appellants establish that damage to areas other than the ground floor, cellar and subcellar was apparent more than three years prior to the commencement of the action (*see* CPLR 214[4]; *Mark v Eshkar*, 194 AD2d 356, 357 [1993]). The damages alleged in the complaint and bill of particulars consisting of structural damage to the front and rear facade, the residential upper floors (interior and exterior), the roof parapet wall, roof cornices, front keystone arches and front stonework of this landmark building did not became apparent until June 2006, thus making these claims timely. It should be noted that the February 18 and March 6, 2005 letters from Leonard's counsel, upon which appellants rely to demonstrate these problems were known to plaintiff prior to 2006, did not assert that the building had already sustained damage, but only that Leonard was concerned that the adjoining project would cause damage. Further, the July 14, 2005 letter from defendant Tishman to defendant Urban referred exclusively to damages in the health club (basement)

area, which Tishman paid to repair. Finally, the engineering report from Lavon, which identified damages outside the health club area, is dated August 30, 2006, less than three years prior to the commencement of the action.

However, appellants demonstrated the absence of a triable issue of fact concerning when damage to the ground floor, cellar and subcellar became apparent. Plaintiff contends that it is not seeking to recover for amounts paid to repair that area, but its bill of particulars appears to include claims for such damage, such as cracking of the exterior wall and slab within the health club area of the basement. Since the complaint was filed on April 27, 2009, and these damages became visible and apparent in March of 2005, these claims are time-barred and the motions for summary judgment should have been granted with respect to these claims.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7871 The People of the State of New York, Ind. 2661/07
Respondent,

-against-

Jessie Ramirez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J. at suppression hearing; Analisa Torres, J. at jury trial and sentencing), rendered September 21, 2009, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. The arresting officer's testimony that he received a radio transmission from a ghost officer about a drug sale, along with the arresting officer's knowledge of the ghost's role in the planned undercover operation, permitted an inference that the transmission was based on the ghost officer's presumptively reliable observations (*see People v Ketcham*, 93 NY2d 416, 420-421

[1999]). This report provided probable cause to arrest defendant once the officer saw him in the vicinity of the drug transaction about five minutes after receiving the radio report and observed that he matched the sufficiently detailed description provided in that report (*see e.g. People v Ramos*, 287 AD2d 305 [2001], *lv denied* 97 NY2d 658 [2001]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7872 Jose Amador, etc., et al., Index 18630/06
Plaintiffs-Appellants,

-against-

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

Rapport Realty Corp., et al.,
Defendants.

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Christopher J. Smith, New Hyde Park, for appellants.

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

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 12, 2011, which granted defendants City of New York and New York City Department of Transportation's (defendants) motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

The injured plaintiff's testimony conveyed that he slipped and fell on the sidewalk in front of a privately owned building because of a combination of a defect in the sidewalk, inadequate lighting, and chronic flooding. Plaintiffs also submitted evidence relevant to defendants' notice of the inadequate lighting and chronic flooding, i.e., that the street was always

dark and that the flooding had been occurring for several months before the date of his accident. However, defendants' motion focused solely on the applicability of Administrative Code of City of NY § 7-210(a), which imposes a duty upon the owner of property abutting a sidewalk to maintain the sidewalk in a reasonably safe condition. Defendants failed to address the allegedly inadequate lighting and tendency to flood that may have caused or contributed to plaintiff's accident by rendering the sidewalk defect obscure (*see Thompson v City of New York*, 78 NY2d 682, 684 [1991]; *De Witt Props. v City of New York*, 44 NY2d 417, 423-424 [1978]). Thus, defendants failed to establish, as required, that they neither created nor had notice of the allegedly dangerous conditions (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [2011]), or that the conditions did not cause plaintiff's injury.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7873 In re Chase L.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 28, 2011, which adjudicated appellant a juvenile delinquent upon a fact finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree, attempted assault in the third degree, menacing in the second and third degrees, and criminal possession of a weapon in the fourth degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence

and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility, and the evidence supported each element of the offenses at issue.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7874 Ezekiel Kommeh, Index 112161/04
Plaintiff-Appellant,

-against-

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

Law Offices of Charles Nathan, P.C., Bronx (Charles Nathan of counsel), for appellant.

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

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 10, 2011, which denied plaintiff's motion to vacate his default and granted defendant City of New York's cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, plaintiff's motion granted, defendant's motion denied, and the complaint reinstated.

Plaintiff provided a reasonable excuse for failure to appear at the preliminary conference and failure to timely serve a complaint (*see Goodwin v New York City Housing Authority*, 78 AD3d 550 [2010]), based on his prior attorney's neglect of matters entrusted to him and subsequent disbarment (*see Matter of Siskin*, 78 AD3d 112 [2010]). Plaintiff's affidavit and accompanying documentation adequately demonstrate the merit of this action for

personal injuries suffered by plaintiff when he was walking across the street and was hit by a police car that was traveling in the wrong direction without using lights or sirens (*see Parker v Alacantara*, 79 AD3d 429 [2010]). Under these circumstances and in view of the strong public policy favoring resolution of cases on the merits (*see Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [2011]), the motion court improvidently exercised its discretion in failing to restore this matter to the trial calendar.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7876 Immanuel Malone, etc., Index 24468/05
Plaintiff-Respondent,

-against-

Choong W. Kim, M.D., et al.,
Defendants,

Alex Boafo, M.D.,
Defendant-Appellant.

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for appellant.

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Jason C. Molesso of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 18, 2011, which denied the motion of defendant Alex Boafo, M.D., for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The record shows that the infant plaintiff's mother, who was approximately 29 weeks pregnant, went to defendant hospital because she was having contractions. The mother was admitted to rule out pre-term labor and was started on magnesium sulfate, in an attempt to stop pre-term labor. She was also given the first

of two doses of a steroid, to hasten fetal lung maturity, and underwent a sonogram.

Defendant Boafo, a perinatologist, performed and interpreted the sonogram. Dr. Boafo found that the umbilical cord and one of the infant's arms was prolapsing into the lower segment of the uterus. Dr. Boafo reported these findings to the mother's treating obstetrician and recommended immediate delivery. Three and a half hours later, the treating obstetrician performed a cesarean section.

In a medical malpractice action, a plaintiff must establish a deviation or departure from accepted practice and that such departure was a proximate cause of the plaintiff's injuries (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). To constitute proximate cause, the physician's negligence must be a "substantial factor" in causing the injury (*Mortensen v Memorial Hosp.*, 105 AD2d 151, 158 [1984]).

Here, dismissal of the complaint as against Dr. Boafo is warranted since he established his entitlement to summary judgment as a matter of law and plaintiff failed to raise a triable issue of fact. Dr. Boafo submitted evidence showing that his recommendation, that the infant plaintiff be delivered immediately, did not proximately cause the injuries sustained by

the infant plaintiff. Although the treating obstetrician testified that he heeded Dr. Boafo's advice, he did not immediately follow the recommendation of delivery. Rather, the obstetrician decided to wait several hours, as he felt that there was no emergency situation present and he wanted to allow time for the steroids to improve the infant plaintiff's fetal lung maturity. The obstetrician later made an independent decision, as the mother's treating physician, to perform the cesarean section, for which he took sole responsibility. The obstetrician testified that he decided to perform the cesarean section based upon, inter alia, his belief that the attempt to stop pre-term labor had failed, there were certain changes in the fetal heart rate pattern, and there was a possible amniotic fluid leak.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7877 Orlando Balbes, Index 309821/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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

Mirman, Markovits & Landau, P.C., New York (David Bloom of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 18, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff sustained injuries when he tripped and fell while crossing within the crosswalk at an intersection. Deposition testimony, photographs of the roadbed where plaintiff fell, and Department of Transportation records, together with reasonable inferences drawn therefrom, present triable issues as to whether defendant created an immediate hazardous condition by performing milling and resurfacing work at the subject intersection at about the time of plaintiff's fall (*see Yarborough v City of New York*,

10 NY3d 726 [2008]).

The record also presents triable issues as to whether plaintiff had a reasonable opportunity to observe and avoid what defendant contends was an "open and obvious" condition that could not be deemed inherently dangerous. The record shows that plaintiff's trip and fall occurred at midnight, in an area of the intersection that purportedly lacked sufficient lighting, and while plaintiff was walking in the company of others and had his vision of the road ahead blocked by a friend who was walking in front of him. Although plaintiff was aware of the recent milling and stripping of the old road surface, factual issues exist as to whether the circumstances at the time, including the lighting conditions, permitted plaintiff to appreciate the degree of the depression hazard that was present (*compare Baynes v City of New York*, 81 AD3d 423 [2011]).

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

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7879 The People of the State of New York, Ind. 3834N/10
Respondent,

-against-

Wayne Nelson,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered on or about February 16, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: JUNE 7, 2012

CLERK

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

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7880 Milton Rodriguez, Index 103276/09
Plaintiff-Respondent,

-against-

Camaway Realty, Inc.,
Defendant-Appellant,

Amado Marin, et al.,
Defendants.

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Friedman, Levy, Goldfarb & Green, P.C., New York (Charles E. Green of counsel), for appellant.

Gropper Law Group, PLLC, New York (Joshua Gropper of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered September 28, 2011, which denied defendant Camaway Realty, Inc.'s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendant established its entitlement to summary judgment, by tendering evidence that there was no prior criminal activity at its premises likely to endanger the safety of plaintiff (*see Jacqueline S. v City of New York*, 81 NY2d 288, 293–294 [1993];

Jean v Wright, 82 AD3d 1163 [2011], *lv denied* 17 NY3d 704 [2011]; *M.D. v Pasadena Realty Co.*, 300 AD2d 235, 237 [2002]). Both the owner and plaintiff testified that they knew of no such activity.

In opposition, plaintiff failed to come forward with sufficient evidence of prior criminal activity on the premises. The identical affidavits plaintiff presented of other tenants failed to raise a triable issue of fact, since the affidavits lacked the necessary specificity to support his negligence claim.

Although the affidavits reported one prior assault at the premises, the alleged victim of that assault, the superintendent of the building, came forward with an affidavit stating that he was struck by a boyfriend of a tenant's daughter, not an intruder. Such an attack is insufficient to establish the necessary notice of prior criminal activity (*see Simms v St. Nicholas Ave. Hotel Co.*, 187 AD2d 373 [1992], *lv denied* 81 NY2d 704 [1993]). Thus, the attack on plaintiff was unforeseeable as

a matter of law (*see Ortiz v Wiis Realty Corp.*, 66 AD3d 429, 429-30 [2009]; *Maria S. v Willow Enters.*, 234 AD2d 177 [1996]).

In light of our determination of nonforeseeability, we need not reach the remaining issues raised by the parties.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7882-
7883 Cherokee Owners Corp., Index 601201/05
Plaintiff-Appellant, 590777/09

-against-

DNA Contracting, LLC, et al.,
Defendants,

JMA Consultants, Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Dunnington, Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian J. Carey of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 7, 2011, which granted defendants JMA Consultants, Inc., JMA Consultants and Engineers, P.C., and Joseph Canton's motion for leave to renew and/or reargue, and order, same court and Justice, entered September 15, 2011, which, upon reargument and renewal, granted the JMA defendants' motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, with costs.

Education Law § 7202 is not violated when an unlicensed entity uses a licensed entity to perform the engineering work for

which the law requires a license (*see Charlebois v Weller Assoc.*, 72 NY2d 587, 593 [1988]; *SKR Design Group v Yonehama, Inc.*, 230 AD2d 533 [1997]). Defendants established prima facie that it was disclosed to plaintiff that Canton and JMA Consultants and Engineers, P.C. would provide the engineering services for the project and that the engineering services rendered were controlled by Canton, with unlicensed individuals acting under his supervision (*see* prior appeal at 74 AD3d 411 [2010]; Education Law § 7208[f]). Plaintiff failed to raise an issue of fact in opposition.

Defendants also established that they performed their duties under the agreement and that their performance was not negligent. Plaintiff failed to raise triable issues of fact as to the specific deficiencies it alleges, since many of its expert's assertions of faulty work were speculative and conclusory, and the expert did not address Canton's affidavit testimony about the limitations placed on the work by plaintiff due to cost constraints. Plaintiff failed to submit an affidavit by anyone with personal knowledge to rebut Canton's testimony. The negligence claim also is duplicative of the breach of contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

As to the claims sounding in fraud, whether or not plaintiff had actual knowledge of Eugene Ferrara's unlicensed status or who was to serve as the engineer for the project, its agent Jon Shechter had such knowledge, and his knowledge is imputed to plaintiff (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 97 [2009]).

In view of the dismissal of the causes of action for breach of contract and fraud, the cause of action for a rescission remedy must also be dismissed. In any event, plaintiff has an adequate remedy at law, and rescission would not substantially restore the status quo (*see Rudman v Cowles Communications*, 13 [1972]).

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

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7884 The People of the State of New York, Ind. 3692N/09
Respondent,

-against-

Michael Garcia,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at motion to controvert search warrant; Herbert I. Altman, J.H.O. at *Darden* hearing; Ruth Pickholz, J. at *Mapp*/*Dunaway*/*Huntley* hearing, plea, and sentencing), rendered June 15, 2010, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

Defendant challenges the denial of his motion to suppress evidence, made on the ground that the evidence was the fruit of an unlawful stop. Defendant also challenges the denial of suppression of other evidence obtained from his apartment pursuant to a search warrant. In each instance, we find no basis

for suppression of any evidence.

In a drug-prone location, an officer saw defendant standing on the street, looking up the street with a cell phone in his hand. Eventually, a late model BMW with New Hampshire plates pulled up and defendant entered it. While defendant and the car's female driver were parked, the officer saw defendant and the driver make hand motions that reasonably suggested an exchange of unidentified objects, concealed in closed fists. The driver then tucked into her brassiere the item that defendant had apparently handed her.

Based on his extensive experience in drug arrests, the officer recognized these actions, viewed as a whole, to form a pattern of suspicious activity indicative of a drug transaction (*see People v Jones*, 90 NY2d 835 [1997]; *People v Bonilla*, 81 AD3d 555 [2011], *lv denied* 17 NY3d 792 [2011]; *People v Smith*, 60 AD3d 456 [2009] [concealment of unknown object in sock among factors suggesting drug sale], *lv denied* 12 NY3d 859 [2009]). Accordingly, the police had reasonable suspicion upon which to stop the car in which defendant was a passenger.

The court properly denied defendant's motion to controvert the search warrant. Nothing in the testimony at either the

initial or the reopened *Darden* hearing (*People v Darden*, 34 NY2d 177 [1974]) provided any basis for suppression, or required a further reopening of the hearing (*see People v Adrion*, 82 NY2d 628, 635 [1993]; *People v Bradley*, 181 AD2d 316, 319 [1992], *appeal dismissed*, 81 NY2d 760 [1992]).

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7885 In re Janice M.,
Petitioner-Appellant,

-against-

Terrance J.,
Respondent-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Randall S. Carmel, Syosset, for respondent.

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about June 6, 2011, which dismissed the petition for an order of protection against respondent for failure to make out a prima facie case, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for further proceedings in accordance herewith.

In determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference that may be drawn therefrom. The issue of credibility is irrelevant and should not be considered (*Matter of Mamantov v Mamantov,* 86 AD3d 540, 541 [2011], *lv denied* 17 NY3d 715 [2011]; *Matter of Ramroop v Ramsagar*, 74 AD3d 1208, 1209 [2010]).

Petitioner testified that respondent, her son-in-law, threatened to have someone beat her up, told her that he would "beat [her] ass," and threatened to hit her with a broom. If true, and giving petitioner the benefit of every reasonable inference, she established a prima facie case of the family offense of harassment in the second degree. The court rejected petitioner's testimony based on her admitted use of marijuana. However, consideration of petitioner's credibility was improper on a motion to dismiss for failure to prove a prima facie case.

The court properly dismissed the charge of disorderly conduct since there was no evidence that respondent intended to cause public inconvenience, annoyance or alarm or that his conduct in the private residence recklessly created such a risk (PL 240.20).

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7886 Segundo Once, et al., Index 109720/05
Plaintiffs-Respondents,

–against–

Service Center of New York, et al.,
Defendant,

218 W 72nd St. Realty Corp., et al.,
Defendants-Appellants.

_____

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for appellants.

Lurie, Ilchert, McDonnell & Ryan LLP, New York (Dennis A. Breen of counsel), for respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 19, 2011, which granted plaintiffs' motion to set aside the jury verdict awarding plaintiffs $50,000 and $10,000, respectively, for past and future pain and suffering and finding plaintiff 70% liable, to the extent of directing a new trial unless the parties stipulated to increase the awards for past and future pain and suffering, respectively, to $75,000 and $150,000, and to assess plaintiff's liability at 15%, unanimously modified, on the law, to set aside the apportionment of fault to plaintiff, and to direct a new trial solely as to damages for past and future pain and suffering unless defendants stipulate to

the trial court's reduced award, and to the entry of judgment in accordance therewith, and otherwise affirmed, without costs.

In cases involving a claim pursuant to Labor Law § 241(6), contributory and comparative negligence are viable defenses (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). However, contrary to appellants' contention, no evidence of culpable conduct on the part of plaintiff was shown here. The jury found that the power saw provided by appellants had no guard, in violation of Industrial Code § 23-1.12(c), and that no other adequate devices were available to plaintiff (*see Tounkara v Fernicola*, 80 AD3d 470, 471 [2011]; *Bajor v 75 E. End Owners, Inc.*, 89 AD3d 458 [2011]). There is no evidence that plaintiff misused the saw, which he had been directed to use (*compare Leon v Peppe Realty Corp.*, 190 AD2d 400 [1993]). Thus, upon a search of the record, judgment in favor of plaintiff on the issue of liability is granted (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984]; *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see also Curley v Consolidated Rail Corp.*, 178 AD2d 318 [1991], *affd* 81 NY2d 746 [1992], *cert denied* 508 US 940 [1993]).

The trial court properly found that the jury's award of $50,000 for past pain and suffering and $10,000 for future pain

and suffering over a period of 27 years deviates materially, to the extent indicated, from what is reasonable compensation for plaintiff's amputation of the distal portion of his ring finger (*see* CPLR 5501 [c]; *Ramos v City of New York*, 68 AD3d 632 [2009]; *Biejanov v Guttman*, 34 AD3d 710 [2006]; *Bradshaw v 845 U.N. Ltd. Partnership*, 2 AD3d 191 [2003]; *Fields v City Univ. of N.Y.*, 216 AD2d 87 [1995]). However, we modify to substitute "unless defendants stipulate" for "unless the parties stipulate" because the only parties required to stipulate to the reduced awards were defendants, as the nonmovants (*see Konfidan v FF Taxi, Inc.*, __ AD3d __, 2012 NY Slip Op 3539 [2012]; *O'Connor v Papertsian*, 309 NY 465, 471 [1956]).

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7888-
7888A James Toth, Index 104047/08
Plaintiff-Appellant,

-against-

Lisa Spellman,
Defendant-Respondent.

_____

Law Offices of Joseph J. Mainero, New York (Anthony Hilton of counsel), for appellant.

Law Offices of Fred L. Seeman, New York (Michelle S. Babbitt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 30, 2009, which, inter alia, granted so much of defendant's motion for summary judgment as sought to dismiss the first three causes of action, and order, same court (Saliann Scarpulla, J.), entered July 12, 2011, which, inter alia, granted defendant's motion for summary judgment dismissing the fourth cause of action, unanimously affirmed, without costs.

The documentary evidence supports defendant's assertion that, contrary to expecting compensation for performing renovations to certain properties owned by defendant during the parties' romantic relationship, plaintiff performed the renovations out of love and affection for defendant, and in an

effort to make her happy (*see Morone v Morone*, 50 NY2d 481 [1980]).

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: JUNE 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7889N 481 Realty Corp., Index 650812/10
Plaintiff-Appellant,

-against-

Soho Gallery, Inc. etc., et al.,
Defendants-Respondents.

_____

Krim & Krim, P.C., New York (Jordan Hiller of counsel), for appellant.

Goldberg, Scudieri & Lindenberg, P.C., New York (Ivy Alexander of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 5, 2011, which granted defendants' motion to vacate the court's prior order directing an inquest and assessment of damages upon defendants' default in appearing and answering the complaint, unanimously affirmed, without costs.

Upon defendants' second motion, seeking to vacate their failure to appear at the oral argument of their prior motion to vacate their default in answering the complaint, the court providently exercised its discretion in vacating defendants' underlying default. The court found that defendants sought to vacate their default when it became known to them, that the motion to vacate the default was not untimely and that plaintiff would not be prejudiced by the granting of vacatur. Defendants

also set forth sufficient factual allegations to demonstrate their potentially meritorious defenses (CPLR 5015; *see e.g. D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 406 [2011]). Contrary to plaintiff's claim, the court was entitled to vacate the underlying default upon defendants' second motion (*see IDX Capital, LLC v Phoenix Partners Group LLC*, 72 AD3d 576, 576 [2010] [court is "well within its continuing jurisdiction to reconsider any prior intermediate determination it has made"]).

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

ENTERED: JUNE 7, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6494 &
M-1813 The People of the State of New York, Ind 4024/07
Respondent,

-against-

Yuris Rodriguez, etc.,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 15, 2008, modified, on the law, to vacate the amended judgment and reinstate the original judgment and, upon reinstatement, the original judgment modified, on the law, to vacate the conviction for burglary in the second degree (first count), and otherwise affirmed.

Motion for leave to file a pro se supplemental brief denied.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny
Rolando T. Acosta
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

6494 &
M-1813
Ind. 4024/07

_____x

The People of the State of New York,
Respondent,

-against-

Yuris Rodriguez, etc.,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered July 15, 2008, convicting him, upon his plea of guilty, of burglary in the second degree (first count) and burglary in the second degree as a sexually motivated felony (second count), and sentencing him to a concurrent term of 5 years on each count and 10 years of postrelease supervision, as amended August 1, 2008, convicting him of one count of burglary in the second degree as a sexually motivated felony, and sentencing him to a term of 5 years and 10 years of postrelease supervision.

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

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

FRIEDMAN, J.P.

On this appeal from a conviction based on a guilty plea, defendant raises two legal arguments. His first argument, which has merit, is that it was improper for the court to amend the indictment, after judgment had been rendered, in the absence of both defendant himself and his attorney, and apparently without giving him notice (*see* CPL 200.70[1] [an amendment of the indictment requires "notice to the defendant and opportunity to be heard"]). The second argument is that his conviction on one count of the original indictment should be vacated on the ground that it failed to designate the offense charged (burglary in the second degree as a sexually motivated felony; *see* Penal Law § 140.25[2], § 130.91) in the manner provided by CPL 200.50(4). This argument is unavailing. The relevant count of the indictment, while to some extent inartfully drafted, gave defendant sufficient notice of the charge against him and of the incident on which it was based, and alleged all the elements of the crime, either expressly or by specific reference to a penal statute (*see People v D'Angelo*, 98 NY2d 733, 735 [2002]). Given that any defect in the instrument — such as the misnomer of the offense — was merely technical, not jurisdictional, defendant waived his objection thereto by entering his plea of guilty (*see People v Iannone*, 45 NY2d 589, 600-601 [1978]).

On June 2, 2007, defendant, a doorman at a Manhattan apartment building, entered an apartment in which a woman was sleeping and masturbated in her presence. The woman awoke and recognized defendant as he left the apartment, leading to his arrest and the return of a two-count indictment. The first count (as to which, in its original form, no issue has been raised) charged defendant with "the crime of BURGLARY IN THE SECOND DEGREE, in violation of Penal Law § 140.25(2)."[1] The second count –- which is the main focus of this appeal –- charged him with "the crime of SEXUALLY MOTIVATED FELONY, in violation of Penal Law § 130.91(1)."[2] The second count provides in full as follows:

> "AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of SEXUALLY MOTIVATED FELONY, in violation of Penal Law § 130.91(1), committed as follows:
>
> "The defendant, in the County of New York, on or about June 2, 2007, did commit a specified offense, that being Burglary in the Second Degree as defined in

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[1]Penal Law § 140.25 provides in pertinent part: "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when: . . . 2. The building is a dwelling."

[2]Penal Law § 130.91(1) provides: "A person commits a sexually motivated felony when he or she commits a specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification." Subsection 2 of the statute defines the term "specified offense" to include burglary in the second degree.

> Penal Law § 140.25(2), for the purpose, in whole or substantial part, of his own direct sexual gratification."

On June 12, 2008, defendant pleaded guilty to both counts of the indictment, and on July 15, 2008, the court sentenced him, as promised, to a concurrent term of 5 years' imprisonment on each count, to be followed by 10 years of postrelease supervision (PRS). At no point during the proceedings, through the rendering of judgment, did defendant raise any objection to the second count of the indictment.

On August 1, 2008, in the presence of an assistant district attorney, but in the absence of both defendant and his attorney, the court, on the record, added this case to the calendar. The court then proceeded, apparently at its own instance, to amend the indictment and the commitment sheet by hand to change the first count of the indictment to burglary in the second degree as a sexually motivated felony and to eliminate the second count. The court gave the following explanation for its action:

> "The case is added to today's calendar because Count 2, sexual[ly] motivated felony, is not a separate crime. We have to amend the indictment, and we have to amend the plea and the sentence commitment count [*sic*].
>
> "Count 1 is the count. Count 1 should be burglary in the second degree as [a] sexual[ly] motivated felony under Penal Law [§] 140.25(2) and [130.91(1)]. The plea to Count 1 stands as amended, and sentence is the same as I just indicated but it's only on that one count."

It appears that, after defendant's sentencing, it came to the court's attention that the second count of the indictment technically misnamed the crime charged. As the court belatedly realized, the offense should have been identified as "burglary in the second degree as a sexually motivated felony" rather than simply as "sexually motivated felony." In this regard, CPL 200.50(4) provides that the indictment in a prosecution under Penal Law § 130.91 should designate the offense being charged as "the specified offense, as defined in subsection two of section 130.91 [here, burglary in the second degree] . . . , followed by the phrase 'as a sexually motivated felony[.]'"

There is no question that the court's sua sponte and post-judgment amendment of the indictment, plea and commitment sheet was improper. Under CPL 200.70(1), defendant was entitled to "notice . . . and opportunity to be heard" before any amendment of the indictment. Here, however, the indictment was amended in the absence of both defendant and his counsel, and there is no indication in the record that defendant was given notice of the proceeding. Accordingly, we vacate the amendment, thereby reinstating the conviction on the original indictment for consideration on this appeal.[3]

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[3]Although the point need not be addressed on this appeal, we note also that CPL 200.70(1) expressly authorizes the amendment

With respect to the conviction based on his guilty plea to the original indictment, defendant raises no issue concerning the first count, burglary in the second degree.[4] He argues, however, that the conviction on the second count of the indictment (denominated "sexually motivated felony") should be vacated on the ground that it "fail[s] . . . to charge or state an offense," a defect that cannot be remedied by amendment (CPL 200.70[2][a]). In this regard, defendant points to the indictment's failure to conform to CPL 200.50(4), which, as previously noted, provides that the indictment in a prosecution under Penal Law § 130.91 should designate the charged offense as "the specified offense . . . followed by the phrase 'as a sexually motived felony[.]'" If granted, the relief defendant requests would leave him convicted of only second-degree burglary, not second-degree burglary as a sexually motivated felony, thereby reducing the

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of an indictment "[a]t any time before or during trial," but says nothing about the permissibility of such an amendment after judgment has been rendered.

[4]Defendant's appellate brief expressly disclaims any challenge to the second-degree burglary conviction. Specifically, his brief states: "As noted, the judgment of conviction on the count of burglary in the second degree is not affected by the defect in the second count of the indictment or the court's unauthorized attempt to amend the indictment. Accordingly, the relief requested on this appeal has no effect on the five year determinate sentence imposed on the burglary count or the five year period of [PRS] applicable to that count."

maximum period of PRS to five years (the court imposed ten) and eliminating his designation as a sex offender. This argument is unavailing.

As is evident from his express disclaimer of any challenge to the conviction for second-degree burglary, defendant raises no issue concerning the validity of his plea or the sufficiency of his allocution. His sole argument for disturbing the conviction on the second count of the indictment is that the second count somehow "fail[ed] . . . to charge or state an offense" (CPL 200.70[2][a]), which, if true, would constitute a jurisdictional defect not waived by the guilty plea and not curable by amendment. There is no question, however, that the second count of the indictment is jurisdictionally sufficient. In *People v D'Angelo* (98 NY2d at 735), the Court of Appeals explained:

> "An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime –- for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged (*People v Iannone*, 45 NY2d 589, 600 [1978]). *The incorporation by specific reference to the statute operates without more to constitute allegations of all the elements of the crime* (*People v Ray*, 71 NY2d 849, 850 [1988]; *People v Motley*, 69 NY2d 870, 872 [1987]; *People v Cohen*, 52 NY2d 584, 586 [1981])" (emphasis added).

Here, the second count of the indictment charges that defendant, "in the County of New York, on or about June 2, 2007,

did commit a specified offense, *that being Burglary in the Second Degree as defined in Penal Law § 140.25(2)*, for the purpose, in whole or substantial part, of his own direct sexual gratification" (emphasis added). The reference to Penal Law § 140.25(2) "operates without more to constitute allegations of all the elements of [that] crime" (*D'Angelo*, 98 NY2d at 735). The element of a sexual motive for the commission of the specified offense is expressly alleged. Thus, the count accuses defendant of having committed all the elements of a particular crime, on a particular date, in a particular county. To the extent that defendant might have objected to the count on the ground that it sets forth insufficient factual particulars to give fair notice, he waived any such nonjurisdictional objection by failing to make a timely motion to dismiss on that ground and then waived it again by pleading guilty (*see Iannone*, 45 NY2d at 600-601; *see also People v Motley*, 69 NY2d 870, 871-872 [1987]; *People v Cohen*, 52 NY2d 584, 587 [1981]; *People v Martinez*, 52 AD3d 68, 70 [2008], *lv denied* 11 NY3d 791 [2008]).

Defendant contends that the second count of the indictment should be dismissed because its preamble identifies the charged offense as "the crime of SEXUALLY MOTIVATED FELONY," rather than as a particular specified offense committed "as a sexually motivated felony," in the manner provided by CPL 200.50(4). This

argument has no merit. It is well established that a misnomer in the designation of the crime charged does not render an indictment jurisdictionally defective. Rather, the jurisdictional sufficiency of the indictment is determined by reference to its underlying factual allegations, and the failure to set forth a correct "recital of the name of the crime . . . [is] an irregularity which was waived by the defendant when he pleaded guilty" (*People v Jacoby*, 304 NY 33, 40 [1952], *cert denied* 344 US 864 [1952]; *see also People v Randall*, 9 NY2d 413, 422-423 [1961]; *People v Oliver*, 3 NY2d 684 [1958]; *People ex rel. Williams v La Vallee*, 30 AD2d 1034 [1968]; *People v Shannon*, 127 Misc 2d 1073, 1077-1078 [1985], *affd* 127 AD2d 863 [1987], *lv denied* 69 NY2d 1009 [1987]; *People v Resnick*, 21 NYS2d 483, 485-486 [1940]).

As this Court stated more than 100 years ago:

> "[I]t is of no moment if the *name* of the crime be incorrectly stated in the accusatory clause of the indictment if the specific allegations of fact are sufficient, for the latter in such case control the character of the crimes presented by the indictment. It is the acts charged which constitute the crime" (*People v Miller*, 143 App Div 251, 256 [1911], *affd* 202 NY 618 [1911] [citation omitted]).

Similarly, in a decision issued in the same year as *Miller*, the Second Department stated:

> "[M]ere misnomer in the charging clause would not require the reversal of a conviction for the offense

> actually described. If the indictment were defective so far as the name in the charging clause is concerned, if the facts stated therein constituted a crime under [another] section, this defect was waived by a failure to demur" (*People v Valentine*, 147 App Div 31, 34 [1911], *affd* 205 NY 556 [1912] [citation omitted]).

In view of the foregoing, upon vacating the improper post-judgment amendment of the indictment, there is no reason to disturb the conviction based on defendant's plea of guilty to the second count of the indictment. To reiterate, that count sufficiently charged defendant with second-degree burglary as a sexually motivated felony, and is not affected by any jurisdictional defect. The conviction on the first count of the indictment, however, is for a lesser included offense (second-degree burglary) of the offense charged by the second count. For that reason, the reinstated original judgment must be modified to vacate the conviction on the first count (*see People v Judware*, 75 AD3d 841, 845 [2010], *lv denied* 15 NY3d 853 [2010]).

Finally, we perceive no reason to reduce the period of PRS that was imposed.

Accordingly, the judgment of Supreme Court, New York County (Charles H. Solomon, J.), rendered July 15, 2008, convicting defendant, upon his plea of guilty, of burglary in the second degree (first count) and burglary in the second degree as a sexually motivated felony (second count), and sentencing him to a

concurrent term of 5 years on each count and 10 years of postrelease supervision, as amended August 1, 2008, convicting defendant of one count of burglary in the second degree as a sexually motivated felony, and sentencing him to a term of 5 years and 10 years of postrelease supervision, should be modified, on the law, to vacate the amended judgment and reinstate the original judgment and, upon reinstatement, the original judgment should be modified, on the law, to vacate the conviction for burglary in the second degree (first count), and otherwise affirmed.

M-1813 - *People v Yuris Rodriguez*

Motion for leave to file a pro se supplemental brief denied.

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

ENTERED: JUNE 7, 2012

CLERK