SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 20,2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6965 Jasmine Zheng, et al., Index 400806/11
Plaintiffs-Appellants,

-against-

The City of New York, et al.,
Defendants-Respondents.
- - - - -
Sanctuary for Families, New Destiny Housing Corporation, Center Against Domestic Violence, Safe Horizon, Violence Intervention Program, Inc., New York Asian Women's Center, Good Shepherd Services, Barrier Free Living and Homeless Services United,
Amici Curiae.

The Legal Aid Society, New York (Steven Banks of counsel), and Weil, Gotshal & Manges LLP, New York (Konrad L. Cailteux of counsel), for appellants.

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

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered October 6, 2011, after a

nonjury trial, dismissing the causes of action for specific performance, injunction and deprivation of due process, and declaring that defendants are not contractually obligated to continue making rent subsidy payments under the Advantage Program, affirmed, without costs.

In this action for specific performance, and declaratory and injunctive relief, plaintiffs seek to bar termination of a rent subsidy program run by the NYC Department of Homeless Services even though federal and state funding was withdrawn effective April 2011. Plaintiffs argue that the various documents appertaining to the subsidy program (Certification Letters, Participation Agreements and Lease Riders) contractually obligate the City to continue the subsidies.

We sympathize with plaintiffs and recognize that an adverse outcome could place them at risk of again ending up in the New York City emergency shelters for the homeless and battered women – a system undoubtedly already overcrowded and overburdened. Unfortunately, this cannot constitute a valid reason to reverse the trial court's determination because we are constrained to apply cardinal principles governing the construction of contracts to the course of conduct and communications between the parties. Accordingly, we find that the trial court correctly found that

the Advantage rent subsidy program for the homeless was simply a social services program, and that defendants did not intend to be bound contractually.

Brown Bros. Elec. Contrs. v Beam Constr. Corp. (41 NY2d 397, 399 [1977]) reiterates the rule applicable here that the existence of a binding contract is not dependent on the subjective intent of the parties, but on the objective manifestations of intent. *Brown Bros.* cautions that, in seeking a practical interpretation of the expression of the parties, disproportionate emphasis should not be placed on any single act, phrase or other expression, but on their totality given the attendant circumstances, the situation of the parties and the objectives they were striving to obtain *(see also Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1987]). Although the question of contractual intent is essentially factual in nature, this does not mean that a court is obliged to accept at face value every conclusory assertion of fact regarding intent (*id.* at 318).

Here, plaintiffs and the dissent place undue emphasis on the trappings of contract language such as "guarantee" or "will pay," construing them as legal promises rather than mere assurances; it was reasonable to understand "guarantee" as defendants do, as

intending to allay fears that rents would not be paid in the absence of public assistance, as had often happened under previous subsidy programs. Plaintiffs and the dissent also rely too heavily on the signing procedure, which was meant to accomplish no more than ensure that participants were aware of the terms of the program.

Accordingly, the dissent's analysis of the course of conduct and communications between the parties suffers from one fundamental flaw. Even if the tenant participants and the landlords intended to be contractually bound, there is no enforceable contract in either instance because defendants profess to have understood the documents differently with respect to their basic material nature, i.e., that the City was undertaking a governmental social services obligation that was within its discretion to terminate rather than a contractual obligation; there was no meeting of the minds *(cf. Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 518 [2010] [no contract if parties have differing understanding of a material term]).

Ultimately, as the court properly found at the nonjury trial, all of the surrounding circumstances lead to the ineluctable conclusion that the Advantage program was a social

service program no different from any other, and not a contractual obligation undertaken by government. Absent a contract, there is no merit to plaintiffs' contention that the City is required to grant a second year of rent subsidies if participants meet previously established criteria.

Absent a contractual meeting of the minds, it is unnecessary to address the parties' arguments regarding the existence of consideration for plaintiffs' becoming participants in the Advantage program. In any event, contrary to the dissent's suggestions, it is a fundamental principle of contract law that a promise to perform an existing obligation is not valid consideration (*see Goncalves v Regent Intl. Hotels*, 58 NY2d 206, 220 [1983]; *Nam Tai Elecs., Inc. v UBS PaineWebber, Inc.*, 46 AD3d 486, 487 [2007]). Pursuant to 18 NYCRR 352.35, plaintiffs were obligated to cooperate and accept the housing offered by the Advantage program (*see McCain v Giuliani*, 252 AD2d 461 [1998], *lv dismissed* 93 NY2d 848 [1999]). Thus, their claim of providing consideration by suffering the detriment of leaving shelters and of leasing apartments that cost more than they could afford is also without merit.

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

MOSKOWITZ J. (dissenting)

Plaintiffs are a class of formerly homeless families and individuals for whom the City paid rent through a program called Advantage. The City induced these plaintiffs, many of whom are victims of domestic violence, to leave the relative safety of the shelter system and to enter into leases for apartments they could not afford. The City accomplished this by agreeing to pay all or a portion of plaintiffs' rent for a year with the promise of a second year if they met the eligibility requirements for the Advantage program. However, once plaintiffs took the City up on its offer and moved, the City terminated that funding during the lease term.

The trial court refused to hold the City liable for the remaining rent. The trial court held that the Advantage program was merely a social benefit program that the City had a right to terminate. However, as the trial court recognized, the City can, and often does, implement a social benefit program through enforceable contracts.

Here, the City did implement the Advantage program through enforceable contracts. The City clearly agreed to pay plaintiffs' rent in return for plaintiffs' leaving the shelter system. The City also agreed to pay rent so the landlords would

provide housing for the Advantage program. These bargained for exchanges support the existence of a contract, primarily between the participants and the City, but also between the landlords and the City. Thus, because the City agreed to be bound, and, because plaintiffs, by vacating the domestic violence shelter system, and landlords, by supplying apartments, provided consideration for that agreement, I dissent.

The following facts are undisputed or are from the findings of fact the trial court adopted. In February 2007, the New York City Department of Homeless Services (DHS) proposed the Advantage program, whereby it would provide rent subsidies to shelter residents who meet public assistance requirements and work at least 20 hours per week at minimum wage or above. In May 2010, DHS amended the program to increase participants' work and financial contribution requirements.

When homeless families became eligible to participate in Advantage, the City issued them a Certification Letter setting forth the terms of the program and providing that the program

> "*guarantees* that the subsidy portion of the rent will be paid directly to your landlord for one year. You *may* receive a second year of rental assistance under Advantage if you meet the eligibility criteria for a second year"(emphases added).

Those eligible for Advantage were expected to seek suitable apartments, with the loss of shelter eligibility as a possible sanction if they failed to do so. However, as the trial court found, "[t]he Advantage Tenants were not under a legal duty to rent Advantage apartments they could not afford, and they could not have been sanctioned for refusing an apartment they could not afford."

In addition, Advantage participants were often required to sign a Participant Statement of Understanding, that the City drafted and a DHS representative witnessed and signed. Right above the signature line for DHS, the Participant Statement refers to itself as "this agreement." The Participant Statement also provides that "[u]nder the Advantage program, the City of New York *will* pay a portion of my monthly rent (over and above my family's monthly rent contribution) directly to my [l]andlord (emphasis added)." It further states that if the City finds a participant eligible for a second year, "the City *will* pay a second year of Advantage Rent Payment to [the] Landlord on a monthly basis (emphasis added)."

When an Advantage participant signed a lease with a private landlord, the participant, the landlord and a DHS representative (as witness) signed a rider. In the rider, the participant

authorized the City to pay the Advantage portion directly to the landlord. In addition, the lease riders state that the rent "must" be paid once a month. It is undisputed that the City drafted the lease riders.

On March 17, 2011, apparently because the State of New York cut off funding for the Advantage program, defendants announced that, as of April 1, 2011, the City would not continue to pay rents. This lawsuit followed on March 28, 2011. On June 2, 2011, after Supreme Court denied plaintiffs' motion for a preliminary injunction, we granted plaintiffs' motion for relief pending appeal, and ordered defendants to continue to make payments under the Advantage program. On September 13, 2011, the trial court rendered its decision after trial. The trial court found that the Advantage program was nothing more than a social benefit program that the City had a right to terminate based on lack of funding. On February 2, 2012, this Court dismissed the appeal from the denial of plaintiffs' motion for a preliminary injunction, dissolved the stay that was in place and denied the motion for consolidation with this appeal and for a continued stay (AD3d , 938 NYS2d 29 [2012]). On February 16, 2012, this Court, over my dissent, denied plaintiffs' motion for a stay pending appeal from the judgment (2012 NY Slip Op 64817[u] [2012]).

To demonstrate the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, mutual assent and an intent to be bound (*Silber v New York Life Ins. Co.*, AD3d , 938 NYS2d 36 [1st Dept 2012] ["(c)ourts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract"]). The mutual assent must include agreement on all essential terms (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [2009]). A contract must also have the support of consideration (*Brearton v De Witt*, 252 NY 495 [1930]). The trial court found mutual assent and consideration to be lacking.

I disagree. First, there is a contract between the City and the Advantage participants by virtue of the Certification Letter, the Participant Statements and the riders to the leases through which the City agreed to pay plaintiffs' rent for two years. To manifest mutual assent, there needs to be an offer and acceptance of that offer, along with an arrangement embodying definite essential terms (*Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096 [2004], *lv dismissed* 5 NY3d 842 [2005]). Here, the Certification Letter clearly represented an offer. In it, the City stated that the "Advantage program *guarantees* that the subsidy portion of the rent will be paid. . ." and that

participants would be entitled to a second year provided they met eligibility requirements for the program. An individual plaintiff accepted that offer when it signed the lease rider and the Participant Statement. The language in the Participant Statements, the lease riders and the surrounding circumstances demonstrate the City's intent to bind itself to this arrangement. With respect to the surrounding circumstances, the City and the program participant signed the Participant Statements at the same time they signed the leases and defendants required the final lease signing to be at defendants' offices under defendants' supervision. The trial court also found that "[i]n both internal and external communications, Defendants have referred to themselves as a party to the Advantage leases." More important, the City drafted and signed the Participation Statement and chose to denominate it an "agreement." In the Participant Statement, the City bound itself when it agreed it "will pay" a portion of the monthly rent for one year and a second year on a monthly basis, subject to participant eligibility. These lease riders, that authorized partial payment or rent from the City, provided that the rent "must" be paid and provided for a City representative to sign as a witness, effectuated the City's promise to pay and placed an affirmative obligation on the City to fund the specific Advantage portion the particular lease

addressed. The City's obligations for the second year were dependent upon plaintiff's eligibility to remain in the program and nothing else. It is undisputed that most, if not all, of the participants meet, or have already met, the eligibility requirements.

The use of the word "may" in relation to the second year of rent subsidies does not refer to the City's discretion to permit a second year of funding. Rather, read in context with phrase "if you meet the eligibility criteria for the second year" the word "may" clearly refers to the Advantage participants meeting the criteria for the program, such as the income ceiling. As the trial court found, nowhere in the Participant Statement or the lease riders did defendants condition the City's obligation to pay on the City's fiscal condition or on state or federal funding ("Nothing in the Advantage program documents or public informational materials authorizes Defendants to terminate Advantage payments in the middle of an Advantage lease term because of lack of funding"). Thus, the Participant Statement and the leases contained all the essential terms necessary to carry out the agreement, namely that the City would pay a sum certain directly to the landlord once per month and the participants would move out of the shelter and into an apartment.

Contrary to the decision of the trial court, it is clear

plaintiffs provided consideration to support the contract. The City admits that it has a legal obligation to provide shelter to the homeless (*see Boston v City of New York*, Sup Ct, NY County, Dec. 12, 2008, Index No 402295/08 [homeless families]; *Callhan v Carey*, Sup Ct, NY County, Index No 42582/79; *Eldredge v Koch*, Sup Ct, NY County, Index No 41494/82 [homeless individuals]), and the trial court observed that "[h]omeless families and individuals who left [d]efendants' shelters to move into private, permanent housing as Advantage [t]enants relieved [d]efendants of their obligation to provide them with housing in the shelter system under the *Boston* final judgment and the rulings and orders in *Callahan* and *Eldredge*."

Moreover, the City admits that it is cheaper to fund Advantage than to house plaintiffs in the shelters. In a letter to Elizabeth Berlin, the Executive Deputy Commissioner for the New York State Office of Temporary and Disability Assistance, protesting the cuts to the Advantage program, Robert Doar, the Commissioner of the Human Resources Administration for the City of New York and Seth Diamond, the Commissioner for the City's Department of Homeless Services, stated that terminating Advantage "will cost the City and State more money than is currently spent on the subsidy. Specifically, there will be a substantial increase in shelter costs, which we estimate to be

$133 million." Further, as the court noted, "[W]hen Advantage recipients left shelters and entered into private apartments, the requirement to provide services pursuant to such State regulation ceased."

A cost savings of $133 million to carry out an existing legal obligation is certainly sufficient consideration (*see e.g. Elfenbein v Luckenbach Terms., Inc*., 166 A 91, 93, 111 NJL 67, 72 [1933] [consideration adequate where there "would have been no saving had defendant not acted"]). That the State may or may not pick up much of this $133 million after the fact is of no moment. Any cost savings to the City may serve as consideration (*see Mencher v Weiss*, 306 NY 1, 8 [1953] ["the law does not weigh the quantum of consideration . . . The slightest consideration is sufficient to support the most onerous obligation"] [internal quotation marks omitted]).

The City argues that plaintiffs had a legal obligation to seek housing anyway and that a preexisting legal obligation cannot serve as consideration. The majority buys into this argument. However, this argument is a red herring. As the trial court found, plaintiffs had no preexisting obligation to move into apartments they could not afford on their own. Nor did plaintiffs have an obligation to place themselves in a worse situation than they were before. Rather, as the trial court

found, “All Advantage Tenants, even if [d]efendants promised to cover their entire rent payment, had to enter into leases with their landlords and thereby incur a new legal obligation” and “[w]hen the Advantage Tenants moved out of shelter to enter Advantage leases, they legally bound themselves to leases they could not afford on their own.” It is black letter law that, a new, as opposed to an existing, legal obligation can serve as consideration (*see Weiss v Weiss*, 266 App Div 795, 795 [1943] [“[p]erformance by a promisee of an act which he is not obligated to perform, or the surrender by him of a privilege which he has the legal right to assert, is sufficient consideration for a promise, since it is a legal detriment, irrespective of whether it is an actual detriment or loss to him”]).

Moreover, there was an agreement between the City and the landlords to which plaintiffs were third-party beneficiaries.[1] Unlike the arrangement between the City and the participants, the trial court did not rule that the contract between the City and the landlords was invalid due to lack of consideration. Rather, the trial court found no mutuality of assent between the landlords and the City. This was error. The overwhelming weight

[1] The City does not dispute that, if it entered into contracts with the landlords, plaintiffs would be third-party beneficiaries to those contracts.

of the evidence supported a finding that the City and the landlords provided their mutual assent to contract through the process of offer and acceptance. Viewed objectively as we must (*see TAJ Intl. Corp. v Bashian & Sons*, 251 AD2d 98, 100 [1998]), the words that the City chose to use in the Advantage program documents and materials: "guarantees," "shall pay" "will pay" "will issue" "assures" and "commitment" demonstrate an intent to bind oneself contractually.

First, the Certification Letters suggested that participants show the letter to landlords during an apartment search. These letters stated that the City "*guarantees* that the subsidy portion of the rent will be paid directly to your landlord . . ." (emphasis added). The Participant Statements, that participants and the City signed at the same time as the leases, contained the assurance that the City "will pay the Advantage Rent Payment directly to [a participant's] Landlord on a monthly basis." More important, the Landlords' Statements of Understanding, that the City drafted, state that "[u]nder the Advantage Program, the City . . . will pay directly to me, the Landlord, monthly rent . . . for a period of one year, on behalf of the eligible Advantage client." The DHS Advantage Rental Assistance Program Brochure states "Work Advantage . . . assures landlords of monthly rent payments with no payment disruptions." Finally, the lease riders

themselves state “The City shall pay the Program Tenant’s rent directly to the [l]andlord.” A clearer indication of assent to guarantee rent payment would be hard to imagine.

The trial court was also incorrect in finding that the landlords did not manifest assent. The terms in the documents that the City required the landlords to sign unequivocably demonstrate the landlord’s intent to bind themselves contractually. For example, in the Landlord Statement of Understanding, the landlords stated, “I understand that if the Program tenant leaves the [a]partment due to an eviction or move, I, the [l]andlord, will return any pre-paid Advantage Rent Payments to the City, or, if the City elects this option, allow another Advantage client to reside in the [a]partment for the remainder of the [l]ease term.” Thus, in exchange for guaranteed rental payments, the landlords actually ceded control over who could reside in their apartments. Also, in the Landlord Statements, the landlords demonstrated their commitment to rent for a second year: “I understand that the Program Tenant is automatically entitled to a self-executing renewal of the Lease for a second year at the same rent provided for in this Rider, provided that (a) Program Tenant has been found eligible by the City for a second year of the Advantage Program. . .” Like many contracts, the lease riders contain a set-off provision should

the landlords default on any of their responsibilities: “The Landlord acknowledges and agrees that in the event that the Landlord is in default of any obligation to the City of New York, DHS may withhold for the purpose of set-off, all or a portion . . . of the Rent payment. . .” In the lease riders, the landlords also agreed that they “shall not demand, request, or receive any payments or other consideration from Program Tenant . . . beyond that authorized in the [l]ease and this Rider.” Thus, there was an agreement between the City and the landlords whereby the landlords agreed to forego certain rights in exchange for guaranteed rental payments for one to two years. The commitments the landlords made certainly demonstrate intent to be contractually bound. This exchange of promises is a textbook example of mutual assent.

Accordingly, there was clearly a contract between the Advantage participants and the City. There was also a contract between the City and the landlords. Taking an objective view of the evidence, one can only conclude that the City assented to this arrangement. As a matter of law, there was consideration to support these contracts. Now, because the City breached its contractual obligations, the landlords face the expense of eviction proceedings in court and nonreceipt of rent. Plaintiffs are now potentially liable for the balance of leases they cannot

afford. They are also in an untenable situation whereby they face eviction and homelessness. Many Advantage participants are victims of domestic violence. They will not be eligible to return to the relative safety of the domestic violence shelter system unless they suffer new incidents of domestic violence. If they do suffer further domestic violence, the domestic violence shelters may not have room as they are always at capacity. Plaintiffs will likely go into the homeless shelter system where they will not receive the protections they need to avoid their abusers. Or, they may be forced to return to the dangerous homes they sought to escape in the first place. Some may simply take to the streets.

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

ENTERED: MARCH 20, 2012

CLERK

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

6162 The People of the State of New York, Respondent, Ind. 4570/09

-against-

George Moore, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered June 18, 2010, convicting defendant of criminal possession of a controlled substance in the fifth degree and tampering with physical evidence, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 3 years and 2 to 4 years, unanimously affirmed.

Defendant argues that the court erred in denying his motion to suppress narcotics and money that were recovered during what he claims was an unlawful seizure. At the suppression hearing, the arresting police sergeant testified to the following: On June 23, 2009, the sergeant was in plain clothes supervising an anti-crime patrol in an unmarked police car with two other

officers. At 11:45 pm, he received radio notification that an anonymous caller had reported a man with a firearm on Seventh Avenue and 134th Street. Several blocks from that location, the sergeant saw defendant, who matched the description provided by the caller. After the police car pulled up alongside defendant and slowed "to a crawl," the sergeant rolled down the window and yelled, "Stop! Police."

The sergeant testified that defendant looked at him, and immediately turned and ran. In response, the sergeant exited the car and reached for his holstered firearm. Running about 10 feet behind defendant, the sergeant saw him "reach[] for something" near his waist and then throw an object that resembled a crumpled napkin towards the curb. Defendant continued running for several yards before he stopped and was apprehended.

The object that defendant threw away was recovered and determined to be "twists" of crack cocaine. Upon a subsequent search of defendant, the police found more crack cocaine and a large amount of cash in his pants pocket. After the hearing court denied the defendant's motion to suppress this evidence, he was convicted after a jury trial of criminal possession of a controlled substance and tampering with physical evidence.

The only issue raised by this appeal is whether the hearing court's finding that the sergeant did not draw his gun until

after defendant ran from the police was supported by the sergeant's testimony at the hearing. Defendant claims that the testimony indicates that the sergeant was drawing his gun as he was calling to defendant to stop and thus that the sergeant conducted an unlawful level III seizure. Defendant argues that he threw the narcotics into the street in response to the sergeant's illegal conduct, and that the evidence should therefore have been suppressed and the indictment dismissed.

We find that the record sufficiently supports the hearing court's determination that when the sergeant called out to defendant to "stop," his gun was not yet drawn. Thus, the hearing court properly found that the sergeant's encounter with defendant began as a level II stop, did not become a level III seizure until defendant fled so that there was no basis for suppression.

A level II stop, based on "founded suspicion that criminal activity is afoot," is a "common-law right of inquiry" where a police officer may ask "pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation," but which stops short of a forcible stop and seizure (*People v Hollman*, 79 NY2d 181, 185 [1992]; *see also People v DeBour*, 40 NY2d 210 [1976]). A level III seizure, based

on “reasonable suspicion that a particular person has committed, is committing or is about to commit” a crime, “requires either physical force, or, if there is no physical force, a submission to the assertion of authority” (*People v Bora*, 83 NY2d 531, 534 [1994]). Although there is no “bright-line test” to distinguish a level II inquiry from a level III seizure, an officer’s command to “stop,” even when repeated, generally does not constitute a seizure where the officer is still in a police car and has not drawn his gun (*People v Gould*, 228 AD2d 280 [1996], *lv denied* 89 NY2d 864 [1996]). However, an officer’s command to “stop” while his gun is drawn constitutes a level III seizure (*see People v Moore*, 6 NY3d 496, 499 [2006]; *People v Hampton*, 200 AD2d 466, 469-470 [1994], *appeal dismissed* 83 NY2d 998 [1994]).

In this case, defendant does not dispute that the anonymous tip justified a level II inquiry and that a level III seizure was justified once defendant began to run in response to the sergeant’s command to stop (*see People v Moore*, 6 NY3d at 500-501 [an anonymous tip, together with suspicious conduct like flight justifies a level III stop and frisk]). However, defendant contends that, even before he fled, the sergeant was conducting an unlawful level III seizure because he was drawing his gun as he called on defendant to stop. Defendant points out that, on direct examination during the hearing, the sergeant did not

mention drawing his gun, but on cross-examination he testified that he may have drawn his gun as he was exiting the car. Defendant argues that the "only fair inference is that [the sergeant] was drawing his gun as he issued his forceful command to . . . stop."

However, defendant's interpretation of the record is untenable. During the hearing, the sergeant testified that when he directed defendant to "stop," he had his hand on the door handle "ready to jump out or stay in the car." The sergeant further testified as follows:

> "Q. At what point did you draw your gun?
>
> "A. When the defendant started run [sic] away from me.
>
> "Q. As you exited the car, did you have your hand on your gun holding it?
>
> "A. Well, I am right handed. I would open the door with my right land [*sic*], and when I exited the car it was almost - like I said it all kind of happened at the same time. I would have reached for my gun, which would have been on the right side, and I had it out. I took it out at that point.
>
> "Q. So it all happen [*sic*] pretty quickly after you exited the vehicle?
>
> "A. Well, he - yeah, it was all pretty much simultaneous when he started running, and when I exited the vehicle. It was within a split second of each other."

Contrary to defendant's argument, the sergeant did not testify that he drew his gun as he was exiting the car. As the sergeant

explained, because he is right-handed, he could not have drawn his weapon until *after* he exited the car and let go of the door handle. Nothing in this testimony indicates that the sergeant drew his gun before defendant started to run. Thus, the sequence of events described by the sergeant supports the hearing court's finding that defendant's "flight commenced before [the sergeant] drew his pistol."

The credibility findings of a hearing court are accorded great deference and will not be disturbed unless a police officer's testimony is "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Rosario*, 275 AD2d 224, 225 [2000], *lv denied* 95 NY2d 938 [2000] [internal quotation marks omitted]; *see also People v Morales*, 210 AD2d 173, 173 [1994]). Because there is no indication that the sergeant's testimony about when he drew his gun was in any way incredible, we affirm.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet Daniels, JJ.

6316 Ernesto Hernandez, Ind. 102544/10
Plaintiff-Respondent,

-against-

Askia Muhammad Abdul-Salaam,
Defendant,

Zoilo Sanchez,
Defendant-Appellant.

Law Offices of Nancy L. Isserlis, Long Island City (Lawrence R. Miles of counsel), for appellant.

Melinda Kirsch, New York, for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered December 29, 2010, which denied defendant Zoilo Sanchez's motion to dismiss for lack of personal jurisdiction, and granted plaintiff's cross motion for leave to extend the time for serving the summons and complaint, unanimously affirmed, without costs.

Plaintiff demonstrated that the interest of justice would be served by extending the time for service of the summons and complaint upon these defendants (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). The statute of limitations had expired, and granting plaintiff the opportunity to pursue his action is consistent with our strong interest in

deciding cases on the merits where possible (*see Henneberry v Borstein*, AD3d 2012 NY Slip Op 00235 [2012]). Moreover, plaintiff's efforts to serve defendants were reasonably diligent (see *Stryker v Stelmak*, 69 AD3d 454 [2010]). Finally, defendants have not demonstrated any prejudice (see *Griffin v Our Lady of Mercy Med. Ctr.*, 276 AD2d 391 [2000]).

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6733 In re Jessica L., and Another,

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

Errol M.,
Respondent-Appellant,

Diane L.,
Respondent,

New York City Administration
for Children's Service,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for respondent.

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

Order of fact-finding and disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about May 22, 2009, which, inter alia, found that respondent father neglected the subject children, unanimously reversed, on the law and the facts, without costs, the finding of neglect against the father vacated, and the petition dismissed as against him.

The finding of neglect is not supported by a preponderance of the evidence. The record shows that the two children, who at the time of the proceeding were 16 years old and 9 years old,

lived with their mother in the home of the mother's maternal aunt. They regularly attended school, never saw their mother using drugs and never complained of dangerous behavior by their mother. The father was actively involved in their lives, visiting with them every week. While the father knew of the mother's past drug use, he had no knowledge that she was currently using drugs, but only a suspicion based on his observation that she was not working and slept a lot during the day. The father eventually sought the intervention of ACS by making an anonymous phone call alleging that the children suffered from a lack of medical care, ostensibly because the younger child had a rash and had not seen a doctor. Upon the case worker's investigation, it was determined that the mother was appropriately treating the rash with cream. However, after interviewing the 16 year old, who stated that she thought her mother might be using drugs, the agency referred the mother for a drug test. Significantly, respondent called the caseworker to express his concern that the mother had taken the 16 year old out of school to accompany the mother to the drug test. Respondent suspected that the mother might be using the daughter for a clean urine sample. The mother tested positive for cocaine.

This is not an instance where the parent took no steps to

protect the children and elected to turn a blind eye (*compare Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415 [2011], *lv denied* 16 NY3d 710 [2011]; *Matter of Albert G., Jr. [Allen G., Sr.]* 67 AD3d 608 [2009]). As noted, it was the father's anonymous phone call that alerted ACS to a problem and that led to its investigation. While the father could have acted sooner to involve ACS based upon his mere suspicion that the mother was using drugs, "the statutory test is *minimum* degree of care -- not maximum, not best, not ideal" (*Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004] [internal quotation marks omitted]). The Family Court's finding of neglect under these circumstances placed the father in a "Catch-22" situation -- once he had failed to act promptly based upon his suspicion, he was faced with the dilemma of involving ACS and risk subjecting himself to a neglect proceeding for not having contacted ACS sooner, or not involving ACS to the detriment of his children. Respondent's actions here did not rise to the level of neglect.

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

ENTERED: MARCH 20, 2012

CLERK

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

7114 The People of the State of New York, Ind. 4460C/05
Respondent,

-against-

Kevin Davis,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Tomas R. Villecco of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered March 12, 2008, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant was properly sentenced as a persistent violent felony offender. There was no violation of the requirement of sequentiality of convictions (*see* Penal Law § 70.04[1][b][ii]; *People v Morse*, 62 NY2d 205 [1984], *appeal dismissed sub nom. Vega v New York*, 469 US 1186 [1985]).

In 1983, defendant was convicted of the violent felony of criminal possession of a weapon in the third degree and sentenced to probation. In 1985, he was convicted of the violent felony of

rape in the first degree and sentenced, as a second violent felony offender, to a term of 12½ to 25 years. As the 1985 rape conviction constituted a violation of the probation imposed on the 1983 conviction, defendant was resentenced on the 1983 conviction to a concurrent term of 2⅓ to 7 years. On the present conviction of attempted rape in the first degree, defendant was sentenced as a persistent violent felony offender pursuant to Penal Law § 70.08, based on his two prior violent felony convictions.

There is nothing in the Penal Law to indicate that a resentencing necessarily resets the controlling sentencing date for purposes of sequentiality. However, the relevant statutes have been interpreted to mean that the invalidation of a judgment may affect sequentiality (*see People v Bell*, 73 NY2d 153 [1989]). Here, defendant concedes that he received a valid sentence of probation in 1983. The resentencing based on revocation of that probation did nothing to invalidate the original sentence (*see People v Mack*, 301 AD2d 863 [2003], *lv denied* 100 NY2d 540 [2003]). Accordingly, "the revocation of probation on the prior...offense may not be 'employed...to leapfrog [the] sentence

forward so as to vitiate its utility as a sentencing predicate'" (*People v Newton*, __AD2d__, 2012 NY Slip Op 00551 [2012] [quoting *People v Acevedo*, 17 NY3d 297, 302 [2011]).

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

ENTERED: MARCH 20, 2012

CLERK

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

7115-
7115A Gladis Anderson, Index 114690/07
Plaintiff-Respondent,

-against-

Ariel Services, Inc., et al.,
Defendants-Appellants.

Leahey & Johnson P.C., New York (James P. Tenney of counsel), for appellants.

Dale Lionel Smith, New York, for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered July 19, 2010, which denied defendants' motion to dismiss the complaint and/or to preclude plaintiff from submitting evidence at trial for failure to comply with discovery orders, unanimously affirmed, without costs. Order, same court and Justice, entered December 28, 2010, which, insofar as appealed from, denied defendants' motion to strike the complaint, to strike plaintiff's third verified bill of particulars and/or to preclude plaintiff from submitting evidence at trial, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in denying defendants' motions to the extent that they

sought dismissal and/or preclusion (*see* CPLR 3126; *see also Gross v Edmer Sanitary Supply Co.*, 201 AD2d 390, 391 [1994]). Preclusion is not warranted since the record reflects that defendants themselves did not comply timely with the first preclusion order (*see e.g. DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [2011]). Moreover, plaintiff proffered a reasonable excuse for the delay, including defendants' consent thereto, and the verified complaint, which alleged that plaintiff was injured when she was struck by defendants' vehicle while crossing the street in a crosswalk, with the right of way, evidenced the existence of a meritorious claim (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

Plaintiff's third verified bill of particulars, which, inter alia, alleges that she had a third surgery, to remove hardware from her left tibia, the insertion of which hardware had been disclosed in an earlier bill of particulars, was a supplemental bill of particulars which concerned the "continuing consequences" of her previously identified injury, and thus, did not require

prior leave of the court (*Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 798, 800 [2008]; *see* CPLR 3043[b]). Since discovery relating to the third surgery had not previously been ordered, the court's direction of related disclosure, rather than sanctions, was appropriate.

M-876 *Anderson v Ariel Services, Inc., et al.*

Motion to take judicial notice denied.

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

ENTERED: MARCH 20, 2012

CLERK

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

7116 In re David G.,
Petitioner-Appellant,

-against-

Maribel G.,
Respondent-Respondent.

Steven N. Feinman, White Plains, for appellant.

Elisa Barnes, New York, for respondent.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about July 22, 2010, which dismissed petitioner's paternity petition with prejudice, unanimously affirmed, without costs.

The court properly found that it was in the child's best interests to equitably estop petitioner from claiming paternity (Family Court Act § 532[a]). The record shows that petitioner had waited eight years before commencing the proceeding, and failed to communicate with the child or provide financial support. In addition, another man was listed on the child's birth certificate and the child believed that the man was her

father (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 327 [2006]; *Matter of Willie W. v Magdalena D.*, 78 AD3d 958, 959 [2010]). Petitioner failed to demonstrate that it would nevertheless be in the child's best interests to order a DNA test (*Matter of Jason E. v Tania G.*, 69 AD3d 518, 519 [2010]). A hearing was not required, as the court had sufficient information to make a determination regarding the child's best interests (*see Matter of Glenn T. v Donna U.*, 226 AD2d 803 [1996]; *cf. Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 15 [1993]). Nor was a formal written motion to dismiss the petition required, as the court may dismiss the petition on its own motion or the motion of any party (*see* Family Court Act § 532[a]).

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

ENTERED: MARCH 20, 2012

CLERK

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

7117 In re Robert Rampolla, Index 110107/10
Petitioner-Appellant,

-against-

Banking Department of the State of New York, et al.,
Respondents-Respondents.

Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale (Richard F. Harrison of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 25, 2011, denying the petition to annul respondent Banking Department's determination, dated March 23, 2010, which denied petitioner's application for a mortgage loan origination license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination denying petitioner's application for a mortgage loan origination license was not arbitrary and capricious. Petitioner contends that in determining his application respondent should have considered the factors set forth in Correction Law § 753, which pertains to the application for a license or employment of a person previously convicted of a

criminal offense (*see* Correction Law § 752). However, Banking Law § 599-e provides, "Notwithstanding any other law, the superintendent shall not issue a mortgage loan origination license" to any applicant who has been convicted of a felony that "involved an act of fraud [or] dishonesty," except that "the superintendent may, in his or her discretion, disregard a conviction where the felon has been pardoned" (subd [1][b][ii]). Correction Law § 753, "a prior general statute," must "yield[] to [Banking Law § 599-e,] a later specific or special statute" (*see Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1601 [2011], *lv dismissed in part, denied in part*, 17 NY3d 838 [2011] [internal quotation marks omitted]). While petitioner was granted a Certificate of Relief from Disabilities automatically imposed by law by reason of his felony conviction, pursuant to Correction Law § 701, he has not been pardoned. Therefore, the superintendent was required to deny his application.

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

ENTERED: MARCH 20, 2012

CLERK

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

7118-
7119-
7120 Eyal Zabari, etc., Index 601352/08
Plaintiff-Respondent,

-against-

Doron Zabari, et al.,
Defendants-Appellants.

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

Robert E. Levy, New York, for respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered August 3, 2010, to the extent appealed from, declaring that plaintiff is a 50% owner of defendants Zed USA Inc. and 506 Broadway, Inc., unanimously modified, on the law and the facts, to vacate the declaration that plaintiff is a 50% owner of 506 Broadway, and otherwise affirmed, without costs. Order, same court and Justice, entered December 14, 2010, which denied defendants' motion for renewal, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 19, 2010, unanimously dismissed, without costs, as abandoned.

Plaintiff established prima facie that he is a 50% owner of

defendant Zed USA Inc., through tax returns and an affidavit by defendant Doron Zabari in an unrelated matter (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). In opposition, defendants did not address the tax returns or the affidavit substantively and therefore failed to raise any triable issues of fact (*see id.* at 326-327). Plaintiff did not, however, meet his prima facie burden as to defendant 506 Broadway, Inc., since the tax return he submitted is unsigned, and the shareholders' statement he submitted has a line drawn through it, as if to negate its relevancy.

We decline to reverse the motion Court's denial of defendants' motion for renewal in the interest of justice (*see Mejia v Nanni*, 307 AD2d 870, 871 [2003]). In view of our disposition of the issue of plaintiff's ownership of 506 Broadway, a finder of fact will have the opportunity to hear defendants' evidence on that issue, and there is no risk of defendants' having to bear the burden of the mistake, alleged to

have been that of prior counsel, of not submitting the evidence on the prior motion.

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 20, 2012

CLERK

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

7121 Angelina Melendez, an Infant by Her Mother and Natural Guardian, et al., Plaintiffs-Respondents, Index 350748/08

-against-

Maria Dorville, et al., Defendants-Appellants.

Ecket Seamans Cherin & Mellott, LLC, White Plains (Mark E. Thabet of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Patricia A. Williams, J.), entered February 23, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to come forward with evidence to show that none of the injuries alleged in the bill of particulars could have been proximately caused or exacerbated by the infant plaintiff's elevated blood lead levels (*see Bygrave v New York City Hous. Auth.*, 65 AD3d 842, 846-847 [2009]). In any event, plaintiffs raised triable issues of fact as to the cause and extent of the infant's injuries. Contrary to defendants' contention, the affidavits by plaintiffs' experts were not

speculative. The experts' conclusions were soundly based upon their personal examinations, administration of objective tests, and explicit consideration of the infant's records (*see Vazquez v New York City Hous. Auth.*, 79 AD3d 623 [2010]; *Zapata v Sutton*, 84 AD3d 521 [2011]).

The motion court made no determination of the credibility of defendants' expert. It simply considered the bases for his opinion, and determined that the experts' conflicting opinions presented triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [2010]). Moreover, as the nonmovants, plaintiffs are entitled to all the reasonable inferences to be drawn in their favor (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 86 [2009]).

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

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

ENTERED: MARCH 20, 2012

CLERK

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

7122-
7122A In re Jafar B.,

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

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

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

Orders of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 4, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, revoked appellant's probation, and placed him with the Office of Child and Family Services for a period of 18 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's discretion, and it constituted the least restrictive alternative consistent with appellant's needs and best interests and the

community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The disposition was justified by the seriousness of the current and prior offenses and appellant's failure to benefit from probation. We do not find the length of the placement excessive.

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

ENTERED: MARCH 20, 2012

CLERK

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

7123 CECO Studios, L.L.C., Index 600744/10
Plaintiff-Respondent,

-against-

C & D West 14th Street LLC,
Defendant-Appellant.

Proskauer Rose LLP, New York (Steven M. Kayman of counsel), for appellant.

Pryor Cashman LLP, New York (Perry M. Amsellem of counsel), for respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered October 8, 2010, which, insofar as appealed from, denied defendant's motion to dismiss the first and third causes of action pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, with costs and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff landlord alleges that defendant tenant breached the parties' lease by failing to use commercially reasonable efforts to obtain certain governmental approvals that were necessary to use plaintiff's building in a particular manner. The motion court found, and plaintiff does not dispute, that this failure was not an Event of Default, as defined in the lease; therefore, neither article 3(b)(2) nor 19(b)(3) applies, and the

only allegation of damages in the first cause of action is, "Tenant's breach of the Lease has caused Landlord monetary damages in an amount to be determined at trial, but not less than $9 million, plus interest." This is insufficient (*see e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]; *Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632, 633 [2011]).

Plaintiff, inter alia, did not try to enforce defendant's obligation to use commercially reasonable efforts to obtain the governmental approvals; instead, it terminated the lease and brought this lawsuit seeking damages. Under these circumstances, and given that attorneys' fees provisions should be strictly construed (*see e.g. Gottlieb v Such*, 293 AD2d 267, 268 [2002], *lv denied* 98 NY2d 606 [2002]), we do not find that article 35(r) of the lease – on which the third cause of action relied – applies to the case at bar.

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

ENTERED: MARCH 20, 2012

CLERK

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

7125-
7126-
7127 In re Margaret Rhee-Karn,
Petitioner-Appellant,

-against-

Kenneth P. Karn,
Respondent-Respondent.

Law Offices of David Scott, New York (Paul Biedka of counsel), for appellant.

Cheryl S. Solomon, Brooklyn, for respondent.

Rosemary Rivieccio, New York, attorney for the child.

Appeal from order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about August 19, 2011, which, inter alia, temporarily modified a shared parental access schedule, reducing petitioner mother's time with the child pending completion of a full hearing, unanimously dismissed, without costs, as taken from a nonappealable paper.

Although the Family Court was unable to complete the hearing concerning access to the child due to scheduling constraints, upon issuing the order, the Referee emphasized that it was only temporary and indicated that no final determination of custody or visitation would be made until the full hearing had been

completed. Accordingly, the order is not appealable as of right (*see* CPLR 5701[a][1], [2]), and neither the Family Court nor this Court has granted petitioner permission to appeal (*see* CPLR 5701[c]; *Sholes v Meagher*, 100 NY2d 333 [2003]).

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

ENTERED: MARCH 20, 2012

CLERK

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

7128 In re Murphy & O'Connell, Petitioner, TAT (E)06-18(UB)

-against-

Tax Appeals Tribunal, et al., Respondents.

Patrick J. Murphy, New York, for petitioner.

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

Decision of respondent New York City Tax Appeals Tribunal, dated July 26, 2011, in relevant part, affirming an administrative law judge's (ALJ) determination to sustain a notice of determination asserting a deficiency for petitioner's New York City unincorporated business tax return for calendar year 2001, unanimously confirmed, the petition denied, and the proceeding pursuant to CPLR artical 78, commenced in this court pursuant to CPLR 506 (b)(4), dismissed, without costs.

The Tribunal's decision — that, pursuant to Administrative Code of City of NY § 11-507(3), the contribution that petitioner made to a defined benefit plan for a partner is not deductible — was not arbitrary and capricious or contrary to law (*see Matter of Proskauer Rose, LLP v Tax Appeals Trib. of City of N.Y.*, 57

AD3d 287, 288 [2008]; *Matter of Horowitz v New York City Tax Appeals Trib.*, 41 AD3d 101, 102 [2007], *lv denied* 10 NY3d 710 [2008]).

Respondent Commissioner of Finance of the City of New York is not a state department, board, bureau, officer, authority, or commission; therefore, he is not subject to article IV (§ 8) of the NY Constitution (*see Matter of Smalls v White Plains Hous. Auth.*, 34 Misc 2d 949, 951 [1962]). Further, respondents were not required to promulgate a rule pursuant to the City Administrative Procedure Act (New York City Charter § 1041 *et seq.*); they could, instead, develop guidelines in the course of adjudicating individual cases (*see Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 109 AD2d 140, 148 [1985, Levine, J., dissenting in part], *revd* 66 NY2d 948 [1985]).

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

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

ENTERED: MARCH 20, 2012

CLERK

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

7130 Leon Kucherovsky, Esq., Index 100488/08
Plaintiff,

-against-

Excel Medical & Diagnostic, P.C., et al.,
Defendants,

Prasad Chalasani, M.D.,
Defendant-Appellant,

Moriah United Corporation,
Intervenor-Respondent.

Prasad Chalasani, appellant pro se.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about September 16, 2010, which denied pro se defendant Prasad Chalasani's motion to reject the decision and order of the Special Referee authorized to hear and determine the amount of certain escrowed funds for the period October 15, 2009 to May 1, 2010, and the proper distribution of those funds based on the court's prior order holding that the distribution was governed by the November 6, 2006 agreement (the November 6 agreement) between the parties, unanimously affirmed, without costs.

The reference in this action was clearly one to hear and determine (*see* CPLR 4301) rather than to hear and report (*see* CPLR 4201). Consequently, the referee possessed "all the powers of a court in performing a like function" (CPLR 4301), and his decision "shall stand as the decision of a court" (CPLR 4319). Since the actions of referees when they are assigned to determine an issue are tantamount to those of any sitting Supreme Court Justice, the Supreme Court may only review whether the referee exceeded the scope of the issues delineated in the order of reference (*see e.g. Cohen v Akabas & Cohen*, 79 AD3d 460, 461 [2010]).

To the extent Chalasani appeals from the court's September 16, 2010 order, the order should be affirmed. The Special Referee did not exceed the scope of his authority as delineated in the order of reference when he determined the amount in escrow held by plaintiff for the period between October 15, 2009 to May 1, 2010, and the proper distribution of these amounts based on the court's March 3, 2010 decision and order which holds that the distribution is governed by the parties' November 6, 2006 agreement.

We note that the Special Referee correctly determined that the court's finding that the distribution of funds in this case

was governed by the November 6 agreement was res judicata. However, Chalasani does not actually dispute the Special Referee's calculations of the escrow amount for the relevant time period; instead, he assigns error to the fact that Universal is receiving any disbursements at all. The "computational errors" that Chalasani is really challenging formed the basis of the court's March 3, 2010 order, from which Chalasani never appealed.

In any event, Chalasani's argument that fund disbursement is now governed by a September 28, 2009 agreement, by which he and Merchant terminated their relationship with Universal, and agreed to new distribution terms, is unavailing, as that agreement was not executed by Universal. In addition, while defendant asserts that Universal has been overpaid, the March 3, 2010 order specifically directed that Chalasani and Merchant be paid an additional amount of $19,858.03 each to compensate them for the "shortfall" that occurred when Universal was paid $72,211 and failed to make any disbursements from those funds.

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

ENTERED: MARCH 20, 2012

CLERK

Andrias J.P., Sweeney, Freedman, Manzanet-Daniels, JJ.

7131 In re Probate Proceeding, Will of Julia Elizabeth Taschereau, Deceased.
- - - - -
Elizabeth Combier, Proponent-Appellant,

-against-

Julia Danger, Objectant-Respondent.

File No. 1042/98

Elizabeth Combier, appellant pro se.

Law Offices of Kenneth T. Wasserman, New York (Kenneth T. Wasserman of counsel), for respondent.

Appeal from order, Surrogate's Court, New York County (Troy Webber, S.), entered on or about November 24, 2010, which, after a nonjury trial, denied probate to the propounded instrument, unanimously dismissed, without costs.

The appeal is dismissed because pro se appellant failed to include the trial transcript in the record on appeal (*see* CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.5). The

omission of the trial transcript "renders meaningful appellate review of this matter impossible" (*Sebag v Narvaez*, 60 AD3d 485, 485 [2009], *lv denied* 13 NY3d 711 [2009]; *see Lynch v Consolidated Edison, Inc.*, 82 AD3d 442 [2011]).

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

ENTERED: MARCH 20, 2012

CLERK

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

7132 In re Kasiem Chaves, Index 251844/08
Petitioner-Appellant,

-against-

The Office of the District Attorney,
Bronx County
Respondent-Respondent.

Kasiem Chaves, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 7, 2009, dismissing the petition brought pursuant to CPLR article 78 seeking to annul a determination of respondent, dated April 29, 2008, which denied his requests under the Freedom of Information Law (FOIL), unanimously affirmed, without costs.

The court erred in dismissing the petition as time-barred. The record shows that petitioner sought to commence this action well before the statute of limitations expired, but that the court did not consider and sign petitioner's order to show cause commencing the proceeding until after the limitations period had expired. Petitioner should not be penalized for this oversight

(*see e.g. Lovett v City of New York*, 6 Misc 3d 1032[A], 2005 NY Slip Op 50278[U] [Sup Ct, New York County 2005]; *see also Matter of Grant v Senkowski*, 95 NY2d 605, 609-610 [2001]).

Although the proceeding was timely commenced, dismissal was nevertheless proper. Petitioner seeks evidence related to his convictions for murder and other felonies, which occurred more than 25 years ago. Respondent was under no obligation to maintain evidence after all appeals had been exhausted (*see People v Watkins*, 189 AD2d 623, 624 [1993], *lv denied* 81 NY2d 978 [1993]), and was not under an obligation to maintain that evidence for more than 25 years following petitioner's convictions (*see e.g. People v Ahlers*, 285 AD2d 664 [2001], *lv denied* 97 NY2d 701 [2002]). Moreover, the record shows that respondent diligently searched for any and all available records responsive to petitioner's FOIL requests, and was, indeed, able to produce some of the materials (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]).

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

ENTERED: MARCH 20, 2012

CLERK

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

7134 The People of the State of New York, Ind. 4945/08
Respondent,

-against-

Michael Hagood,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 16, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, reckless endangerment in the second degree and resisting arrest, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 7½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant only raised credibility issues at the suppression hearing, and he did not make any of the legal claims he raises on appeal. Furthermore, the court did not "expressly decide[ ]"

these issues "in re[s]ponse to a protest by a party" (CPL 470.05 [2]; *see People v Colon*, 46 AD3d 260, 263 [2007]). Accordingly, defendant did not preserve these claims, and we decline to review them in the interest of justice. As an alternative holding, we find that the police lawfully arrested defendant and conducted a lawful search incident to that arrest.

The police observed defendant riding his bicycle on a sidewalk, in violation of Administrative Code of the City of New York § 19-176(b). When an officer attempted to issue a summons, defendant angrily refused to stop. Defendant continued to ride rapidly on the crowded sidewalk, causing pedestrians to quickly get out of his way. When he was finally stopped, he threatened the officer by raising his fists.

We need not decide whether an arrest, and a search incident to that arrest, were justified by the Administrative Code violation itself (*see e.g. People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]), or by the violation coupled with defendant's flight to avoid a summons (*see e.g. People v Henry*, 181 Misc 2d 689 [Sup Ct, Queens County 1999]). The circumstances objectively provided probable cause to arrest defendant for several crimes. Probable cause does not require proof beyond a reasonable doubt. Defendant's conduct went beyond merely riding

on the sidewalk; he endangered pedestrians to an extent that warranted an arrest for reckless endangerment in the second degree. Defendant's belligerent conduct toward the officer also provided probable cause to arrest him for obstructing governmental administration and menacing.

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

ENTERED: MARCH 20, 2012

CLERK

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

7135-
7135A Josefina Cruz, Index 117004/08
Plaintiff-Appellant,

-against-

New York City Department of Education,
Defendant-Respondent.

Josefina Cruz, appellant pro se.

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

Appeal from order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 7, 2010, which granted defendant's motion to dismiss the complaint seeking to vacate the arbitration award in defendant's favor, unanimously dismissed, without costs, as untimely. Appeal from order, same court and Justice, entered November 19, 2010, which denied plaintiff's motion to renew and reargue the January 7, 2010 order, deemed to be an order denying a motion to reargue only, and, so considered, the appeal therefrom unanimously dismissed, without costs, as taken from a nonappealable order.

The appeal from the January 7, 2010 order was untimely (CPLR 5513[a]). As to the November 19, 2010 order, although plaintiff's motion was denominated as one for renewal and

reargument, it was solely for reargument and was treated as such by the motion court (*see Stratakis v Ryjov*, 66 AD3d 411 [2009]).

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

ENTERED: MARCH 20, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

7136N Cadles of Grassy Meadows II, L.L.C., Index 106421/06
Plaintiff-Respondent,

-against-

Edward B. Lapidus,
Defendant-Appellant,

David Glaser,
Defendant.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heighs (Michael C. Sferlazza of counsel), for appellant.

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 6, 2011, which, inter alia, denied defendant Lapidus's (defendant) motion, pursuant to CPLR 5240, for a protective order restraining plaintiff from further efforts to enforce a judgment rendered in the State of Connecticut and filed in New York pursuant to CPLR 5402, unanimously affirmed, with costs.

Defendant's challenge to the validity of the chain of assignments through which plaintiff acquired the Connecticut judgment is not an impermissible collateral attack on the judgment, since it challenges not the merits of the judgment but

plaintiff's standing to file the judgment in New York. It therefore is reviewable by New York courts (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5402:2 ["Since New York ... is just lending its judiciary to aid the enforcement of the foreign judgment, it should base a vacatur on only such defect as goes to the registration procedure itself, or ... manifests some proceeding in the original rendering court that has divested the underlying foreign judgment of its validity"]). However, defendant waived the defense of lack of standing by participating in this proceeding for years without raising it (*see CDR Creances S.A.S. v Cohen*, 77 AD3d 489 [2010]). In any event, plaintiff established the validity of the assignments by submitting a certified copy of the Connecticut judgment and certified copies of the assignments, which were filed with the Superior Court of the Judicial District of Hartford in Connecticut (*see Cadle Co. v Biberaj*, 307 AD2d 889 [2003]).

Since the Connecticut judgment was valid and enforceable in that State on May 10, 2006, the date on which plaintiff filed it in New York, the New York judgment became a distinct entity with

a term of enforceability of 20 years from that date (*see* CPLR 211[b]; *Roche v McDonald*, 275 US 449 [1928]; *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2009 NY Slip Op 32650[U] [Sup Ct, New York County 2009], *revd on other grounds* 87 AD3d 119 [2011]; *Mee v Sprague*, 144 Misc 2d 1057, 1059 [Sup Ct, Westchester County 1989]). We have reviewed defendant's remaining contentions and find them unavailing.

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

ENTERED: MARCH 20, 2012

CLERK

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

7137
[M-5363] In re Murphy & O'Connell, TAT(E)06-18(UB)
Petitioner,

-against-

The Tax Appeals Tribunal, et al.,
Respondents.

Patrick J. Murphy, New York, for petitioner.

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

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

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

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

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7138 The People of the State of New York, Ind. 721/09
Respondent,

-against-

Jason Hinds,
Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Eunice C. Lee of counsel), and Debevoise & Plimpton LLP, (Nicholas A. Duston of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at *Hinton* hearing; Richard D. Carruthers, J. at dismissal motion, jury trial and sentencing), rendered March 24, 2010, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. We have considered and rejected defendant's challenges to the evidence establishing that the substance sold

to the undercover officer was cocaine.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]), particularly to the extent it involves matters of demeanor. Defendant's general reference to "other occupations" of prospective jurors was insufficient to preserve his present claim of disparate treatment by the prosecutor of similarly situated panelists, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Wainwright*, 11 AD3d 242, 244 [2004], *lv denied* 4 NY3d 749 [2004]).

The court properly granted the People's challenge for cause to a prospective juror. The panelist's responses revealed "opinions reflecting a state of mind likely to preclude impartial service" (*People v Johnson*, 94 NY2d 600, 614 [2000]). He gave only a qualified assurance of impartiality that was rendered even more equivocal by his demeanor, as noted by the court.

The evidence at the *Hinton* hearing established an overriding

interest that warranted the limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Therefore, the closure order did not violate defendant's right to a public trial. The officer testified, among other things, that he continued his undercover work in the vicinity of the charged crimes, that he had open investigations, that he had cases pending in the courthouse nearby, that he had been threatened in other undercover investigations, and that he took precautions to protect his identity. This demonstrated that his safety and effectiveness would be jeopardized by testifying in an open courtroom, and it satisfied the requirement of a particularized showing (*see e.g. People v Plummer*, 68 AD3d 416, 417 [2009], *lv denied* 14 NY3d 891 [2010]. Furthermore, the court considered alternatives to full closure and made adequate findings.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7140-
7140A In re Octavia Loretta R.,
etc., and Another,

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

Randy McN., Sr.,
Respondent-Appellant,

Keisha W.,
Respondent,

Edwin Gould Services for Children
and Families, et al.,
Petitioners-Respondents.

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

John R. Eyerman, New York, for respondent.

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

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 22, 2010, which denied appellant's motion to vacate two orders of fact-finding and disposition of the same court, entered on September 25, 2008, upon appellant's default, terminating his parental rights to the subject children on the ground of permanent neglect, and committing custody and guardianship of the children to the Commissioner for the

Administration for Children's Services of New York City and petitioner agency for the purpose of adoption, unanimously affirmed, without costs, insofar as it concerns Randy McN, Jr. Appeal from so much of the order as concerned Octavia Loretta R., unanimously dismissed, without costs, as moot.

Family Court properly exercised its discretion in denying appellant's motion to vacate the orders terminating his parental rights upon his default because his moving papers failed to demonstrate a reasonable excuse for his absence from the court's February 5, 2008 proceeding and a meritorious defense to the permanent neglect allegation (*see Matter of Alexander John B. [Cynthia A.]*, 87 AD3d 927 [2011]). Even accepting that appellant was unavailable for that entire day due to a mandatory Department of Housing Preservation and Development program, he offered no evidence showing that he had apprised his counsel, the court, or the agency of his unavailability.

Appellant also failed to establish that he had a meritorious defense to the permanent neglect allegation. He failed to establish that he had not relapsed or that the agency made no effort to help him with his drug addiction, or that he had completed the drug program at the time of the hearings (*see Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559 [2011]). He

also did not establish that he attended all of the scheduled visits with the children. Nor did he demonstrate that at the time of the dispositional hearing he was ready to care for Randy. Rather, he acknowledged that he had not completed his second drug program and did not have suitable housing.

The appeal insofar as it concerns Octavia is moot since on or about August 10, 2011, the Family Court reopened the dispositional hearing as to Octavia and discharged her to appellant's care on a trial basis, upon all the parties' consent, and she continues to reside with appellant.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7141 William Anderson, Index 108913/09
Plaintiff-Appellant,

-against-

New York City Department of Education,
Defendant-Respondent.

Willam Anderson, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 29, 2010, which, in an action arising out of the termination of plaintiff's employment as a probationary teacher, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint was properly dismissed as barred by the doctrine of res judicata. Plaintiff's action arose out of the same set of circumstances as his prior article 78 proceeding, which was dismissed. "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon

different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see Daved Fire Sys. Inc. v New York City Health & Hosps. Corp.*, 46 AD3d 364 [2007]).

We have considered plaintiff's remaining arguments, including that he did not have a full and fair opportunity to litigate his claims, and find them unavailing.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7142-
7143 In re The State of New York, Index 30013/10
Petitioner-Respondent,

-against-

Bobby Powell,
Respondent-Appellant.

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

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

Order, Supreme Court, New York County (Daniel FitzGerald, J.), entered on or about October 22, 2010, which, in a proceeding pursuant to Mental Hygiene Law article 10, upon a jury finding of mental abnormality, committed respondent to a secure treatment facility, and order, same court and Justice, entered on or about June 17, 2011, denying respondent's motion for a new trial in the interests of justice, unanimously affirmed, without costs.

Respondent was not deprived of due process, and a new trial is not warranted in the interests of justice. Although petitioner's psychologist provided erroneous testimony regarding

respondent's score on the Static–99 risk assessment instrument, there was other overwhelming evidence of mental abnormality presented at trial, including the admission of respondent's own expert that respondent was predisposed to commit sex offenses.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7144 Douglas Elliman LLC, Index 650743/11
Plaintiff-Appellant,

-against-

Corcoran Group Marketing,
etc., et al.,
Defendants-Respondents,

Madison Park Owner LLC,
Defendant.

Cole Hansen Chester LLP, New York (Michael S. Cole of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Joseph A. Boyle of counsel), for Corcoran Group Marketing, respondent.

Epstein Becker & Green, P.C., New York (J. William Cook of counsel), for Glosserman, respondents.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 19, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Marc and Kristin Glosserman, who are husband and wife, entered into agreements to purchase 2 apartment units, identifying defendant Corcoran Group Marketing as "Selling Agent" and listing Douglas Elliman as an "Additional Broker." In late 2009, a year after the couple defaulted on these agreements, Marc's father, Michael Glosserman, allegedly purchased the units

through his corporation, 15 Madison Ave. LLC. Plaintiff alleged that this purchase was secretly negotiated, closed, and wrongfully not disclosed to it, with the purpose of depriving it of its commission pursuant to its co-brokerage agreement with The Corcoran Group.

Neither Corcoran nor the Glossermans owed a fiduciary duty to Douglas Elliman to advise it of the subsequent negotiations for the two units (*see Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]). Nor did any duty arise under a theory of an implied covenant of good faith and fair dealing, as the contract between Corcoran and Douglas Elliman had expired by the time of the purchase, and even at the time of Marc and Kristin Glosserman's purchase agreements, more than 60 days had passed since plaintiff "registered" these potential purchasers with Corcoran. Under the express terms of the co-brokerage agreement, this meant that Douglas Elliman could not be considered a procuring cause. Thus, no contract existed, written or implied, under which any issue of good faith and fair dealing existed, which could give rise to a duty to speak of the later negotiations. Thus, Douglas Elliman's claims sounding in fraudulent concealment/intentional misrepresentation were properly dismissed.

Nor was Douglas Elliman entitled to a commission by common law, as it was not the procuring cause of the sale to the ultimate purchaser, whether that be Michael Glosserman, or his corporation, 15 Madison Ave. LLC, due to various factors -- the lack of contact by Douglas Elliman or its real estate agent with Michael Glosserman, or any purchaser; the agent did not show Glosserman the units; the lack of any attempted negotiations; and the lapse of approximately twelve months after the initial deal failed (*see Greene v Hellman*, 51 NY2d 197, 206-207 [1980]). Similarly Douglas Elliman may claim no right to a commission because of its actions in relation to Marc and Kristin Glosserman, as it did no more than introduce them to the seller (*see Hagedorn v Elwyn*, 229 AD2d 654, 656 [1996]).

Douglas Elliman has no cause of action against the Glossermans for tortious interference with its co-brokerage agreement with Corcoran (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *cf. Lansco Corp. v Strike Holdings LLC*, 90 AD3d 427 [2011]), since it cannot show, inter alia, damages, as it was

not the procuring cause of the ultimate purchase (*see Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]).

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7147-
7147A In re Christopher L.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

Orders of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 16, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crimes of criminal possession of stolen property in the fifth degree and burglary in the second degree, and placed him with the Office of Children and Family Services for an aggregate period of 18 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's discretion, and it constituted the least restrictive alternative consistent with appellant's needs and best interests and the

community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The disposition was justified by appellant's repeated conflicts with the law, his poor attendance and performance in school, and the recommendations contained in the probation and Mental Health Services reports. Although appellant had been accepted into a community-based rehabilitation program, the court properly concluded that a period of probation would be insufficient to control appellant's criminal behavior. We do not find the length of the placement excessive.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7150 Angela Pierre, et al., Index 100143/10
Plaintiffs-Appellants,

-against-

Mary Manning Walsh Nursing Home Co., Inc., et al.,
Defendants-Respondents.

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellants.

Bond, Schoeneck & King, PLLC, New York (Michael P. Collins of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 19, 2011, which, upon concluding that plaintiffs agreed to arbitrate the underlying dispute, denied their motion for summary judgment, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion denied, the matter remanded for further proceedings consistent with this opinion, and otherwise affirmed, without costs.

In this action seeking damages and declaratory relief for breach of a pension agreement and violation of Labor Law § 198, Supreme Court erred by concluding that plaintiffs, health care providers employed by defendant Mary Manning Walsh Nursing Home

(MMW), clearly, explicitly, and unequivocally agreed to arbitrate their dispute (*see Matter of Fiveco Inc. v Haber*, 11 NY3d 140, 144 [2008]). In reaching this conclusion, the court relied upon an arbitration provision contained in a collective bargaining agreement (CBA), effective from 2001-05, which governed the union's representation of MMW's service and maintenance workers, a separate and distinct unit from that of plaintiffs. Plaintiffs did not agree to join the union until 2007, and the record on appeal shows that the agreement between the union and MMW regarding plaintiffs' employment is governed by a Memorandum of Agreement dated July 2, 2008, which contains no provision requiring the arbitration of disputes. Although defendants claim that the Memorandum was intended to incorporate by reference certain unspecified provisions of the 2001-05 CBA, the Memorandum itself is silent on that point, and an agreement to arbitrate cannot depend upon implication or subtle reference (*Crespo v 160 W. End Ave. Owners Corp.*, 253 AD2d 28, 32-33 [1999], quoting *Matter of Waldron [Goddess]*, 61 NY2d 181, 184 [1984]).

Defendants' federal preemption claim is unavailing, as the Labor Management Relations Act (29 USCS § 185) has preclusive effect only when resolution of a state law claim is substantially

dependent upon the analysis of a CBA (*Allis-Chalmers Corp. v Lueck*, 471 US 202, 220 [1985]). Here, as explained, the CBA relied upon by defendants when seeking to compel arbitration is not applicable to plaintiffs. Contrary to defendants' urging, plaintiffs' subsequent action to compel arbitration, which was unsuccessful, does not compel invocation of the doctrine of judicial estoppel, as they have not "secured a judgment in [their] favor" by assuming "a certain position in a prior legal proceeding," and then assumed "a contrary position in another action simply because [their] interests have changed" (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 [1998], *lv dismissed* 92 NY2d 962 [1998]).

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7151 In re Perry C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant,

- - - - -

Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about July 27, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and

those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The seriousness of the underlying robbery, along with appellant's poor school attendance record, justified a longer period of supervision than an ACD would have provided.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7152-
7153-
7154 Sterling National Bank, Index 601543/04
Plaintiff-Appellant,

-against-

Travelers Casualty and Surety
Company of America,
Defendant-Respondent.

Kaplan Landau LLP, New York (Mark Landau of counsel), for appellant.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Daniel W. White of counsel), for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 15, 2011, dismissing the complaint, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered December 7, 2010, which denied plaintiff's motion for summary judgment, and granted defendant's motion for summery judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

By letter dated May 9, 2002, plaintiff's general counsel gave defendant notice of the discovery of a loss under the subject bond. Plaintiff commenced this action on May 21, 2004. Since the action was not commenced within two years after the

discovery of the loss, as required by the bond, it was untimely.

Contrary to plaintiff's contention, the June 2003 letter agreement between the parties did not toll the contractual limitations period. It contains no language tolling or extending the two-year time period. Nor did plaintiff offer any evidence of bad faith behavior on defendant's part to support its estoppel argument.

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: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7155 The People of the State of New York, Ind. 348/08
Respondent,

-against-

Donte Harris,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 27, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of nine years, unanimously affirmed.

The court properly denied defendant's suppression motion. This Court has conducted an in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]). After reviewing those minutes and all of the arguments raised by defendant on appeal, we find no basis for suppression. The People properly established the confidential informant's

existence through extrinsic evidence after they demonstrated that the informant was legitimately unavailable (*see People v Carpenito*, 80 NY2d 65, 68 [1992]). In any event, the police lawfully arrested defendant on the basis of their own observations (*see People v Farrow*, 98 NY2d 629, 631 [2002]).

We adhere to our prior decision in which we denied defendant's motion for disclosure of the sealed hearing minutes and related relief (*People v Harris*, 2010 NY Slip Op 90173[U]).

The court properly exercised its discretion in precluding defendant from eliciting the informant's role in defendant's arrest, and its ruling did not deprive defendant of the right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). Under the circumstances of the case, the proposed line of questioning lacked a sufficient foundation, called for improper speculation and was irrelevant to the issues before the jury. There was no evidence to support defendant's theory that the informant may have schemed to place defendant in unwitting possession of an assault rifle (that was protruding from defendant's bag) and then report him to the police. In any

event, there is no reasonable possibility that the court's ruling affected the outcome of the trial.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Abdus-Salaam, JJ.

7156-
7156A Andrew Gering, Index 350060/03
Plaintiff-Respondent,

-against-

Charisse Tavano,
Defendant-Appellant.

Charisse Tavano, appellant pro se.

Cohen Rabin Stine Schumann LLP, New York (Gretchen Beall Schumann of counsel), for respondent.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 5, 2010, which, insofar as appealed from as limited by the briefs, denied defendant wife's motion to set aside the parties' judgment of divorce, to reinstate spousal support, and for an upward modification of child support, unanimously affirmed, without costs. Order, same court and Justice, entered May 3, 2011, which, insofar as appealed from as limited by the briefs, denied defendant's motion to compel plaintiff husband to pay for the parties' children's college expenses and granted plaintiff's cross motion to the extent of finding that plaintiff has no obligation to pay for such expenses, unanimously affirmed, without costs.

Defendant failed to make a prima facie showing that a

substantial, unanticipated change in circumstances has occurred warranting a modification of the maintenance or child support awards (*see Merl v Merl*, 67 NY2d 359, 362 [1986]). Although defendant submitted a net worth statement, she failed to submit tax returns, credit card statements, bank account statements, or other documents to support her claim of financial hardship (*see* Domestic Relations Law § 236[B][4][a]). Nor did she submit medical records to support her claim that she is unable to work due to a medical issue. The issue of the parties' son's learning disability has already been litigated and decided, and defendant did not submit any evidence showing that her son's educational needs have changed. In light of the absence of any evidence supporting a modification of the maintenance and child support awards, a hearing is unnecessary (*see Shachnow v Shafer*, 82 AD3d 423, 424 [2011], *lv dismissed* 17 NY3d 935 [2011]; *see also Lloyd v Lloyd*, 226 AD2d 816, 817 [1996]).

Defendant did not set forth any basis for vacating the parties' divorce judgment (*see* CPLR 5015[a][2],[3]); she merely seeks to relitigate issues that have already been presented and decided. Further, as we stated in a prior order in this action (50 AD3d 299, 301 [2008], *lv denied* 11 NY3d 707 [2008]), Supreme Court providently exercised its discretion in not requiring

plaintiff to pay for the children's college expenses.

Upon plaintiff's motion (M-4994, decided December 15, 2011), we dismissed defendant's purported appeal from the order entered on or about February 15, 2011. We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: MARCH 20, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7157 Zurich American Insurance Company, et al., Plaintiffs-Appellants, -against- Illinois National Insurance Company, Defendant-Respondent, Urban Foundation/Engineering, LLC, Defendant. Index 105533/09

Melito & Adolfsen P.C., New York (Ignatius John Melito of counsel), for appellant.

Bevan, Mosca, Giuditta & Zarillo, P.C., New York (Anthony J. Zarillo, Jr. Of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 5, 2011, which granted defendant Illinois National Insurance Company's motion for summary judgment dismissing the complaint as against it and declaring that it has no obligation to defend plaintiff Moretrench American Corporation in the underlying property damage action, and so declared, and denied plaintiffs' cross motion for summary judgment declaring in their favor, unanimously modified, on the law, to deny the part of Illinois National's motion that sought dismissal of the complaint, and otherwise affirmed, without costs.

The Illinois National "owner controlled insurance policy"

(OCIP) at issue defines "contractors" as "contractors who *have executed* a written agreement pertaining to said Contractors[']s performance of work at the Project Site, *have been enrolled* in this insurance program, and who performs [*sic*] operations at the Project Site in connection with the Project" (emphasis added). Since plaintiff Moretrench, a subcontractor on the Project, did not receive the written agreement pertaining to its work on the Project or complete its application for enrollment in the insurance program until nearly four weeks after the damage alleged in the underlying complaint occurred, it does not meet the policy definition of "contractor" and is not covered under the policy (*see Hartford Underwriters Ins. Co. v American Intl. Group*, 300 AD2d 24, 26 [2002]).

Plaintiffs' argument that Illinois National is equitably estopped to deny coverage to Moretrench is unsupported by the record (*see River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [2005]). The documentary evidence does not establish that Illinois National (through its agents) ever conceded that Moretrench was covered during the relevant period (2006). Nor could Moretrench have relied on any such concession years after the underlying complaint was filed and Illinois National disclaimed coverage. Moreover, Moretrench cannot invoke

equitable estoppel against Illinois National on the basis of promises made by defendant Urban Foundation Engineering, LLC (the contractor that subcontracted with Moretrench). We have considered plaintiffs' remaining arguments and find them unavailing.

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

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7158-
7159-
7160-
7161 Donna Gianvito, Index 107629/09
Plaintiff-Appellant, 107888/10
107887/10
-against- 107886/10

Premo Pharmaceutical
Laboratories, Inc., etc.,
Defendant-Respondent.
- - - - -
Jill Kern,
Plaintiff-Appellant,

-against-

Premo Pharmaceutical
Laboratories, Inc., etc.,
Defendant-Respondent.
- - - - -
Kim Kiernan,
Plaintiff-Appellant,

-against-

Premo Pharmaceutical
Laboratories, Inc., etc.,
Defendant-Respondent.
- - - - -
Kathleen Dalton, as Executrix of
the Estate of Mary Margaret Norton,
Plaintiff-Appellant,

-against-

Premo Pharmaceutical
Laboratories, Inc., etc.,
Defendant-Respondent.

Law Offices of Sybil Shainwald, P.C., New York (Sybil Shainwald of counsel), for appellants.

Goodwin Procter, LLP, New York (Jordan D. Weiss of counsel), for respondent.

Orders, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 5 and 6, 2010, which granted defendant's motions for summary judgment dismissing the complaints or to dismiss the complaints for failure to state a cause of action, unanimously affirmed, without costs.

In these product liability actions, plaintiffs allege that they suffered injury due to in utero exposure to the estrogen drug Diethylstilbestrol (DES), and they urge application of the "market share" theory of liability. The law to be applied in DES cases is the law of "the place of the wrong," which is considered to be "the place where the last event necessary to make the actor liable occurred" (*Kush v Abbott Labs.*, 238 AD2d 172, 173 [1997] [internal quotation marks omitted]). Here, the unrefuted evidence demonstrates that plaintiffs' mothers were residents of New Jersey while pregnant, that the mothers ingested DES while in New Jersey, that they received medical treatment in New Jersey, and that plaintiffs were born in New Jersey. Accordingly, the

last event to make defendant DES manufacturer liable clearly occurred in New Jersey, and thus New Jersey law applies (*see id*.).

New Jersey has not formally adopted a market share theory of liability in DES or similar cases (*see Namm v Charles E. Frosst and Co., Inc.*, 178 NJ Super 19, 427 A2d 1121 [1981]; *Shackil v Lederle Laboratories*, 116 NJ 155, 561 A2d 511 [1989], *revg* 219 NJ Super 601, 530 A2d 1287 [1987]; *see also Matter of New York County DES Litig.*, 281 AD2d 173 [2001]). Contrary to plaintiffs' contention, such a theory cannot be found based on dicta from certain New Jersey appellate courts (i.e., *Shakil*, 116 NJ at 191, 561 A2d at 529; *Moreno v Am. Home Products, Inc.*, 2010 WL 4028605, 2010 NJ Super Unpub LEXIS 1537 [NJ Super Ct App Div, July 12, 2010, No. A-3935-07T2], *cert denied* 205 NJ 101, 13 A3d 364 [2011]). Moreover, to the extent New Jersey law is unsettled on the issue, we decline to expand the law therein to allow plaintiffs to allege a market share theory (*Kush*, 238 AD2d at 173). Lastly, to the extent that two of the four plaintiffs have been able to identify the drug manufacturer responsible for their

alleged DES-related injuries, they cannot rely on the market share theory (*see Lyons v Premo Pharm. Laboratories, Inc.*, 170 NJ Super 183, 192, 406 A2d 185, 190 [1979], *cert denied* 82 NJ 267, 412 A2d 774 [1979]).

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

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Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7162 The People of the State of New York, Ind. 1848/09
Respondent,

-against-

Lania Cagle,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Lewis Bart Stone, J.), rendered on or about, July 15, 2010.

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: MARCH 20, 2012

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

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7163
[M-350] Roy Taylor, Ind. 4222/11
Petitioner,

-against-

Hon. Michael Obus, etc.,
Respondent.

Roy Taylor, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

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

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

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

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

ENTERED: MARCH 20, 2012

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