SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 11, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6297 F. Isaac Hakim, Index 651529/10
Plaintiff-Respondent,

-against-

Kamran Hakim, et al.,
Defendants-Appellants.

Kramer Levin Naftalis & Frankel, LLP, New York (Ronald S. Greenberg of counsel), for appellants.

Michael B. Kramer & Associates, New York (Rubin Jay Ginsberg of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 12, 2011, which, to the extent appealed from, denied defendants' motion to dismiss the complaint with respect to the causes of action for breach of contract, an accounting, and constructive trust, and the causes of action for quantum meruit and unjust enrichment insofar as they seek recovery for services post-dating September 17, 2004, unanimously modified, on the law, to dismiss the causes of action for quantum meruit and unjust enrichment as against the individual defendant

insofar as they seek recovery for services post-dating September 17, 2004, and otherwise affirmed, without costs.

In late 1997 or early 1998, plaintiff F. Isaac Hakim (Isaac) located a business opportunity involving a triple net lease of a commercial office building at 41 West 57th Street. Isaac approached his uncle, defendant Kamran Hakim (Kamran), about entering into a joint venture to lease the property. Isaac thereafter began negotiations for the lease with the property owner. Kamran advised his nephew that he wanted to form an entity called 41 West 57th Street LLC for the express purpose of pursuing this opportunity. The limited liability corporation was formed on March 6, 1998.

On March 9, 1998, 41 West 57th Street LLC entered into a 49 year triple net lease[1] with the building owner. The lease named Isaac as a guarantor under a "Good Guy Guarantee." The same day, uncle and nephew executed an Option Agreement (the Option), whereby Isaac could obtain up to a one-third membership interest in the LLC. The Option gave Isaac two years, until March 10,

[1]Also termed a "net-net-net lease", a triple net lease is one in which "the lessee pays all the expenses, including the mortgage interest and amortization, leaving the lessor with an amount free of all claims." (Black's Law Dictionary, [9th ed 2009], lease.)

2000, to exercise his option to obtain the membership interest. With respect to the purchase price, the Option provided: "The purchase price for the Membership Interest shall be an amount equal to (a) the Membership Interest multiplied by (b) 110% of all monies therefore expended by the LLC and/or [Kamran] in connection with the Lease and/or Premises."

The Option also provided that within three days of the exercise thereof, "a closing shall occur," at which time the purchase price would be delivered by certified check, and that an operating agreement "shall be executed which shall provide, inter alia, that [Kamran] shall be the sole managing member," with rights to make all decisions for the LLC. Finally, the Option provided that if it was not exercised, Kamran would indemnify Isaac for any losses pursuant to the Guaranty signed by Isaac when the lease was executed.

On March 9, 2000, Isaac timely exercised his option under the parties' agreement. He alleges that Kamran and his attorneys, Harold Rinder and Joseph Tuchman, accepted exercise of the option. With respect to the three-day closing period, Kamran advised Isaac that Rinder would put together an accounting so that Isaac's portion of the LLC could be determined, and that Tuchman would draft an operating agreement. No accounting was

put together by Kamran or his attorneys.

Isaac asserts that Kamran told him that in order to facilitate negotiation of a mortgage for the property, execution of Isaac's operating agreement for the LLC would be postponed until after the mortgage was obtained. Accordingly, Isaac applied for the mortgage in April 2001, and on August 9, 2001, 41 West 57th LLC borrowed $3 million against the leasehold. Isaac contends that the mortgage was intended to reimburse Kamran for his original financial investment. Kamran continued to delay preparation of the operating agreement despite the alleged satisfaction of Kamran's expenditures, and despite Isaac's repeated requests therefor.

Meanwhile, Isaac worked with a contractor to renovate the property. He located tenants, negotiated subleases, and managed the day-to-day operation of the property. Kamran was aware that Isaac negotiated and executed leases, holding himself out as a member of the LLC. Isaac was in constant contact with Tuchman and Adam Brodsky, Kamran's in-house attorneys, and his accountant, Harold Rinder, advising them of his progress, providing documentation of his efforts, and requesting the accounting.

In opposition to Kamran and the LLC's motion to dismiss,

Isaac produced emails regarding the requested accounting. On June 6, 2005, in an email, Tuchman requested that Isaac give him additional time to provide the accounting, stating that "[w]e are scheduled to meet Tues June 28 and Wed June 29 to go over the monies and accounts that are owed to Kamran by you. I will in good faith try to have preliminary numbers for you on those date[] [*sic*]. We will try to finalize all numbers on that Wed." That meeting was cancelled.

In response to a November 5, 2008 email by which Isaac requested an accounting, Tuchman replied on November 6, 2008, as follows: "I spoke to Kamran and he wanted me to furnish to you more complete numbers (including all calculations). I can try to finish it within the next couple of days and have something to [you] by next week. Hopefully this will put the economics in a clearer light."

Although Kamran promised, as indicated by these emails, to provide an accounting, he continually offered excuses for not doing so. By letter dated September 17, 2008, Isaac formally requested that Kamran recognize Isaac's membership interest in the LLC. By letter dated September 22, 2008, Kamran, represented by new counsel, denied that Isaac had exercised his option, and stated that Isaac was not, and would never be, a member of the

LLC.

On September 17, 2010, Isaac brought this action, asserting contractual and equitable claims against his uncle and the LLC. In lieu of an answer, defendants moved, pursuant to CPLR 3211, to dismiss the action as time-barred.

We affirm the order appealed from to the extent that it denied defendants' motion to dismiss the causes of action for breach of contract, an accounting, and constructive trust. While we also sustain that portion of the order which denied dismissal of the causes of action for quantum meruit and unjust enrichment against the LLC for services post-dating September 17, 2004, we modify to dismiss those causes of action against Kamran individually.

This is an appeal from the disposition of a pre-answer, prediscovery motion to dismiss the complaint pursuant to CPLR 3211. At this juncture, we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Submissions offered in opposition to the motion must also be accepted as true for purposes of determining whether there is any cognizable cause of

action (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

The six-year limitations period for Isaac's contract-based claims technically expired several years before Isaac commenced this action (CPLR 213[2]). However, Isaac's claims were revived, pursuant to General Obligations Law § 17-101, by Kamran's in-house counsel's emails to Isaac dated June 6, 2005 and November 6, 2008, referring to Kamran's intent to provide Isaac with an accounting of the amount that he owed to his uncle Kamran (the sole member of the corporation). Viewing the emails in the light most favorable to Isaac and drawing all reasonable inferences therefrom, they constitute an acknowledged obligation to furnish the accounting required for Isaac's purchase of his membership in the LLC. No other reason has been offered for an accounting of any amount owed by Isaac to Kamran; and indeed, Isaac had been providing Kamran and the LLC with free managerial services for years.

The emails unambiguously promise to provide the long overdue figures necessary to complete Isaac's exercise of his option. Accordingly, Isaac has stated a viable claim for revival pursuant to defendants' "absolute and unqualified acknowledgment" of the validity of his option-based claims (*Lew Morris Demolition*

Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 521 [1976]; *see Hon Fui Hui v East Broadway Mall, Inc.*, 4 NY3d 790, 791 [2005]; *Sullivan v Troser Mgt. Inc.*, 15 AD3d 1011, 1012 [4th Dept 2005]). The emails were authenticated by in-house counsel, who placed his name under the messages, acting on behalf of Kamran and the LLC, and thus constitute the requisite "writing signed by the party to be charged" (General Obligations Law § 17-101; *see Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476 [1st Dept 2011]; *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [1st Dept 2008], *lv dismissed* 10 NY3d 930 [2008]).

We dismiss the causes of action for quantum meruit and unjust enrichment as against Kamran. Because Isaac alleges that he provided uncompensated management services to the LLC, not to Kamran individually, Kamran cannot be held liable on these causes of action. Insofar as the quantum meruit and unjust enrichment claims are asserted against the LLC, the motion court properly

determined that these claims are not time-barred to the extent they seek recovery for services Isaac allegedly performed within the six years before he commenced this action.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

7754 In re Katie Kickertz, Index 103461/10
Petitioner-Appellant,

-against-

New York University,
Respondent-Respondent.

Leeds Morelli & Brown, Carle Place (Rick Ostrove of counsel), for appellant.

Bonnie S. Brier, New York (Nancy Kilson of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered February 14, 2011, insofar as appealed from, denying the petition to annul the determination of respondent New York University (NYU) that expelled petitioner from its dental college, and dismissing the CPLR article 78 proceeding, reversed, on the law, without costs, the judgment vacated, and the petition granted.[1]

Petitioner was dismissed from NYU's dental college, without the possibility of readmission, after a Peer Review Board on Ethics and Professionalism (PRB), convened pursuant to NYU's

[1]Petitioner filed a separate appeal from the part of the order that dismissed her plenary action against NYU and three of its employees seeking monetary damages under sixteen causes of action. That appeal remains sub judice.

"Code of Ethics and Professional Conduct, Peer Review Board Proposal FINAL 2.6.09" (the 2009 Code), found that she forged a patient treatment record and presented multiple patient encounter forms that she knew to be false in order to obtain the Practice Model Values (PMV) credits that she needed to graduate. Petitioner argues that the disciplinary proceeding should have been conducted under NYU's "Code of Ethics and Professional Conduct Approved EMC 080405" (the 2005 Code), that NYU's determination is contradicted by the evidence, and that the penalty of expulsion without the possibility of readmission shocks the conscience. For the reasons that follow, we conclude that irrespective of whether the 2009 Code or the 2005 Code is the applicable code, NYU did not substantially comply with its own published guidelines and policies. Thus, its determination expelling petitioner must be annulled as arbitrary and capricious.

The PMV requirement was created by the "NYUCD Practice Model Plan" dated May 17, 2005. Although NYU claims that production goals were expected to help students "gain more experience and knowledge in delivering comprehensive care," and to "graduate efficient and ethical practitioners ready to meet the challenges of 'the real world,'" the PMV requirement was not based on hours

of service. Rather, in addition to certain competency requirements, the program required students "to meet defined production level/goals," or, in other words, to generate a specified amount of revenue for NYU.

From its inception, the program appears to have been the subject of controversy. The minutes of the NYU Space and Revenue Committee Meeting held on April 5, 2006, state:

> "Students feel exploited over pressure to generate income in clinics, feel 'overwhelmed,' and that they pay too much feel like [*sic*] 'mules.' Faculty feel there is significant growth potential there. The point was made that we use dollars in the same way other schools use points, but it's the same financial requirement, and we're doing them a service by preparing them for their later practice. Resentment may fade, and the incentive and bonus program will really help. Clinic income will have to be a big revenue source."[2]

It is from this obligation to generate revenue that petitioner's troubles arise. After passing all of her academic courses, competency exams, and both parts of the National Board Dentistry Examinations, at 9:54 P.M. on Monday, May 25, 2009 -- the night before she was supposed to graduate -- petitioner received an e-mail from her group practice director, Dr. Harry

[2]Petitioner avers that student posts to Internet forums in 2010 say that NYU announced that "it will return its DDS degree to its original foundations in classroom work and procedural competencies, rather than fee-paid clinical work or PMV."

Meeker, advising her that he was "uncertain about [her] status for graduation. The paper that I have with me says you still owe me something." On Tuesday, May 26, 15 minutes before she was to graduate, Meeker told petitioner that she was short on PMV credits.

Petitioner claims that this was the first time she was informed of the PMV shortfall. Meeker allegedly disputed this. According to the report of the PRB's Investigating Panel, comprised of two students, Meeker told the investigators, without providing supporting documentation, that petitioner was supposed to meet with him three to four weeks before graduation to check graduation requirements, but did not do so, and that he notified petitioner of the deficiency in PMV credits in mid-April, and provided her with regular notices about it thereafter.

However, petitioner avers that Meeker never contacted her to set up an appointment or mentioned that such a meeting was needed. She states that after being told of the shortfall on graduation day, in a state of panic she told Meeker that she was moving to Boston the next day to start a pediatric dentistry residency at Boston University. Meeker replied that she should find him and Ivan Cornejo, the clinic manager, at the post-graduation reception to resolve the problem. At the reception,

Cornejo, who told the Investigating Panel that he was not aware that there was a problem until that morning, advised petitioner to call Meeker and him the next day. Again, Meeker's version allegedly differed. According to the Investigating Panel Report, Meeker told the student investigators that on graduation day petitioner "knew she was deficient [in her PMV requirement] but she thought she did not have to do it." Petitioner denies this.

In any event, on May 27, 2009, Meeker advised petitioner by e-mail that "Your PMV requirement as of today is $19,093 and the target is $21,000. You should come back to make the requirement before your diploma can be awarded." Petitioner replied that she was already in Boston to start her residency orientation and that she would have fulfilled the requirement had she been timely advised of the deficiency and the need to remedy it. By e-mail dated May 29, 2009, Meeker responded:

> "Perhaps one of the reasons [the PMV] was not attained was due to the fact that you only treated patients in 10 out of 36 sessions in April, and incredibly did not see any patients in May ....
>
> "If you had treated even just an average number of patients during these 53 sessions that you did not attend, ... then you would have achieved and surpassed your PMV well before May."

By e-mail dated May 30, 2009, petitioner disputed Meeker's contentions and tendered a proposal to resolve her deficiency in

PMV credits:

> "I am sick with grief from this situation. I have started my orientation in Boston and cannot return, nor do I have any patients to treat at NYU. I was finishing up my patients in April and in May. I had Invisalign and [oral surgery] consultations with patients and several disappointments [undoubtedly meaning cancellations]. The only major treatment I could've done was on my bridge patient because he needs a total of 3 FPDs. This was the patient that you said I could not do another bridge on because there are others who needed that requirement ... Additionally, I have been dealing with medical issues the past couple months. I am a deeply private person and did not wish to discuss this. It has been very hard and I do not want sympathy. When I checked my requirements back a few weeks ago I was fine ... I do not know if some procedures were entered incorrectly but now I do not have enough of the PMV which I thought I did. If this was the case I certainly would not have been okay with doing only consultation and[] referrals and disappointments the past few weeks. I have to be in MA to start my training but I also need to graduate. I worked hard over the past four years and tried very hard to not cause any problems and follow the guidelines. I worked hard to get accepted into a specialty program and I hope with all my heart that all this hard work does slip away [*sic*]. I regret deeply that this has happened and need your help. I would pay the school back the money that I did not earn for treatment if needed. I am stuck between a rock and a hard place. I have 11 family members in Illinois that are willing to help me by purchasing the at-home bleaching treatments, which at $175 each for 11 people would be $1925 and would put me over the needed PMV.... PLEASE email me asap [*sic*] if this will work."

Although other students had allegedly been allowed to purchase the home bleaching treatments to satisfy their PMV requirements, petitioner's offer was rejected.

Petitioner met with Meeker at the clinic on June 1, 2009. According to petitioner, Meeker told her that "it would have all been taken care of if [she] had not called or emailed [the clinic] because doing so made [his supervisor] Dr. [Mark] Wolff aware of the situation," and that she was "making [Meeker] look bad and it would reflect poorly on him in his upcoming performance review."[3]

David Hershkowitz, an instructor at NYU, then joined the meeting. According to the Investigating Panel Report, Meeker told the student investigators that petitioner agreed that she "would continue patient care to complete the [PMV] requirement," and Hershkowitz told them that he "left [petitioner] with Dr. Meeker so that they could place patients on her roster and make appointments with patients to ... help her attain her goal."

Petitioner denies this. She claims that both Meeker and Hershkowitz acknowledged that there were no patients on her roster and told her that they would not let her treat any clinic patients because the patients had already been assigned to other students. Meeker instructed her to just get the money and Hershkowitz told her, "You're not getting any of your patients

[3]Meeker has apparently left NYU under circumstances not explained by the record.

back. You have to give us the money or you're not going to graduate." Towards this end, Luz Tartaglia, Hershkowitz's secretary, told petitioner to write out the billing information "as if you did them [i.e., the treatments]" for one of the patients. Petitioner then gave Tartaglia four encounter forms for a total of $2,050, and paid $200 in cash and $1,850 on her credit card, which Tartaglia accepted with full knowledge that petitioner was paying the fees from her own funds.

The Investigating Panel Report states that when Hershkowitz was told that petitioner had completed her PMV requirements, he looked into the matter and determined that she did not actually do the work. He confronted petitioner, who allegedly admitted that she had fraudulently entered treatment on one chart, and fraudulently signed a "start" on the encounter so the receptionist would enter treatment. The report also states that petitioner told the student investigators that she "did something that was out of [her] character" and admitted "forging treatment records for 4 patients ... and forging a chart entry for one patient." Petitioner allegedly attributed this conduct to confusion, panic, mental health issues, other medical problems, and the failure of Meeker to appropriately guide and accommodate her.

Petitioner avers that she admitted creating the encounter forms but that at no time did she state that she had falsified a patient's chart or records. She maintains that she took this action based on a good faith belief that she was following the instructions of program faculty who told her that she had to produce the PMV fees without having any patients on her roster or she would not be allowed to graduate.

On July 16, 2009, NYU sent petitioner a letter notifying her that "the [PRB] convened and, based upon the report of its Investigation Panel, determined that you made a fraudulent entry in a patient's chart and, in addition, forged fraudulent treatment records for multiple patients. Based upon this finding, the [PRB] has recommended that you be dismissed from the College." The letter further advised petitioner that the College Review Board had "determined that the investigation was thorough and the sanction reasonable and appropriate." When petitioner objected on the ground that she had been dismissed without a hearing, NYU withdrew the July 2009 determination because it had admittedly failed to follow its own internal procedures, which provided that a hearing had to be held before a student could be expelled.

On October 7, 2009, the PRB, which is comprised of dental

college students, held a "hearing" and voted unanimously to dismiss petitioner, without the possibility of reinstatement. The College Review Board, consisting of three faculty members, allegedly confirmed that decision by a majority vote. Dr. Anthony Palatta, the Assistant Dean for Student Affairs and Admissions, informed petitioner of the decision and of her right to appeal to the dean of the dental college. While this letter is in the record, neither the PRB nor the College Review Board determinations have been produced.

Petitioner appealed, arguing among other things that Meeker was "negligent in the administration of his responsibilities, failed to complete the required Progress Reports, and ha[d] repeatedly lied and defamed [her] during the [PRB] process," and that the "hearing was conducted without due process and in violation of the [2005 Code]." Dean Charles Bartolami upheld the decision of the College Review Board.

Meanwhile, before the PRB made its finding, petitioner was instructed to go to the clinic and complete her PMV requirement. According to petitioner, although Meeker and Hershkowitz still refused to assign patients to her roster, she found them on her own and "reached the required amount of PMV on June [8, 2009]." Nonetheless, Assistant Dean Palatta allegedly told petitioner

that she “needed to keep coming to clinic and continue treating patients to earn even more PMV.” Petitioner complied, ultimately generating a total of $23,648 in revenues, which exceeded the $21,000 goal. At that point, petitioner had already satisfied all academic requirements for graduation. Accordingly, her expulsion, based on charges of "inappropriate professional behavior," under a Code of Ethics, was undeniably disciplinary in nature (*see e.g. Matter of Katz v Board of Regents of the Univ. of the State of New* York, 85 AD3d 1277 [3d Dept 2011], *lv denied* 17 NY3d 716 [2011]).

Judicial review of an academic institution's disciplinary determinations is limited to whether it “substantially adhered to its own published rules and guidelines” and whether the determinations are based on “a rational interpretation of the relevant evidence” (*Matter of Katz*, 85 AD3d at 1279; *see also Tedeschi v Wagner Coll.*, 49 NY2d 652 [1980]). "When a university has not substantially complied with its own guidelines or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious" (*Matter of Hyman v Cornell Univ.*, 82 AD3d 1309, 1310 [3d Dept 2011]).

Petitioner argues that NYU did not substantially comply with

its published guidelines because the disciplinary proceeding should have been conducted under the 2005 Code. She contends that NYU's attempt to replace the 2005 Code with the 2009 Code was ineffective because it did not conform to the requisite procedures for rule changes, and that she was prejudiced by the changes in the new code. Supreme Court found that petitioner's reliance on the 2005 Code was misplaced and that NYU substantially complied with the guidelines and procedures set forth in the 2009 Code. Upon our review of the record, we find that NYU did not substantially comply with its own published guidelines under either the 2009 Code or the 2005 Code.

If the 2005 Code is the applicable code, then plaintiff clearly was prejudiced when NYU applied the 2009 Code. Under the 2005 Code, the Council on Ethics and Professionalism was composed of both faculty and student members, and the Investigating Panel was composed of one student and one faculty member. Under the 2009 Code, the PRB and Investigating Panel were composed solely of students. Dr. Eric Ploumis, petitioner’s faculty advisor at the PRB hearing, averred that an investigating panel made up of two students instead of one student and one faculty member is “much more susceptible to influence from the dean and administration of the college of dentistry. Faculty, having

tenure, are far more independent and objective in such matters."

Further, under the 2005 Code, a student facing suspension or dismissal had "the right to be accompanied at the hearing by an adviser ... or an individual from outside the University, or legal counsel from outside the University." Under the 2009 Code, the student had the right only to an adviser from within the University. Despite a request from her psychotherapist, petitioner was not permitted to have an attorney present, even though NYU knew that she was suffering from a mental disability at the time of the hearing. Indeed, NYU "had a mental health therapist at the hearing in the event [she] had a nervous breakdown."

On the other hand, the 2009 Code provides that "[w]hen sanctions of extended suspension or dismissal from the College are under consideration, a hearing before the Board is *mandatory*" (emphasis added). NYU admittedly did not follow the 2009 Code in the first instance when it issued its July 16, 2009 dismissal without affording petitioner a hearing before the PRB. While NYU claims that it corrected this omission as soon as petitioner brought it to the school's attention, at that point the PRB had already determined that petitioner had committed an ethical violation warranting dismissal, and the determination had been

reviewed and approved by the College Review Board.

As to the hearing itself, the 2009 Code requires that "[t]he charges and supporting evidence shall be presented by the Investigating Panel." Neither Hershkowitz or Meeker testified; the case against petitioner was based on the Investigating Panel Report. Tartaglia was not called to testify even though the Investigating Panel had not previously interviewed her and a key element of petitioner's defense was her claim that Tartaglia specifically instructed her, in conformity with Hershkowitz and Meeker's statements, to pay the PMV fees and fill out encounter forms "as if you did them," and accepted the fees knowing that they were being paid by petitioner herself.

Moreover, neither the allegedly fraudulent patient chart nor the encounter forms are annexed to the Investigating Panel Report. There is no proof in the record that those documents were reviewed by the investigators, the PRB, or the College Review Board. Nor was any evidence submitted supporting Meeker's claim that petitioner had been notified of a shortfall in her PMV goals before the eve of graduation. Further, there is no evidence demonstrating the reliability of the statements Hershkowitz and Meeker purportedly made to the Investigating Panel.

The 2009 Code also provides that:

> "The hearings shall be conducted in a manner to achieve *substantial justice* and shall not be restricted by the rules of evidence used in a court of law. Members of the Board may address questions to any party to the proceedings or to any witness called by the parties or by the Panel. *Each side shall have a fair opportunity to question the witnesses of the other.* Questions shall be posed through the Chair, unless the Chair determines otherwise. The Board may in its discretion limit the number of witnesses and may accept affidavits. *All matters of procedure not specified in this Code shall be decided by the Board in its discretion*" (emphasis added).[4]

The PRB's determination was not based on written statements by persons with knowledge, or their oral testimony. The hearsay in the Investigating Panel Report was not subject to cross examination, and petitioner was not afforded any, let alone a fair, opportunity to cross-examine the witnesses whose accusations were the basis of the charges lodged against her. Additionally, and of great significance, certain matters of procedure were determined by Dean Palatta, rather than the PRB, as required by the 2009 Code.

In advance of the hearing, petitioner sent a letter to Palatta requesting, "as a reasonable accommodation of [her]

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[4]The 2005 Code contains essentially the same clause, granting the powers to the Council, rather than the Board, and the analysis that follows would apply equally to that code.

medical condition, which ha[d] left [her] in an anxious and weakened state, [that] [her] adviser be permitted to question witnesses and summarize documents." She also requested various documents. Palatta refused.

Professor Ploumis averred, without contradiction, that Palatta "made it very clear that [Ploumis] was not permitted to ask questions, present evidence, or make objections on [petitioner]'s behalf during questioning by the [PRB]." Palatta "threatened that, were [Ploumis] to interject or participate in any other way [besides advising petitioner], [he] would be removed from the hearing and [petitioner] would have to proceed alone." Further, on October 13, 2009, Ploumis sought out Palatta to find out why a decision had not been issued, and Palatta "made it abundantly clear that no matter what the PRB decided, the Deans could send the decision back until they got the holding that they desired."

NYU also refused petitioner's request for contact information for potential witnesses, including Meeker, even though he was no longer at NYU. Petitioner's request to have Meeker, Hershkowitz, or Cornejo attend the hearing was also denied, even though their allegedly false statements were part of the Investigating Panel Report that formed the basis of the case

against her.

These facts, fully set forth in the record, establish that NYU did not substantially comply with its own published guidelines and policies, whether judged under the 2005 Code or the 2009 Code. In violation of both codes, petitioner was not afforded substantial justice. Significantly, among other things, she was not given a fair opportunity to cross-examine her accusers, and key procedural rulings were made and/or influenced by Palatta. Under these circumstances, we need not remand to allow NYU to interpose an answer; we can annul the determination expelling petitioner (*Matter of Matter of Tamsen v Licata*, 94 AD3d 1566, 1569 [4th Dept 2012]).

> "Where, as here, the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer, the court may reach the merits of the petition and grant the petitioner judgment thereon notwithstanding the lack of any answer and without giving the respondent a further opportunity to answer the petition."

(*Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1311 [4th Dept 2007] [internal quotation marks omitted]).

The dissent disagrees and believes that CPLR 7804(f) mandates that NYU be permitted to answer. While acknowledging that the Court of Appeals in *Matter of Nassau BOCES Cent. Council*

of Teachers v Board of Coop. Educ. Servs. of Nassau County (63 NY2d 100, 102 [1984]) recognized an exception to the statutory mandate, the dissent finds that the exception does not apply because "[t]here are a number of disputed issues of fact in the record as presently developed, including, but not limited to, whether a 2005 or 2009 Code of Ethics governed the challenged disciplinary proceedings, and whether petitioner falsified a patient's chart." However, as detailed above, the record establishes that NYU did not substantially comply with either the 2005 Code or the 2009 Code. Consequently, there is no need to remand to determine which code should have been applied. Further, given that NYU did not substantially comply with its own published guidelines, its determination must be annulled (*see Matter of Hyman v Cornell Univ.,* 82 AD3d 1309, 1310 [3d Dept 2011], *supra*), and there is no need to review whether it was rationally based upon the evidence. In this regard, we note that it would be improper for NYU to produce the actual patient charts for the first time in the article 78 proceeding (*see Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001]).

In light of the foregoing, there is also no need to determine whether the penalty of expulsion without possibility of readmission "is so disproportionate to the offense, in the light

of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]). Nevertheless, we feel compelled to express our view that even if NYU had substantially complied with its own guidelines and policies, we would find that the penalty of expulsion shocks one's sense of fairness.

Under the 2009 Code of Ethics, authorized sanctions for misconduct include:

> "a) Warning: Notice to the student in writing that continuation or repetition of the conduct found wrongful, or participation in similar conduct, within the period of time stated in the warning, shall be cause for disciplinary action.
>
> "b) Censure: Written reprimand for violation of specified regulation, including the possibility of more severe disciplinary sanction in the event of conviction for the violation within a period of time stated in the letter of reprimand.
>
> "c) Disciplinary probation: Exclusion from participation in privileges or extracurricular University activities as set forth in the notice of disciplinary probation for the specified period of time.
>
> "d) Restitution: Reimbursement for damage to or misappropriation of property. Reimbursement may take the form of appropriate service to repair or otherwise compensate for damages.

> “e) Extended suspension: Exclusion for classes and other privileges or activities as set forth in the notice of suspension for a specified period of time.
>
> “f) Dismissal from the College: Permanent termination of student status without the possibility of readmission.”

Petitioner’s academic performance at NYU dental college was exemplary, and this incident was at worst a single lapse in judgment in the face of extraordinary pressure. As Ploumis – who has been a member of NYU dental college for over 20 years – explained:

> "In a moment of panic and desperation, Katie did something foolish and imprudent that blemished an otherwise spotless record. Her lapse was not premeditated ....
>
> "... The entire student body is aware of, and aghast at, the punishment. Every student and graduate I have spoken to has indicated that, given a similar set of facts and conditions, he or she could envision acting similarly in a moment of panic....
>
> "... Decent people, compassionate institutions, don't throw a student away on the eve of her graduation for one lapse."

Furthermore, because petitioner was able to enter the dentistry program before completing her undergraduate degree, expulsion from NYU leaves her with no degree of any kind after seven years of educational toil and the expenditure of hundreds of thousands of dollars.

There are also extenuating circumstances, grounded in the Code of Ethics, that were not given the weight they were due. The 2005 Code and the 2009 Code both provide:

> "Commitment of the Colleges to Students.
>
> "The faculty, administration, and staff of the College will work to clarify academic requirements and provide assistance and mentoring for students in meeting expectations."

On the record before us, it appears that NYU frustrated petitioner's ability to complete her PMV requirements by giving her patients to other students because she had already showed competency in performing certain dental procedures. Petitioner was not informed until the night before her graduation that she might not be able to graduate due to a problem with PMV credits. Hershkowitz and Meeker refused to give petitioner any patients so that she could fulfill the remaining $2,007 of her PMV requirement and allegedly led her to believe that all they were interested in was having the $2,007 show up on her PMV account.

Further, the punishment that NYU meted out to petitioner is allegedly harsher than the punishment it has given to similarly situated students. For example, the Annual Report of the Council on Ethics and Professionalism of the New York University College of Dentistry for 2008-09 states that a student who "violated the

code by misrepresenting their [*sic*] clinical work" merely had to repeat the academic year. Similarly, petitioner said that Meeker told her on June 9, 2009 that "he had another student a couple of years ago do 'something really bad' and that student, a male, was still able to graduate. Dr. Meeker did not tell [petitioner] what the student had done, only that 'it was much worse than what [she] did.'"

All concur except Gonzalez, P.J. and DeGrasse, J. who dissent in part in a memorandum by Gonzalez, P.J. as follows:

GONZALEZ, P.J. (dissenting in part)

Petitioner brought this article 78 proceeding to annul a determination of New York University (NYU) terminating her from its dental college. The appeal challenged the grant of respondent NYU's pre-answer motion to dismiss the petition.

I agree with the majority that dismissal was error and that the petition should be reinstated. However, it is my view that CPLR 7804(f) requires us to permit respondent to serve and file an answer (*see Matter of Bethelite Community Church, Great Tomorrows Elementary School v Department of Envtl. Protection of City of N.Y.*, 8 NY3d 1001 [2007]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 103 [1984]).

CPLR 7804(f) mandates[1] that a respondent whose pre-answer motion to dismiss is denied be permitted to "answer, upon such terms as may be just." In *Bethelite* (8 NY3d at 1001-1002), the Court of Appeals reversed an order of this Court that granted an

[1]Notably, in the usual special proceeding, CPLR 404(a) uses permissive language, stating that if a motion to dismiss the proceeding is denied, the court "may" permit a respondent to answer. By contrast, § 7804(f) was specifically modified to include mandatory language, "shall," indicating a "***require***[ment] that respondent be given an opportunity to answer if the motion is denied" (N.Y. Adv. Comm. on Prac. & Proc., Fifth Prelim. Rep., Legis. Doc. No. 15 at 755 [1961] [emphasis added]).

article 78 petition upon review of the denial of a pre-answer motion to dismiss. By granting the petition in this case, the majority is repeating precisely the same error that formed the basis of the *Bethelite* reversal.

The Court of Appeals has recognized an exception to the CPLR 7804(f) mandate, where "the facts are so fully presented ... that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Nassau BOCES,* 63 NY2d at 102). In my view, this case does not fall within that exception *(see Matter of Julicher v Town of Tonawanda*, 34 AD3d 1217 [4th Dept 2006]).

There are a number of disputed issues of fact in the record as presently developed, including, but not limited to, whether a 2005 or 2009 code of ethics governed the challenged disciplinary proceedings and whether petitioner falsified a patient's chart. Specifically, the June 17, 2009 annual report of the Council on Ethics and Professionalism (CEP) of NYU's College of Dentistry seems to refute respondent's assertion that disciplinary matters were no longer handled by CEP during the academic year in question.

Kelly v Safir (96 NY2d 32 [2001]), cited by the majority in support of an assertion that "it would be improper for NYU to

produce the actual patient charts for the first time in the article 78 proceeding," is inapplicable here. In *Kelly*, the Court of Appeals addressed the narrow scope of judicial review of penalties imposed after administrative hearings in two consolidated article 78 proceedings. Here, by contrast, there was no article 78 hearing. This appeal arises from the grant of a pre-answer motion to dismiss a petition that challenged both the penalty of expulsion and the manner in which NYU conducted a disciplinary proceeding.

Finally, the relief demanded in the petition includes a judgment directing respondent to reinstate petitioner as a student and to grant her a degree from the College of Dentistry as well as attorneys' fees. Curiously, by today's ruling, the majority grants all of the requested relief even though it acknowledges an issue as to whether petitioner falsified patient records as alleged in the underlying disciplinary proceeding.

Accordingly, I would vacate that portion of the order and

judgment appealed from that dismissed the article 78 proceeding, reinstate the petition, and remand to Supreme Court to allow respondent to submit an answer and for further proceedings on the pleadings.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8188 The People of the State of New York, Respondent, Ind. 2078/03 3126/03

-against-

Ramon Arroyo, etc., Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about September 8, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Because this State's Legislature wanted to grant relief from the harsh punishment imposed upon nonviolent drug offenders under the Rockefeller Drug Laws, the Drug Law Reform Act (DLRA) of 2009 (L. 2009, Ch. 56, §9), codified in part at CPL 440.46, permits a criminal defendant imprisoned for class B drug felonies committed while the Rockefeller Drug Laws were in force to apply for resentencing under the current, less severe sentencing regime (*People v Paulin*, 17 NY3d 238, 243-244 [2011]). Specifically CPL 440.46(1) states that

"[a]ny person in the custody of the

> department of corrections and community supervision convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence."

While resentencing under the 2009 DLRA is not mandatory, and is instead left to the Supreme Court's discretion (*People v Myles*, 90 AD3d 952, 953 [2d Dept 2011]; *People v Gonzalez*, 29 AD3d 400, 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]), the statute creates a presumption in favor of resentencing, and absent an exclusion expressly listed in the statute (*see* CPL 440.46[5]), denial of an application for resentencing is warranted only upon a showing that substantial justice dictates it (*Myles*, 90 AD3d at 953; *Berry*, 89 AD3d 954, 955 [2d Dept 2011]); *People v Beasley*, 47 AD3d 639, 641 [1st Dept 2008]; *Gonzalez*, 29 AD3d at 400). When determining whether to grant resentencing, the court can consider any and all facts relevant to the imposition of a new sentence, including the defendant's willingness to participate in drug treatment while incarcerated (*People v Avila*, 84 AD3d 1259, 1259 [2d Dept 2011], *lv denied* 17

NY3d 804 [2011]), defendant's institutional record of confinement, the defendant's prior criminal history, the severity of the conviction for which resentencing is sought, whether the defendant has shown remorse, and the defendant's history of parole or probation violations (*Myles*, 90 AD3d at 953-954).

Here, in 2003 defendant pleaded guilty to two counts of criminal sale of a controlled substance in the third degree. Provided he completed a drug treatment program, defendant would be allowed to withdraw his plea, replead to a class C felony, and be sentenced to probation. In 2004, however, while in the drug treatment program, defendant was once again arrested and convicted of attempted robbery in the second degree. The robbery arrest constituted a violation of his plea agreement on the previous drug convictions and accordingly, defendant was sentenced to two concurrent indeterminate prison terms of 2 to 6 years on the drug convictions and to a determinate one-year prison term on the robbery conviction.

In 2007, while defendant was on parole for his drug convictions, he was once again arrested and convicted of attempted conspiracy in the second degree, for which he received an indeterminate prison term of 3 to 6 years. While in prison, defendant successfully completed a comprehensive drug treatment

program and took educational courses. However, while incarcerated, defendant committed eight tier II infractions and seven tier III infractions. Several of defendant's infractions were for drug use, one infraction was for possession of a weapon, and another was for creating a flood condition.

Given defendant's criminal record, involving two felony convictions subsequent to the convictions for which he seeks resentencing (one occurring while he was on parole), and his poor infraction history (eight tier II and seven tier III infractions), the motion court, in the exercise of its discretion, properly denied defendant's application for resentencing (*see Gonzalez*, 29 AD3d at 400 [order denying resentencing affirmed, where defendant was rearrested and convicted of a new drug-related crime while on parole and had a poor disciplinary history while incarcerated]; *Myles*, 90 AD3d at 954 [resentencing denied, given defendant's poor disciplinary history, which included several tier II and III infractions, and his felony conviction, which occurred after the conviction for which he sought resentencing]).

Contrary to defendant's assertion, *People v Milton* (86 AD3d 478 [1st Dept 2008]) does not warrant a reversal of the Supreme Court's order, as the facts there are easily distinguishable. In

Milton, we held that resentencing was warranted, despite the defendant's failure to complete a drug treatment program and his poor disciplinary history while incarcerated (*id*. at 478). Here, however, not only does defendant have a poor disciplinary history, including multiple tier III infractions, but after his convictions for the crimes for which he seeks resentencing, he was arrested and convicted of felonies twice - once while in a drug treatment program and then again while on parole. Thus, the defendant here has demonstrated that even when given ample opportunity, he has not been capable of refraining from criminal behavior. Therefore, substantial justice dictates that resentencing be denied.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

7218 Dabriel, Inc., et al., Index 300939/11
Plaintiffs-Respondents,

-against-

The First Paradise Theaters Corp.,
Defendant-Appellant.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for appellant.

Kenneth K. Frankel, New York, for respondents.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 28, 2011, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to grant the motion as to the first six causes of action in the complaint, and otherwise affirmed, without costs.

Defendant is the owner of the former Loew's Paradise Movie Theater in the Bronx. Plaintiff Dabriel, Inc., is the current tenant of the theater. Plaintiff Gabriel Boter is Dabriel's principal. In or about 2003, an entity controlled by Boter, Paradise Theater Productions (Productions), entered into a lease with defendant for the premises commencing on March 1, 2004 (the 2003 lease). The 2003 lease provided that defendant would

perform certain work at the premises, including, but not limited to, improvements to the theater's lighting, sound system, stage, and marquee (the Landlord's Work), and that Productions would pay $1,050,000 for the Landlord's Work in the form of additional rent.

Notwithstanding Productions' position that defendant never completed the Landlord's Work, Productions paid defendant over $525,000 in rent, and, on October 28, 2005, Boter signed an agreement formally accepting delivery of the premises "in the condition required by the lease, including but not limited to completion" of the Landlord's Work. Ultimately, however, Productions experienced financial difficulties in operating the theater, and negotiated an assignment of the 2003 lease to nonparty Mossberg Credit Services, Inc. (Mossberg). Defendant consented to the assignment of the lease, which took effect on February 12, 2007.

In April 2008, Mossberg commenced an action in Supreme Court, New York County, against defendant, Boter, and Productions. Mossberg claimed, inter alia, that the Landlord's Work had never been performed. After Mossberg stopped paying rent, defendant commenced a nonpayment proceeding against Mossberg in Civil Court, Bronx County. On or about July 28,

2009, Boter, Productions, defendant and Mossberg entered into a global settlement agreement whereby they exchanged general releases of all claims against one another, and the premises were returned to the possession of defendant.

On September 16, 2009, Boter, through Dabriel, a separate entity from Productions, entered into a new lease agreement for the theater (2009 lease). The 2009 lease provided, in pertinent part: "**No Representations by Owner: 20**. Neither [defendant] nor [defendant]'s agent have made any representations with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, leases, expenses of operation, or any other matter or thing affecting or related to the demised premises, except as expressly set forth..." The 2009 lease also provided that Dabriel would execute two promissory notes, pursuant to which they promised to pay defendant $1,464,582.20 over two overlapping repayment periods. Boter personally guaranteed the notes. The guarantees identified the loans as having been made "to assist [Dabriel] in the leasing of the premises."

By November of 2010, plaintiffs were $25,600 in arrears on their rent under the 2009 lease. The parties reached another agreement, the First Amendment of the lease, pursuant to which

defendant agreed to waive the rent arrears and defer monthly payments on the promissory notes in exchange for an increase in rent and additional guarantees of the lease.

Nonetheless, plaintiffs commenced this action in an effort to, inter alia, set aside the promissory notes and Boter's personal guarantees of the notes (collectively, the notes) and to compel defendant to perform the Landlord's Work delineated in the 2003 lease. In the first cause of action, plaintiffs seek a declaration that the notes are unconscionable and void as against public policy. In support of that claim, plaintiffs allege that, at the meeting at which Boter executed the 2009 lease and the notes, the attorney who attended on defendant's behalf had represented Productions in connection with the assignment to Mossberg. Plaintiffs further assert that Boter was undergoing chemotherapy treatment for cancer at the time of the meeting. In addition, plaintiffs allege that during the meeting, defendant represented to Boter that it would perform all of the Landlord's Work outlined in the 2003 lease, that the rent could be renegotiated if it became too onerous, that the ancillary documents "were only letters executed to ensure that [d]efendant would avoid the litigation it encountered with Mossberg," and that defendant would offer Boter's son a job.

The second cause of action seeks a declaration that the notes are void because the aforementioned representations amounted to fraud in the inducement. The third cause of action, for fraud in the execution, alleges that the notes were not supported by consideration, did not indicate why they were being given, and differed from the draft notes that were "intended for execution." The fourth cause of action seeks reformation of the 2009 lease to include the representations allegedly made by defendant at the September 2009 meeting regarding the Landlord's Work.

In the fifth cause of action, plaintiffs seek damages in connection with defendant's breach of its promise to perform the Landlord's Work. In the sixth cause of action, seeking damages for tortious interference with prospective business relations, plaintiffs allege that defendant demanded access to the premises for purposes of showing the space to a party interested in using the theater, notwithstanding that plaintiff was negotiating with the same prospective client. Finally, plaintiffs claim in the seventh cause of action that defendant surreptitiously connected plaintiffs' Con Edison meter to the adjacent property, also owned by defendant, causing plaintiffs to be billed $86,000 for electricity they did not use.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). It argued that plaintiffs waived any unconscionability claim by failing to disaffirm the notes in a timely fashion. It further argued that plaintiffs' claim that they were fraudulently induced to enter into the notes by defendant's alleged promise to perform the Landlord's Work is barred by the general releases executed at the end of the Mossberg litigation. Defendant similarly relied on those releases in arguing that plaintiffs could not insist that the 2009 lease should be reformed to include a requirement that defendant completed the Landlord's Work. Defendant also argued that the fraud in the execution claim fails because the leasehold interest was sufficient consideration, and the complaint fails to allege how the executed documents varied from the drafts which plaintiffs maintain were "intended for execution." As for the cause of action for tortious interference, defendant asserted that it had a contractual right to request entry to the premises, and that, in any event, the claim was not supported by the requisite allegation that plaintiffs' failure to consummate a transaction with the unspecified client was a direct result of defendant's behavior. Finally, defendant construed plaintiffs' seventh cause of action as one for tortious interference, and

again contended that the allegations were too vague to state such a claim. In opposition to the motion, Boter submitted an affidavit which essentially reiterated the allegations in the complaint.

The IAS court denied the motion in its entirety. It found that "plaintiff's complaint and evidence are sufficient to overcome a CPLR § 3211(a)(7) challenge." It further held that "the documents do not bar plaintiff's claim of misrepresentation as they do not establish a defense as a matter of law at this stage of the action."

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made - i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988] [internal citations and quotation marks omitted]). Here, even if we accept the allegations in the complaint as true, and afford plaintiffs every reasonable inference available from the pleadings, as required (*see Leon v Martinez*, 84 NY2d 83 [1994]), plaintiffs cannot meet this standard. First, to establish procedural unconscionability, a party needs to establish the

presence of certain elements during the transaction such as deceptive or high-pressured tactics, the use of fine print in the contract, a lack of experience and education and a disparity in bargaining power *(Gillman*, 73 NY2d at 11). Plaintiffs point to the fact that Boter was undergoing chemotherapy, but fail to allege that this impeded his ability to act rationally in conducting business, or that defendant took advantage of his physical condition.

Further, there is no basis to conclude that Boter was not sophisticated enough to enter into the agreements, especially since he executed the 2003 lease and acted as the principal of the entity that ran a significant theater operation. That the attorney who previously represented Boter attended the meeting at which the notes were executed on defendant's behalf does not establish that the playing field was tilted too heavily in defendant's favor. All told, "plaintiffs failed to plead anything regarding an alleged lack of meaningful choice . . . and it is noteworthy that plaintiffs were free to walk away from the lease negotiations at any time and rent space elsewhere" (*Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc. L.L.C.*, 72 AD3d 456, 457 [1st Dept 2010] *lv denied* 15 NY3d 711 [2010]). In any event, the agreements are not substantively unconscionable.

There is nothing inherent in the notes and the lease guaranty which suggests that the terms were "unreasonably favorable" to defendant (*Gillman*, 73 NY2d at 12).

Plaintiffs' second cause of action, for a declaration that the notes are void for having been induced through fraud, is only viable if there is an allegation that they reasonably relied on defendant's representations (*see Comtomark, Inc. v Satellite Communications Network*, 116 AD2d 499, 501 [1st Dept 1986]). Plaintiffs claim that they executed the notes because defendant promised that it would complete the Landlord's Work, ultimately tear up the notes, offer Boter's son a job, and consider renegotiating the lease terms if the rent turned out to be onerous. Initially, we disagree with defendant that the releases exchanged at the conclusion of the Mossberg litigation bar this claim. The parties were free to disregard the releases and once again negotiate the Landlord's Work. Nevertheless, the clause in the 2009 lease whereby plaintiffs explicitly acknowledged that defendant made no representations concerning the premises, outside of the lease itself, bars plaintiffs from relying on parol evidence of alleged oral representations (*see Mahn Real Estate Corp. v Shapolsky*, 178 AD2d 383, 385 [1st Dept 1991]). In any event, in light of plaintiffs' assertion that defendant

failed to perform the Landlord's Work even when it was expressly required by the 2003 lease, it was not reasonable for plaintiffs to rely on subsequent oral representations from defendant regarding performance of the work. For these reasons, plaintiffs' fourth and fifth causes of action, for, respectively, reformation of the 2009 lease and damages in connection with defendant's failure to perform the Landlord's Work, should have been dismissed as well.

It was similarly unreasonable for plaintiffs to rely on defendant's alleged representation that the notes and guarantees were only "letters" designed to avoid the litigation which Mossberg had commenced. The notes, on their face, are not "letters," but rather legitimate instruments indebting Dabriel (*see Dunkin' Donuts of Am. v Liberatore* [138 AD2d 559, 560 [2nd Dept 1998] [holding that, even if guarantee was deceptively described as a "routine document," it was enforceable because it clearly indicated that the defendant was guaranteeing a debt, and the document was unambiguously identified as a personal guarantee]). The alleged promise that the rent "would be renegotiated in the event the business could not handle the rental amount" is too vague to have been justifiably relied on by plaintiffs. As for the promise to employ Boter's son, plaintiffs

do not allege that this representation directly induced them to enter the 2009 lease.

For these reasons, we also find that there was no fraud in the execution of the ancillary documents. Further, the 2009 lease clearly provides that the notes were given as an inducement for entering into the lease, and thus, contrary to plaintiffs' contention, they were supported by consideration (*Dunkin' Donuts*, 138 AD2d at 560-561). Plaintiffs' argument that the documents differed from the ones "intended for execution" must fail because they make no allegations as to how any drafts may have differed from the final versions. In any event, plaintiffs have offered insufficient evidence as to why their voluntary execution of the "wrong" documents was excusable.

As to plaintiffs' sixth cause of action, for tortious interference with a prospective business relationship, they have not identified who defendant brought to the premises, how defendant's showing of the space was a substantial interference with plaintiffs' business opportunity, or that but for defendants' conduct, plaintiffs would have entered into the prospective contract. Accordingly, the allegations fail to make out the necessary elements of such a claim (*see e.g. Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266-67 [1st Dept 2002]).

Finally, defendant characterizes plaintiffs' seventh cause of action as one for tortious interference with contractual relations or economic advantage, and argue that plaintiffs have not alleged the necessary elements of either of those claims. While plaintiffs have perhaps pleaded this claim inartfully, they have undoubtedly set forth a cause of action based on conversion of electricity (*see Good Sports of N.Y. v Llorente*, 280 AD2d 261, 262 [1st Dept 2001], *lv denied* 96 NY2d 714 [2001]).

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

ENTERED: OCTOBER 11, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8088 The People of the State of New York, Respondent, Ind. 3261/08

-against-

Julian Silva, Defendant-Appellant.

John R. Lewis, Sleepy Hollow, for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 15, 2010, as amended December 21, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, attempted criminal possession of a weapon in the third degree and criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 24 years, unanimously affirmed.

The court's rulings on uncharged crimes evidence were proper exercises of discretion. This case involved a lengthy investigation into large-scale drug trafficking. Evidence of uncharged crimes that surrounded the charged crimes was relevant

to establish the essential element of intent, to explain the context in which the charged crimes occurred, to complete the narrative, particularly in view of the code words used to refer to cocaine and money, and to refute claims made by defendant on cross-examination (*see generally People v Dorm*, 12 NY3d 16, 19 [2009]). The volume of uncharged crimes evidence was not excessive, and its probative value exceeded its prejudicial effect. Furthermore, evidence of criminal activity by persons other than defendant was relevant under the circumstances of the case, and it did not constitute uncharged crimes evidence as to defendant (*see People v Arafet*, 13 NY3d 460, 465 [2009]).

Defendant's challenges to the People's summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. Defendant's unspecified objections, belated mistrial motion, and objections made at earlier stages of the trial were insufficient to preserve his present claims for review as questions of law. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The record is insufficient to establish any basis for

reversal regarding a jury note that was marked as an exhibit, because the note did not result in a response by the court or any other mention in the transcript. Indeed, on this record, it is impossible to determine if the note was presented to the judge or if the jury reached a verdict without the judge being aware they had submitted the note.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8153 O. Aldon James, Jr., et al., Index 109945/11
Plaintiffs-Respondents,

-against-

The National Arts Club, et al.,
Defendants-Appellants.

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Sercarz and Riopelle, LLP, New York (Roland G. Riopelle of counsel), for appellants.

Jaffe & Asher LLP, New York (Ira N. Glauber of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 23, 2012, which, granted plaintiffs' motion to renew their prior motion to disqualify defendant Board of Governors of the National Arts Club (NAC) from acting as the trier of fact on a statement of charges against plaintiffs, and, upon renewal, granted the motion, invalidated the hearing previously conducted by the Board, annulled the Board's post-hearing decision, and directed a new hearing by a neutral arbiter, unanimously reversed, on the law, without costs, the motion denied, the Board's decision reinstated, and the direction for a new hearing vacated.

Plaintiffs are the former president and other members of the NAC, a not-for-profit corporation and private club dedicated to

the promotion of public interest in the arts. Defendants are the NAC, the NAC Board of Governors and several individual Board members. In or about August 2011, after a preliminary inquiry into allegations of misconduct by plaintiffs, the Board served plaintiffs with a statement of charges pursuant to the NAC bylaws. Plaintiffs were provided notice of an NAC disciplinary hearing on the charges scheduled for August 30, 2011.

The day before the scheduled hearing, plaintiffs commenced this action seeking, inter alia, a declaration that the statement of charges was void, and an injunction staying the disciplinary hearing. Additionally, plaintiffs sought a preliminary injunction to prevent the hearing from going forward, which the court granted. Plaintiffs then moved to disqualify the Board from presiding over the hearing, alleging that it was biased. The court determined that plaintiffs had failed to show bias on the part of the entire Board, but granted plaintiffs' motion to the extent of disqualifying certain Board members. In addition, the court ordered further procedures to be followed, including the exchange of witness lists and documents, and time limits for direct and cross examination.[1]

[1] That order is not the subject of this appeal.

In January 2012, the court granted defendants leave to amend their answer to include counterclaims. Plaintiffs moved to renew their previously-denied motion for disqualification, and sought a further stay of the disciplinary hearing. As relevant here, plaintiffs argued that the Board's vote to authorize the counterclaims was a new fact demonstrating the Board's bias. The court denied the request for a stay, and the hearing proceeded on January 23, 2012 before a subcommittee of the Board. Plaintiffs failed to appear at the hearing, but were given permission to submit evidence and a written summation.

On February 16, 2012, the Board found that the statement of charges was sustained by the evidence, and voted to expel plaintiffs from the NAC. In the order on appeal, entered March 23, 2012, the court granted plaintiffs' motion to renew their motion to disqualify, and, upon renewal, granted the motion, disqualified the Board, invalidated the expulsion, and directed that a new hearing be held before a neutral arbitrator. The court concluded that the effect of the Board members' having voted to assert counterclaims in this action, together with the various Board members' roles as hearing officers responsible for judging the merits of the statement of charges, deprived them of the necessary neutrality to adjudicate the claims.

We conclude that the motion court improperly disqualified the NAC Board from adjudicating the statement of charges against plaintiffs. The court should not have decided this issue by way of motion in this plenary action for declaratory and injunctive relief. Rather, the appropriate venue for plaintiffs, as members of a private club, to challenge their expulsion would be in an Article 78 proceeding after the NAC's internal proceedings were completed, and upon a full record (*see Dormer v Suffolk County Police Benevolent Assn., Inc.*, 95 AD3d 1166, 1168 [2d Dept 2012]). In this regard, we note that the court reached its conclusion without even reviewing the full record of the hearing.

Even if we were to address the merits, we would find that the court, in this ruling, overstepped its authority by interfering with internal, private, club proceedings. "It is well established that where the constitution and by-laws of a voluntary association reasonably set forth grounds for expulsion and provide for a hearing upon notice to the member, judicial review of such proceedings is unavailable, unless the reason for expulsion is not a violation of the constitution or by-laws or is so trivial as to suggest that the action of the association was capricious or corrupt, or unless the association failed to administer its own rules fairly" (*Bloch v Veterans Corps. of*

Artillery, 61 AD2d 772, 773 [1st Dept 1978]). Here, there is no showing that the disciplinary process was not conducted in accord with the NAC bylaws.

Nor have plaintiffs demonstrated bias on the part of the Board warranting its disqualification. Although "a determination based . . . on a body's prejudgment or biased evaluation must be set aside[,] . . . a mere allegation of bias will not suffice. There must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it" (*Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied*, 454 US 1125 [1981]). The proffered reason for the disqualification of the Board — the filing of the counterclaims — is not evidence of bias sufficient to warrant the Board's removal. Nor, on this record, was there any showing that the decision to expel plaintiffs from the NAC flowed from any such alleged bias.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8168 In re Besjon B.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 20, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him on probation for a period of nine months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1), nunc pro tunc to January 20, 2012.

The court improvidently exercised its discretion when it

adjudicated appellant a juvenile delinquent and imposed probation. This was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]). An adjournment in contemplation of dismissal would have sufficed to serve the needs of appellant and society (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [2011]).

Appellant was 11 years old at the time of the incident, which was his only conflict with the law. The circumstances of the assault were not particularly egregious. Although appellant's school record had been unsatisfactory, it had greatly improved by the time of the disposition. An ACD with appropriate conditions would have provided adequate supervision, and the nine-month term of probation that the court imposed was unnecessary.

In light of this determination, we find it unnecessary to discuss any of the other issues raised by appellant.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8257- Ind. 3696/07
8258 The People of the State of New York,
Respondent,

-against-

Matthew Chacko,
Defendant-Appellant.
- - - - -
Immigrant Defense Project,
Amicus Curiae.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

Immigrant Defense Project, New York (Dawn M. Seibert of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered November 3, 2011, which denied defendant's CPL 440.10/440.20 motion to vacate judgment and set aside the sentence, unanimously reversed, on the law, and the matter remanded for an evidentiary hearing.

This case presents factual issues requiring a hearing into whether defendant was deprived of effective assistance of counsel under *Padilla v Kentucky* (559 US__, 130 S Ct 1473 [2010]). Defendant alleges that his attorney prejudicially failed to

advise him of the immigration consequences of his plea. Defendant acknowledges that his attorney was unaware her client was not a United States citizen, but alleges that the attorney never asked him anything about his citizenship.

The People would place the burden on a defendant to show that his or her attorney was aware, or should reasonably have been aware, that the client was a noncitizen in order to trigger the obligation to give advice regarding immigration consequences. However, we see no reason to limit *Padilla* to cases where the client volunteers that he or she is not a US citizen, or some other circumstance casts doubt on the client's US citizenship. Instead, the burden of asking the client about his or her citizenship should rest on the attorney. A defendant who is unaware that his or her immigration status is relevant to the criminal proceedings "would have no particular reason to affirmatively offer information regarding his or her immigration status to counsel" (*People v Picca*, 97 AD3d 170, 179 [2d Dept 2012]). This case warrants, at least, a hearing into whether defendant misinformed his attorney as to his citizenship, or whether counsel had any other reason for not inquiring about that matter.

This case also warrants a hearing on the prejudice prong of

defendant's *Padilla* claim. Defendant made a sufficient showing to at least raise an issue of fact as to whether he could have rationally rejected the plea offer under all the circumstances of the case, including the serious consequences of deportation, defendant's incentive to remain in the United States, the strength of the People's case and defendant's sentencing exposure (*see Picca*, 97 AD3d at 183-186). Furthermore, defendant sufficiently alleges that if immigration consequences had been factored into the plea bargaining process, counsel might have been able to negotiate a different plea agreement that would not have resulted in automatic deportation.

In light of this determination, we do not reach defendant's challenges to the voluntariness and fundamental fairness of his plea, and his claim that his sentence was unconstitutionally harsh.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8259 In re Mahamadou H.,

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

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

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

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about January 5, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, criminal possession of a weapon in the fourth degree and menacing in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and 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 court's determinations concerning identification and credibility, including its finding that the victim had a sufficient opportunity to observe appellant and make a reliable identification.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8260 The People of the State of New York, Ind. 1381/09
Respondent,

-against-

Joel Gutierrez,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 16, 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: OCTOBER 11, 2012

CLERK

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

Andrias, J.P., Friedman, Moskowitz, Freedman, JJ.

8263- Index 570674/11
8263A IGS Realty Co., L.P.,
Petitioner-Respondent,

-against-

James Catering, Inc., doing
business as Loft Eleven, etc.,
Respondent-Appellant.

- - - - -

IGS Realty, Co., L.P.,
Petitioner-Respondent,

-against-

Loft West Side at 37th
Street, Inc., etc.,
Respondent-Appellant.

- - - - -

IGS Realty, Co., L.P.,
Petitioner-Respondent,

-against-

Loft Eleven Inc.,
Respondent-Appellant.

- - - - -

8262 West Side Loft, Inc., et al., Index 600740/09
Plaintiffs-Appellants,

-against-

IGS Realty Co., et al.,
Defendants-Respondents.

- - - - -

8261 IGS Realty, Inc., L.P., etc., Index 603561/09
Plaintiff-Respondent,

-against-

James H. Brady,
Defendant-Appellant.

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Law Offices of Edward Alper, New York (Edward Alper of counsel), for James Catering, Inc., West Side Loft, Inc., and Loft Eleven Inc., appellants.

Robert J. Adinolfi, New York, for James H. Brady, appellant.

Bryan Cave LLP, New York (Daniel P. Waxman of counsel), for respondents.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about January 23, 2012, which, in a summary nonpayment proceeding, affirmed an order of the Civil Court, New York County (Arthur F. Engoron, J.), entered December 6, 2010, denying respondents James Catering, Inc., West Side Loft, and Loft Eleven Inc.'s (the tenants) motion to vacate the default judgments against them, unanimously reversed, on the law and the facts and in the exercise of discretion, and the motion granted. Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about June 16, 2011, which, insofar as appealed from as limited by the briefs, granted defendants-landlords' (IGS Realty) motion for summary judgment

dismissing the amended complaint in index no. 600740/09 with prejudice, denied plaintiffs-tenants' cross motion to amend their complaint in index no. 650463/09, and sua sponte dismissed the only remaining cause of action in index no. 650463/09, unanimously reversed, on the law (as to the motion) and on the law and the facts and in the exercise of discretion (as to the cross motion), the motion denied, and the cross motion granted. Judgment, same court (Joan A. Madden, J.), entered November 21, 2011, against tenants' guarantor James H. Brady (Brady) in the amount of $178,631.17, unanimously reversed, on the law, and the judgment vacated. Appeal from order (same court and Justice), entered November 4, 2011, which, insofar as appealed from as limited by the briefs, granted IGS Realty's motion for summary judgment in lieu of complaint and denied Brady's cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Although tenants' argument that IGS Realty never served the default judgments with notice of entry is not preserved for appellate review (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [1st Dept 2000]), it is irrelevant since the motion to vacate was timely. Assuming the clock began ticking on the date of entry stamped on the judgments, tenants' motion was made

within one year (*see* CPLR 5015[a][1]). Further, tenants established both a reasonable excuse for their failure to appear with counsel on October 13, 2009 and a meritorious defense to IGS Realty's nonpayment proceedings.

As a result of tenants' inability to obtain substitute counsel within 13 days of prior counsel being relieved by the court, tenants and Brady, their principal, have been deprived of their day in court in four cases: the Civil Court proceedings brought by the IGS Realty, the Supreme Court actions between tenants and IGS Realty, and the Supreme Court action between IGS Realty and Brady. Given the disputed issues of fact in these cases, they should be resolved by trial, not default. (*see Ackerson v Stragmaglia*, 176 AD2d 602, 604 [1st Dept 1991]). Since we are granting the motion to vacate the Civil Court judgments, they no longer have res judicata effect (*see e.g. Trisingh Enters. v Kessler*, 249 AD2d 45, 46 [1st Dept 1998]). Thus, the Supreme Court order and judgment, which were based on res judicata, must be reversed.

Tenants' cross motion for leave to amend the complaint in index no. 650463/09 should have been granted. The motion court erred in finding that tenants failed to furnish a proposed amended complaint. Furthermore, the proposed fraud claim was

sufficiently specific (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

Brady's contention that he is entitled to summary judgment in IGS Realty's action on his guarantees is unavailing. He failed to preserve his claim that the guarantees are unenforceable as unconscionable and there are issues of fact as to whether IGS Realty failed to perform its obligations to tenants.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8264 The People of the State of New York, Ind. 2671/02
Respondent,

-against-

Lazaro Silva,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 27, 2010, resentencing defendant to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8265 In re Trisha B.,

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

Lisa H. Blitman, New York, for appellant.

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

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about July 6, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

Appellant's challenges to the legal sufficiency of the petition and the evidence adduced at the fact-finding hearing are unavailing. The evidence set forth in the petition and supporting deposition, and the similar evidence presented at the

hearing, both support the inference that appellant trespassed in a Housing Authority building in violation of Penal Law § 140.10(e) (*see Matter of Lonique M.*, 93 AD3d 203 [1st Dept 2012]).

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8266 The People of the State of New York, Ind. 2661/07
Respondent,

-against-

Khani Phillibert,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Matthew R. Maddox and Gabriel Gillett of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J. at hearing; Analisa Torres, J. at jury trial and sentencing), rendered November 2, 2009, as amended December 2, 2009, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing record does not support defendant's assertion that the arresting officer had no actual recollection of the description conveyed to him by the ghost officer. The totality of the arresting officer's testimony made clear that while he had no *independent* recollection of the description, his recollection

had been refreshed by reading the buy report prepared by the primary undercover officer, so that he was testifying on the basis of this revived recollection (*see* Prince, Richardson on Evidence § 6-214 [Farrell 11th ed]). A witness may use "any memorandum, whether made by himself [or herself] or another," to refresh his or her memory (*People v Goldfeld*, 60 AD2d 1, 11 [4th Dept 1977], *lv denied*, 43 NY2d 928 [1978]). The issue of whether a document actually refreshed a witness's recollection is a matter of credibility to be resolved by the trier of fact (*see e.g. People v Rivera*, 213 AD2d 281, 281-281 [1995], *lv denied* 86 NY2d 740 [1995]), and there is no basis for disturbing the court's determination.

Defendant's remaining suppression arguments are unavailing. As this Court held on the codefendant's appeal, "[T]he arresting officer's testimony that he received a radio transmission from a ghost officer about a drug sale, along with the arresting officer's knowledge of the ghost's role in the planned undercover operation, permitted an inference that the transmission was based on the ghost officer's presumptively reliable observations. This report provided probable cause to arrest defendant once the officer saw him in the vicinity of the drug transaction about five minutes after receiving the radio report and observed that

he matched the sufficiently detailed description provided in that report" (*People v Ramirez*, 96 AD3d 474 [1st Dept 2012] [citations omitted]).

Defendant did not preserve his challenge to the court's charge and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Defendant and the codefendant were charged with jointly engaging in a drug transaction. Under the facts of the case, the buy money recovered from the codefendant was admissible against both defendants, and defendant was not entitled to an instruction to the contrary.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8267 Tony Diaz, Index 305204/09
Plaintiff-Respondent,

-against-

1100 Wyatt LLC,
Defendant-Appellant,

The City of New York,
Defendant.

_____

McGaw Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for appellant.

Scott Baron & Associates, P.C., Howard Beach (John Burnett of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 31, 2011, which, in an action to recover for personal injuries allegedly sustained when plaintiff tripped on a sidewalk abutting defendant-appellant's property, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff testified at his deposition that he tripped in front of defendant's premises when his foot went into a crack or hole in the sidewalk. He did not see the crack until he was shown a picture of the area, but he felt it with his foot when he fell. Despite never seeing the crack or hole at the time of the

accident, plaintiff attributed his fall to that condition. Thus, defendant did not sustain its burden of demonstrating, in the first instance, that the alleged sidewalk defect was not the cause of plaintiff's fall (*see Tiles v City of New York*, 262 AD2d 174 [1st Dept 1999]; *see also Clark v Jay Realty Corp*, 94 AD3d 635 [1st Dept 2012]).

Even if defendant met its burden, plaintiff raised an issue of fact by submitting, among other things, the deposition testimony of defendant's employee, who identified the area of the fall from a photograph and testified that the crack shown in the photograph was present on the day of the accident.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8268 Joseph Rubio, Index 100785/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 25, 2011, upon a jury verdict, awarding plaintiff the amounts of $750,000 for past pain and suffering, $1,684,615.40 for future pain and suffering over 14.6 years and $30,000 for past medical expenses, unanimously modified, on the facts, to vacate the awards for past and future pain and suffering and order a new trial as to such damages, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the awards for past and future pain and suffering to $500,000 and $500,000, respectively, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The court did not improvidently exercise its discretion in

allowing plaintiff's expert to testify on the proper use of a bus' kneeling mechanism based upon, inter alia, his 35 years of experience in the transportation industry and familiarity with kneeling mechanisms (*see Melo v Morm Mgt. Co.*, 93 AD3d 499 [1st Dept 2012]). Defendant's objections to the expert's qualifications go to the weight and not the admissibility of his testimony (*see Williams v Halpern*, 25 AD3d 467 [1st Dept 2006]). The expert's reference to defendant's internal rules did not improperly suggest a higher standard of care than that required under common law (*see Lopez v New York City Tr. Auth.*, 60 AD3d 529, 530 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]).

The court did not err in limiting the introduction of plaintiff's medical records concerning preexisting conditions not alleged to have been exacerbated or aggravated in the accident where defendant failed to establish relevance (*see e.g. Arroyo v City of New York*, 171 AD2d 541, 543 [1st Dept 1991]; *compare McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479 [1st Dept 2011]). Contrary to defendant's claim, plaintiff did not place his entire pre-accident medical condition at issue by testifying as to his general health.

Defendant's argument that statements made by plaintiff's counsel during summation warrant a new trial is unpreserved (*see*

Lucian v Schwartz, 55 AD3d 687, 689 [2d Dept 2008], *lv denied* 12 NY3d 703 [2009]). In any event, the statements complained of constituted either fair comment on the evidence or a response to defendant's arguments with respect to witness credibility, and are not the type that could have deprived defendant of a fair trial (*see Bennett v Wolf*, 40 AD3d 274, 275 [1st Dept 2007], *lv denied* 9 NY3d 818 [2008]).

Plaintiff, who was 62 years old at the time of the accident and had a preexisting biceps tear, suffered a rotator cuff tear, for which he underwent an unsuccessful surgical repair, resulting in a permanent reduction in strength and range of motion. Under the circumstances, we find that the awards for past and future pain and suffering deviate materially from what would be reasonable compensation to the extent indicated (CPLR 5501[c]; *compare Bernstein v Red Apple Supermarkets*, 227 AD2d 264 [1st Dept 1996], *lv dismissed* 89 NY2d 961 [1997]*; Guillory v Nautilus*

Real Estate, 208 AD2d 336 [1st Dept 1995], *lv dismissed and denied* 86 NY2d 881 [1995]).

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

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8269 Dean Phillips, Index 304035/07
Plaintiff-Appellant,

Adrian Ward,
Plaintiff,

-against-

Tolnep Limo Inc., et al.,
Defendants-Respondents.

Mitchell Dranow, Sea Cliff, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about May 18, 2011, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing plaintiff Dean Phillips' complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing of entitlement to judgment as a matter of law as to plaintiff's claims of "permanent consequential" and "significant limitation of use" of his lumbar spine (Insurance Law § 5102[d]). Defendants submitted expert medical reports finding normal ranges of motion, as well as the report of a radiologist who opined that changes shown in

an MRI of plaintiff were degenerative.

In opposition, plaintiff failed to raise a triable issue of fact as to his lumbar spine injuries. His physician's measurement of a minor limitation in one plane of range of motion was deficient in raising a triable of fact as to whether plaintiff sustained a serious injury (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011]*; see also Lattan v Gretz Tr. Inc.*, 55 AD3d 449 [1st Dept 2008]). Such finding does not amount to a serious, or important, limitation of the use within the meaning of Insurance Law § 5102(d) (*see Sone v Quamar*, 68 AD3d 566 [1st Dept 2009]).

Plaintiff's bill of particulars and deposition testimony refuted his 90/180-day claim, since he alleged that he was confined to home and bed for one week, after which time he returned to work (*see Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 201]).

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8270 The People of the State of New York, Ind. 2681/08
Respondent,

-against-

David Rivera,
Defendant-Appellant.

Epstein & Weil, New York (Lloyd Epstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 21, 2010, as amended August 4, 2010, convicting defendant, after a jury trial, of predatory sexual assault against a child, and sentencing him to a term of 13 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

The court should not have permitted the psychiatrist who treated defendant to testify about defendant's admissions of sexual abuse. Although the psychiatrist made a proper disclosure of the abuse (*see Tarasoff v Regents of Univ. of Cal.*, 17 Cal 3d 425, 440-442, 551 P2d 334, 340, 341, 342-343 [1976]; *People v Bierenbaum*, 301 AD2d 119, 141-142 [1st Dept 2002], *lv denied* 99 NY2d 626 [2002], *cert denied* 540 US 821 [2003]), the *Tarasoff*

disclosure did not operate as a waiver of the physician-patient privilege (*see United States v Hayes*, 227 F3d 578 [6th Cir 2000]; *but see United States v Auster*, 517 F3d 312 [5th Cir 2008], *cert denied* 555 US 840 [2008]). This privilege (*see* CPLR 4504) is broadly construed, and it does not contain a general public interest exception (*see People v Sinski*, 88 NY2d 487, 494-495 [1996]). We note that *Bierenbaum* did not involve testimony by the defendant's psychiatrist.

In this case, the psychiatrist's testimony was arguably the most damaging evidence against defendant, and we do not find its admission to be harmless.

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8271 Irene Mulcahy, Index 108422/10
Petitioner-Appellant,

-against-

New York City Department
of Education,
Respondent-Respondent.

Noah A. Kinigstein, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan Lobis, J.), entered January 13, 2011, denying the petition and dismissing the proceeding as untimely, unanimously reversed, on the law, without costs, and the matter reinstated as a hybrid article 78 proceeding/42 USC § 1983 action and remanded for further proceedings.

Supreme Court erred in dismissing the petition as an untimely commenced article 78 proceeding and rejecting petitioner's claim that it was actually a hybrid action under 42 USC § 1983, which provides for a three-year statute of limitations. Petitioner denominated this matter as an article 78 proceeding, but asserted that she was a tenured teacher with respondent New York City Department of Education (DOE), which

improperly terminated her in violation of her rights to procedural due process under both the State and Federal Constitutions.

Contrary to the Supreme Court, we conclude that the petition properly raised claims under 42 USC § 1983 and thus, could be maintained as a hybrid action (*see Bistrisky v New York State Dept. of Correctional Servs.*, 23 AD3d 866, 867 [3rd Dept 2005] [rather than a pleading's label, "it is the essence of the action that controls"]). To the extent that the DOE asserts that its documentation proves that petitioner was only a probationary teacher and thus, did not have a property interest protected by the Constitution (*see Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522-23 [1st Dept 2010], *affd* 18 NY3d 457 [2012]), we note that petitioner also annexed documentary proof of her tenured status, hence the DOE has merely raised a triable issue of fact.

Federal and state courts possess concurrent jurisdiction over 42 USC § 1983 actions. To hold that petitioner cannot bring her 42 USC § 1983 claims solely because she asserted them in the same action in which she seeks article 78 relief, due to the latter's much shorter statute of limitations, would impermissibly conflict with 42 USC § 1983's broad remedial purpose and result

in different outcomes based solely on whether the federal claims are brought in state or federal court (*see Felder v Casey*, 487 US 131, 138 [1988]). Hence, petitioner's action should be reinstated as one arising under 42 USC § 1983 (*see Matter of Beers v Incorporated Vil. of Floral Park* (262 AD2d 315, 316 [2nd Dept 1999]).

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8272 Ilia Nieves-Hoque, etc., Index 601667/08
Plaintiff-Respondent, 59071/08
591105/08
-against- 590242/09

680 Broadway, LLC, et al.,
Defendants,
- - - - -
680 Broadway, LLC.,
Third-Party Plaintiff-Respondent,

-against-

M.D. Robiul Hoque Co., Inc.,
Third-Party Defendant-Appellant.
- - - - -
[And A Second Third-Party Action]
- - - - -
Marc Jancou Fine Art Limited,
Third Third-Party
Plaintiff-Respondent,

-against-

M.D. Robiul Hoque Co., Inc.,
Third Third-Party
Defendant-Appellant.

Linda A. Stark, New York, for appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 27, 2011, which, insofar as appealed from as limited by the briefs, granted the motion of third-party plaintiff 680 Broadway LLC (680 Broadway) for summary judgment on its claim for common-law indemnification from third-party defendant M.D. Robiul

Hoque Co., Inc. (Hoque) and denied Hoque's motion for summary judgment dismissing 680 Broadway's third-party complaint, unanimously reversed, on the law, without costs, 680 Broadway's motion denied and Hoque's motion granted. The Clerk is directed to enter judgment accordingly.

In this action arising out of the injury and death of plaintiff's decedent, the motion court erred in granting 680 Broadway summary judgment on its common-law indemnification claim against Hoque (decedent's employer). Prior to the grant of indemnification, the court had granted 680 Broadway's motion for summary judgment dismissing plaintiff's complaint on the ground that there was no non-speculative basis for its liability. Absent liability, vicarious or otherwise, there is no basis for indemnification (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

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

ENTERED: OCTOBER 11, 2012

CLERK

CORRECTED ORDER - OCTOBER 15, 2012

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

8275 In re Khaliah T.

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Lorna T.,
Petitioner-Appellant,

-against-

Desiree Danielle S.C.,
Respondent-Respondent.

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

Leslie S. Lowenstein, Woodmere, for respondent.

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

Order, Family Court, Bronx County (Jennifer S. Burt, Referee), entered on or about October 27, 2011, which dismissed the custody petition brought pursuant to article 6 of the Family Court Act by petitioner, the subject child's paternal grandmother, unanimously affirmed, without costs.

The referee's determination that petitioner failed to establish the existence of extraordinary circumstances warranting a change of custody has a sound and substantial basis in the record (*see Matter of Tristram K.*, 25 AD3d 222, 226 [1st Dept 2005]). Petitioner's concerns related to matters that occurred when the child was living with her maternal grandmother and was under Administration for Children Services (ACS) supervision.

She raised no concerns about the care provided by the mother after the child was discharged to her. Petitioner acknowledged that she was aware that ACS had investigated the allegations raised in the instant petition and determined that they were unfounded.

Contrary to petitioner's contention, the court did not err by sustaining a hearsay objection to her testimony regarding the child's out-of-court statements. The record is devoid of any offer of proof as to how the child's statements would be corroborated (*see Matter of Peter G.*, 6 AD3d 201 [1st Dept 2004]; *appeal dismissed* 3 NY3d 655 [2004]).

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8276 The People of the State of New York, Ind. 1407/07
Respondent,

-against-

Alana Gordian,
Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered March 12, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and fourth degrees, and possession of ammunition, and sentencing her to an aggregate term of 3½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant did not receive effective assistance of counsel. The existing record establishes that trial counsel's performance was prejudicially deficient based on her demonstrated lack of comprehension of a material provision of law.

Defendant was arrested while carrying a bag containing an unloaded .22 caliber revolver and eight loose rounds of .22 caliber ammunition. Criminal possession of a weapon in the

second degree involves the possession of a “loaded firearm” outside the defendant’s home or place of business (Penal Law § 265.03[3]). Penal Law § 265.00(15) provides that loaded firearm means any “firearm loaded with ammunition or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.” There is no dispute that defendant possessed a loaded weapon under this legal definition.

Nevertheless, throughout the entire case, defense counsel focused on the legally irrelevant fact that the cartridges were not in the revolver at the time of the arrest. This was the essence of the entire defense strategy at trial. Moreover, it is clear that counsel was not simply trying to appeal to the jury for sympathy or nullification. Counsel’s legal arguments to the court, outside the presence of the jury, also demonstrated the same lack of understanding of the Penal Law consequences of possessing an unloaded firearm accompanied by ammunition.

Under the circumstances, trial counsel could not have been able to advise defendant properly as to whether it was in her best interest to accept the plea offer that had been available. Furthermore, the record indicates that counsel could have pursued a more appropriate line of defense at trial had she realized that

focusing on the unloaded condition of the weapon was futile.

Accordingly, we find that defendant was denied effective assistance and is entitled to a new trial (*see People v Fleming*, 58 AD3d 527 [1st Dept 2009]; *People v Logan*, 263 AD2d 397, 398 [1st Dept 1999], *lv denied* 94 NY2d 798 [1999]; *see also People v Butler*, 94 AD2d 726 [2d Dept 1983]). The existing record is sufficient to determine this issue, and we reject the People's arguments to the contrary. We decline to address defendant's remaining claims.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8277N Lawrence Bennett, et al., Index 306933/09
Plaintiffs-Respondents-Appellants,

-against-

Sydney Gordon, etc., et al.,
Defendants-Appellants-Respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Lawrence A. Steckman of counsel), for appellants-respondents.

Law Office of Jeffrey I. Schwimmer, New York (Jeffrey I. Schwimmer of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 15, 2011, which, upon defendants' motion for an order compelling outstanding discovery and plaintiffs' cross motion for a protective order, directed plaintiffs to provide authorizations for a legal file from plaintiff Lawrence Bennett's 1998 personal injury action, limited to the bill of particulars, summons and complaint and medical records pertaining to a right shoulder injury, and directed plaintiffs to provide authorizations for a workers' compensation file relating to the 1998 accident, unanimously affirmed, without costs.

Plaintiffs' argument that defendants' appeal is defective because it relies heavily upon the complaint which was not submitted on the motion and is dehors the record, is unavailing.

This Court may take judicial notice of the complaint in the case file (*cf. Walker v City of New York*, 46 AD3d 278, 282 [1st Dept 2007]; *see Matter of Magid v Gabel*, 25 AD2d 649 [1st Dept 1966]).

The trial court exercised its discretion in a provident manner in this discovery dispute. The court properly allowed defendants limited discovery as to a prior injury Lawrence Bennett suffered which damaged his right shoulder when he attempted to deflect a concrete "form" from hitting his head as it fell from a height (*see* CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-408 [1968]; *Matter of Matter of New York County DES Litig.*, 171 AD2d 119, 123 [1st Dept 1991]). Plaintiff, as a consequence of his more recent accident, which is the basis for the instant personal injury action, has alleged regular tremors in his upper extremities and overall weakness in addition to more specific injuries to his head and left shoulder, all of which has allegedly rendered him permanently disabled and has resulted in his loss of enjoyment of life. The court reasonably concluded that the aforesaid allegations conceivably derived from Bennett's prior accident.

The motion court also reasonably determined that Bennett's injuries arising from the two accidents were sufficiently distinct, and his recent head and left shoulder injuries were

relatively new complaints, thereby undermining Gordon's argument for discovery of Bennett's entire medical history.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 11, 2012

CLERK

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

8278 [M-3959] In re Curtis Johnson, also known as Clinton Colson, Jr., Petitioner,

-against-

Judge Jill Konviser, etc., et al., Respondents.

Ind. 3799/72
4532/72

Curtis Johnson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for Judge Jill Konviser and N.Y. State Board of Examiners, respondents.

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

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

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

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

ENTERED: OCTOBER 11, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8386 In re Ahmed Mora,
Petitioner-Respondent,

-against-

Silvia Alatriste,
Respondent-Appellant.

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O'Melveny and Myers, New York (Matthew F. Damm of counsel), for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about April 14, 2011, which granted petitioner father's petition to modify a prior order of custody and visitation, entered on or about August 22, 2006, and awarded him sole legal and physical custody of the parties' child, with visitation to respondent mother, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for an evidentiary hearing consistent herewith. Pending the hearing, the child is to be returned to the mother's custody, with visitation to the father, as prescribed in a prior order of custody and visitation, entered on or about March 24, 2009.

The court committed reversible error when it failed to advise the mother of her right to assigned counsel (*see* Family Ct

Act § 262[a][iii]). Reversal is also warranted since the court failed to conduct an evidentiary hearing before modifying the prior order of custody and visitation (*see Matter of Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]) and did not afford the mother an opportunity to testify, cross-examine, or present evidence (*see Alix A. v Erika H.*, 45 AD3d 394, 394 [1st Dept 2007]). Accordingly, the matter is remanded for a full evidentiary hearing, at which the court should consider the father's petition in light of any subsequent change in circumstances, including his planned relocation to Wisconsin. Prior to the hearing, the mother shall be advised of her rights pursuant to Family Ct Act § 262(a).

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

ENTERED: OCTOBER 11, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7903 In re Yary,

- - - - -

Carol W.,
Petitioner,

Leake & Watts Services, Inc., et al.,
Respondents.

- - - - -

Leake & Watts Services, Inc.,
Respondent-Appellant,

Carmen A.,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for appellant.

Warren & Warren, Brooklyn (Ira L. Eras of counsel), for Carol W., petitioner.

Andrew J. Baer, New York, for Carmen A., respondent.

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

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Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 28, 2011, reversed, on the law, the motion granted, without costs, and the petition dismissed.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

7903

_____x

In re Yary,

- - - - -

Carol W.,
Petitioner,

Leake & Watts Services, Inc., et al.,
Respondents.

- - - - -

Leake & Watts Services, Inc.,
Respondent-Appellant,

Carmen A.,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____x

Respondent Leake & Watts Services, Inc., appeals from the order of the Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 28, 2011, which denied its motion to dismiss the aunt's petition to adopt the child, over whom respondent has had custody and guardianship since the death of the child's mother.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger and Gail Steinhagen of counsel), for appellant.

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

Andrew J. Baer, New York, for Carmen A., respondent.

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

SAXE, J.P.

This appeal requires us to consider an issue not previously directly addressed by this Court: When a foster care agency has guardianship and custody of a child and there is no living parent or other individual with the right to consent to the child's adoption, does the agency's refusal to consent to an adoption by a potentially viable candidate preclude the court from entertaining that individual's adoption petition? Here, the child's biological mother is deceased, the child is in foster care, and respondent foster care agency is the only entity with the legal authority to consent to the child's adoption. Both the child's foster mother and her maternal aunt have filed petitions to adopt the child, but the agency declined to consent to the aunt's proposed adoption of the child. The Family Court was unwilling to dismiss the aunt's adoption petition, and determined that the two competing petitions would be addressed simultaneously. We conclude that the statutory scheme requires us to reverse the order of the Family Court and dismiss the aunt's petition, because in the absence of the agency's consent, the petition is legally insufficient; the court is precluded from permitting her to adopt the child.

Yary was born February 25, 2006. On June 22, 2006, the Administration for Children's Services (ACS) filed a neglect

petition alleging that Yary's mother failed to provide her with adequate care and had a prior history of neglecting Yary's older siblings, all of whom had been removed from her care. On July 10, 2006, pursuant to an order of the Family Court, Bronx County, Yary was removed from her mother's care and remanded into foster care in the custody of ACS. On July 13, 2006, ACS placed Yary with respondent foster care agency Leake and Watts Services, which on August 8, 2006 placed her in the home of the foster mother, where the child has remained.

On May 8, 2007, the Family Court issued a dispositional order placing Yary in ACS custody with a permanency goal of reuniting mother and child, but on January 10, 2008, the court changed Yary's permanency goal from reunification to adoption. On January 31, 2008, the agency filed a petition to terminate the mother's parental rights (TPR petition). For a variety of reasons, the fact-finding hearing on the TPR petition had to be repeatedly adjourned and reassigned, and on the day before the rescheduled fact-finding hearing was to be held on January 27, 2010, the mother unexpectedly suffered a heart attack and died. Her death abated the TPR petition, and, since Yary's father had not answered the petition and had never supported Yary or been part of her life, which made his consent to any adoption unnecessary (Domestic Relations Law § 111[2][a]), the court

immediately transferred guardianship and custody of the child to the agency. Thereafter, on July 6, 2010, the court issued a written order freeing the child for adoption and granting ACS and the agency the authority to consent to her adoption "by a suitable person or persons, subject to the customary approval and order of a court of competent jurisdiction." ACS transferred its authority to consent to Yary's adoption to the agency on September 21, 2010. On December 13, 2010, the foster mother executed a written agreement with the agency to adopt Yary. The agency executed its written consent to the foster mother's adoption on February 9, 2011, and the foster mother's agency adoption petition was filed with the court pursuant to Domestic Relations Law §§ 112 and 113 on February 23, 2011.

Meanwhile, a few weeks after the mother's death, on March 1, 2010, petitioner Carmen A., Yary's maternal aunt, a Florida resident, filed a petition for guardianship of the child. The aunt and the agency appeared in court on May 7, 2010, but the matter was adjourned for completion of service. On the August 10, 2010 adjourn date, both the aunt and her attorney of record were absent, and the Family Court referee dismissed the aunt's guardianship petition, observing that: the aunt had failed to appear; the foster mother, in whose home Yary had resided since 2006, had "proceeded diligently with plans to adopt"; and since

Yary had already been freed for adoption, a guardianship by the aunt would not be in her best interest.

On October 12, 2010, the aunt moved to vacate the default, explaining that she had been present in the courthouse on the previous date, but was late because of the long line to enter the building, and that her attorney had been engaged in another proceeding. The matter was adjourned to November 22, 2010, at which point the court denied the application to vacate the default, finding that since Yary's permanency goal is adoption, and she had been freed for that purpose, guardianship would not be in her best interest, because it would not satisfy that goal. The aunt indicated that she wished to adopt Yary, and the court informed her that she could file an adoption petition. The aunt retained new counsel, and filed her petition for a private placement adoption pursuant to Domestic Relations Law § 115 on April 26, 2011.

Court conferences on both petitions were held with all parties on May 25, July 11, and September 28, 2011. The court initially found that both the foster mother's and the maternal aunt's petitions were missing necessary documentation. Specifically, the aunt's private adoption petition was filed without the certification that she is a qualified adoptive parent, the Interstate Compact for the Placement of Children

approval, an affidavit of marital status, and a written consent from Yary's lawful custodian, i.e., the agency. By May 24, 2011, with the exception of the agency's written consent, the aunt had submitted all of the remaining outstanding documentation or its functional equivalent.

The foster mother's agency adoption petition was originally missing an adoption report signed and notarized by both an agency representative and the foster mother, as well as tax returns needed to determine whether the forensic evaluator could be paid by state funds. In addition, the foster mother had failed to explain the nature of her relationship with the other adult in her home, the two different amounts listed as her mortgage payment, how she was managing funds, and to provide verification of her monthly income.

Agency's Motion to Dismiss

On June 30, 2011, the agency moved to dismiss the aunt's adoption petition, arguing that since the custody and guardianship rights of the child for the purpose of adoption had been transferred to it, the only path for an adoption was through an agency adoption pursuant to Domestic Relations Law §§ 112 and 113, to which the agency must give its consent under Domestic Relations Law § 112(2). The agency further argued that since, as it stated on the record at the May 25, 2011 court appearance and

in an earlier letter to the aunt's counsel, it would not consent to the aunt's adoption, the court was deprived of jurisdiction to hear the aunt's petition, mandating its dismissal.

The Family Court denied the agency's motion to dismiss the aunt's petition, denominated a private placement adoption petition. The court held that the agency's consent was not required for the aunt's private placement adoption of the child, because Domestic Relations Law § 115(3) and (7) only require the agency with lawful custody of the child to "appear" before the court and provide an affidavit stating how it obtained lawful custody. The court explained that the adoption court is the appropriate forum for determining the child's best interests and that persons seeking to adopt have the right to intervene even if the agency has denied their adoption application (citing *Matter of O'Rourke v Kirby*, 54 NY2d 8, 15 [1981]). Since it has the authority to approve of an adoption by an intervening party who had not received the agency's consent, the court reasoned, lack of agency consent to the aunt's proposed adoption did not deprive the court of jurisdiction over the aunt's petition.

We reverse. The statutory scheme does not allow for a private placement adoption of the child by her aunt without the agency's consent.

Discussion

Adoption is "solely the creature of, and regulated by, statute," and, consequently, the adoption statutes must be strictly construed (*see Matter of Jacob*, 86 NY2d 651, 657 [1995], quoting *Matter of Eaton*, 305 NY 162, 165 [1953]).

> "Adoption in New York may be accomplished either by means of a private transaction between individuals, which is referred to as a 'private-placement' adoption, or it may be arranged between an authorized agency set up for the care, custody, and placement of children and prospective adoptive parents, which is referred to as an authorized-agency adoption" (45 NY Jur 2d, Domestic Relations § 590 [footnotes omitted]).

Domestic Relations Law § 111, applicable to both authorized agency adoptions and private placement adoptions, is "the principal statute governing consent requirements in adoption proceedings" (Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, C 111:1, at 86; *see* Zimmerman, *Adoption Law: Practice and Procedure in the 21st Century*, at 19 [NYSBA 2004]), and it sets forth the entities whose consent to an adoption is necessary. Subdivision (1)(f) specifically requires the consent of "any person or authorized agency having lawful custody of the adoptive child," the category that covers respondent foster care agency, Leake and Watts Services, in this case.

In addition, the portions of Domestic Relations Law article VII covering both adoption from an authorized agency (§§ 112

through 114) and private placement adoptions (§§ 115 through 116) contain additional consent provisions. Domestic Relations Law § 112(2)(c) echoes § 111, specifying that the documents adoptive parents must present to the judge include "the consents required by section one hundred eleven of this article." Section 115-b, denominated "Special provisions relating to consents in private-placement adoptions," contains pages of detailed procedures for the various means by which a birth parent's or guardian's valid consent to giving up their child to proposed adoptive parent(s) may be proved.

The concept of private placement adoption focuses on situations where biological parents, or other individuals who are in lawful custody of the child, agree to turn over custody of the child to intended adoptive parents; in contrast, the framework for authorized agency adoptions applies where it is an agency, rather than a parent, that has been granted custody of the child and the right and obligation to decide whether to consent to a proposed adoption. In the present circumstances, the agency is the only entity having lawful care and custody of the child, and there is no individual in the position of parent or guardian who has the right to consent, or withhold consent, to an adoption of the child. Consequently, we conclude that adoption of the child in this instance must satisfy the provisions of §§ 112 through

114, covering authorized agency adoptions, and that the framework for private placements adoptions is not applicable here (*see Matter of Brendan N. [Arthur N.]*, 79 AD3d 1175 [3d Dept 2010], *lv denied* 16 NY3d 735 [2011] [grandparents' petition for private placement adoption was properly dismissed as defective since the child was in the custody of an authorized agency]).

We reject the aunt's suggestion that the agency's consent is not required because for private placement adoptions, Domestic Relations Law § 115(3) only requires that the persons whose consent is required appear before the adoption court, and therefore their failure or refusal to provide consent is inconsequential to the adoption. Not only is § 115 inapplicable to this particular adoption, but subdivision (3) of that section nowhere suggests that the consent of a "person[] whose consent is required by section one hundred eleven" may be treated as unnecessary.

Indeed, even if we agreed with the aunt that the statutory framework for private placement adoptions may be applicable here, the consent provisions of Domestic Relations Law § 111 would still control; the statutory provisions concerning both agency adoptions and private placement adoptions explicitly recognize the applicability of the consent provisions of § 111 (*see* Domestic Relations Law §§ 112[2][c] and 115[3]).

We agree with the essence of the analysis repeatedly employed by the Fourth Department in holding, in situations where an agency has been awarded care and custody of a child, that the agency's refusal to consent to an adoption petition leaves the court without the authority to entertain the petition. In *Matter of Savon* (26 AD3d 821 [4th Dept 2006]), the subject child was in the care and custody of the Department of Social Services, and when the child's great aunt sought to adopt her, the agency refused to give its consent to her adoption. The Court held that the agency's refusal to consent left the court without jurisdiction to entertain her adoption petition, explaining that "[a]lthough petitioner may challenge respondent's refusal to consent to the adoption by requesting a fair hearing and may thereafter challenge an adverse ruling ... by commencing a proceeding pursuant to CPLR article 78," she could not properly proceed with an adoption petition without the agency's consent (*id.* at 822). Similarly, in *Matter of Alexandria Mary* (227 AD2d 44, 46-47 [4th Dept 1996]), the Court dismissed an adoption petition where the agency declined to consent, "subject to the rejected prospective parents' due process rights to seek administrative review of the determination through a fair hearing and subsequent judicial review through a CPLR article 78 proceeding."

The aunt here contends that the Family Court is required to consider the best interests of the child, and that in so doing it must weigh her adoption petition alongside the foster mother's adoption application. The first half of that contention is indisputably correct; the second half is not. The best interests analysis central to consideration of the foster mother's adoption petition may include any relevant information. But, the Family Court has no authority to determine the merits of the aunt's adoption petition in the absence of the agency's consent.

The Family Court's reliance on *Matter of O'Rourke v Kirby* (54 NY2d 8 [1981], *supra*) is misplaced. *O'Rourke* does not stand for the proposition that the court has the authority to approve of the adoption of the child by the aunt absent the agency's consent, based on the aunt's intervention in the foster mother's adoption proceeding. In *O'Rourke*, the person whose adoption of the child the agency had declined to consent had the right to intervene in the adoption proceeding and make her case that adoption by her was in the child's best interest, pursuant to Social Services Law § 383(3), *because she had been the child's foster parent who had had continuous custody of the child for a period of 12 months or more through the authorized agency*, and therefore was entitled to intervene (*see* 54 NY2d at 14-15). In contrast, here, the aunt has never fostered Yary. In any event,

the right to intervene would not eliminate the unwavering requirement of the agency's consent to the proposed adoption.

Nor do we agree with the Family Court that Social Services Law § 384-b(11) compels the court to hear and render a determination on the merits of the aunt's adoption petition irrespective of the agency's consent. That provision requires that upon entry of an order of disposition terminating parental rights and committing the guardianship and custody of a child to a government agency, the court "shall inquire whether any foster parent or ... any relative of the child ... seeks to adopt such child," and, if so, "such person or persons may submit, and the court *shall accept*, all such petitions for the adoption of the child" and "shall thereafter establish a schedule for completion of other inquiries and investigations necessary to complete review of the adoption of the child" (emphasis added). Here, however, there is no such order of disposition, because the biological mother died before the hearing on the TPR petition was held; because the petition abated at that time, the agency was immediately granted custody of the child. Moreover, at that point, the maternal aunt had not yet come forward with *any* petition or application regarding the child.

The situation contemplated and provided for in Social Services Law § 384-b(11) is not the situation presented here; the

agency was granted custody of the child upon the mother's death and at that time became the only entity with the authority to consent, or refuse to consent, to a proposed adoption of the child. The agency's consent would not automatically confer on the aunt the right to become the child's adoptive parent, but its absence precludes the court from granting her petition.

As the Fourth Department has pointed out, a prospective parent has a remedy for the denial of consent: to request a fair hearing and thereafter challenge an adverse ruling with a CPLR article 78 proceeding (*Matter of Savon,* 26 AD3d at 822; *Matter of Alexandria Mary*, 227 AD2d at 46); as this Court has stated, "implicit in [the agency's] power must be a recognition that such consent cannot be unreasonably withheld" (*see People ex rel Williams v Windham Child Care*, 55 AD2d 146, 148 [1st Dept 1976]). Here, since the agency has not articulated the basis for its denial in either its motion papers or in its appellate briefs, or challenged the assessment by the Florida authorities that the aunt is a suitable adoptive parent, the record does not permit this Court to assess the reasonableness of the agency's decision or determine whether the agency informed the aunt of her right of review pursuant to the agency's internal administrative procedures (*see* Social Services Law §372-e[3][a]).

Finally, we reject the agency's suggestion that the case

should be reassigned to a different Family Court judge. The record reflects nothing but evenhanded treatment by the court.

Accordingly, the order of the Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 28, 2011, which denied respondent agency's motion to dismiss the aunt's petition to adopt the child, over whom the agency has had custody and guardianship since the death of the child's mother, should be reversed, on the law, the motion granted, without costs, and the petition dismissed.

All concur.

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

ENTERED: OCTOBER 11, 2012

CLERK