SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 3, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12203N- Index 400207/04
12203NA The City of New York, et al.,
Plaintiffs-Respondents,

-against-

Thomas A. Maul, etc.,
Defendant.
- - - - -
L.J., et al.,
Plaintiffs-Intervenors-
Appellants-Respondents,

-against-

John B. Mattingly, etc.,
Defendant-Respondent-
Appellant,

Thomas A. Maul, etc.,
Defendant.

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Patterson Belknap Webb & Tyler LLP, New York (Rachel B. Sherman of counsel), for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Joshua P. Rubin of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 21, 2013, which denied without prejudice defendant Commissioner's (ACS) motion for partial summary judgment and to decertify or modify the class, unanimously

affirmed, without costs. Order, same court, Justice, and entry date, which denied plaintiffs-intervenors' motion to compel discovery, unanimously modified, on the law and the facts, and the motion granted, insofar as plaintiffs seek material from January 1, 2006 to the present, as to discovery requests 1, 5, 13, 14, 15, and 16; as to request 4, only to the extent it requests all documents and things concerning the placement of any child with a developmental disability in ACS' care or custody who has been placed by ACS in a nursing home; as to request 6, only to the extent it requests all documents and things concerning overnight placement of children with developmental disabilities at ACS' Center for more than 48 hours; as to request 11, only to the extent it requests all notes and correspondence concerning any child with developmental disabilities in ACS' foster care system who was not referred to the Office for People with Developmental Disabilities (OPWDD) by the time he or she turned 18 years of age; as to requests 17, 18, 19, and 20, only insofar as they pertain to children with developmental disabilities under the care, custody or guardianship of ACS; as to request 10, only to the extent it requests a sampling of individual case files of children with a developmental disability who turned 21 years of age while in ACS' foster care system but had not yet received an OPWDD placement at the time he or she turned 21 years of age; and

as to the request for an updated list of children with developmental disabilities found eligible for, but still awaiting, placement by OPWDD, and otherwise affirmed, without costs.

In this class action, plaintiffs-intervenors, children with developmental disabilities who are or who have been in the care or custody of New York City Administration for Children's Services (ACS), seek to ensure that defendants ACS and OPWDD[1] provide services to plaintiffs, and other members of the certified class, to which they are legally entitled. In 2011, plaintiffs moved to compel ACS to produce the documents listed in their third set of requests for production of documents. ACS, however, moved for partial summary judgment against plaintiffs and for decertification or modification of the class. The motion court denied plaintiffs' motion to compel the production of documents from ACS and denied ACS' motion to decertify or modify the class, as well as its motion for partial summary judgment.

We find that the motion court erred in denying plaintiffs' motion to compel disclosure by ACS. Under CPLR 3101(a), "full disclosure" is required for "all matter material and necessary in the prosecution or defense of an action." The Court of Appeals

[1] Formerly called the Office of Mental Retardation and Developmental Disabilities.

has held that "material and necessary" is "to be interpreted liberally," and that the test of whether matter should be disclosed is "one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see e.g. Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). Here, the documents requested by plaintiffs on appeal concern ACS' identification, placement and referral to OPWDD of children with developmental disabilities in ACS' care or custody,[2] and are relevant to the alleged failure of ACS to provide them with appropriate services. Although ACS argues that many of the documents requested are irrelevant given ACS' adoption of new policies and procedures in 2009, disclosure will be useful in determining how ACS actually executed its policies and procedures, both before and after the policy changes took effect. Thus, in the exercise of discretion, we grant plaintiffs' motion to compel to the extent indicated above.

ACS urges that disclosure should be restricted to the specific four issues cited by the Court of Appeals in its discussion of whether the class should be certified (*City of New York v Maul*, 14 NY3d 499, 512 [2010]). The Court of Appeals did

[2] On appeal, plaintiffs do not address the motion court's denial of requests 2, 3, 7, 8, 9, 12, 21, 22, 23 or 24. These requests are abandoned (*see e.g. Dias v Stahl*, 256 AD2d 235, 237 [1st Dept 1998]).

not address the scope of discovery, but rather it identified the issues that united the class members (*id.* at 514). Given the liberal standard for discovery, we see no reason to preclude plaintiffs' requests entirely. Furthermore, the discovery requests here may be material to one of the issues noted by this Court and by the Court of Appeals, i.e., ACS' recurrent failure to meet its permanency obligations. As to ACS' contention that some of the requested material, such as individual case files, contain confidential information, once the material to be disclosed has been identified, appropriate action, such as the redaction of identifying information, may be taken to protect individuals' privacy. The implementation of such measures for all of these requests rests in the sound discretion of the trial court.

Finally, we find that the motion court did not err in denying ACS' motion for partial summary judgment and decertification or modification of the class. Although ACS argues that its implementation of new policies and procedures in 2009 has remedied the harms alleged by plaintiffs, there is evidence in the record that raises triable issues of fact as to whether ACS, in actual practice, provided children with developmental disabilities in its care the services to which they are entitled. Further, we reject ACS' contention that the class

certification is improper because it may involve review of individual cases already decided by the Family Court. There is no indication that plaintiffs seek to encroach on Family Court's jurisdiction; rather, plaintiffs seek to ascertain whether there is a reoccurring problem.

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

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10773 Christine Gitelson, Index 101055/09
Plaintiff-Appellant,

-against-

Mary L. Quinn,
Defendant-Respondent.

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Bailey & Sherman, P.C., Douglaston (Edward G. Bailey of counsel), for appellant.

Kurre Levy Schneps LLP, Manhasset (Michael A. Levy of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 30, 2012, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

We agree with the motion court that the parties made a mutual rather than a unilateral mistake. Contrary to plaintiff's claim, the mistake was material, and not a mere mistake about value (*cf. Simkin v Blank*, 19 NY3d 46, 55 [2012]). However, contrary to the dissent's conclusion, the issue of mutual mistake is essential to the determination of this case.

The dissent acknowledges that there was an oral agreement in this case, and that the agreement was conditioned upon defendant commencing a lost will proceeding. That such proceeding ultimately became moot does not make it, as the dissent posits, a

condition upon which performance under the agreement depended. Plaintiff met her obligations under the agreement to pay one half of the decedent's funeral expenses and attorneys fees for the proceeding. Defendant did, as required, commence a lost will proceeding. Both parties thus fulfilled the terms of the oral agreement. It was only less than one month before the hearing on the lost will proceeding was to commence that defendant's husband found the original will in the same box which defendant had searched *prior* to entering into the agreement. It was at that point that defendant attempted to abrogate the contract. It is noteworthy that defendant, in her motion for summary judgment dismissing the complaint argued that the contract should be rescinded due to a mutual mistake as to the existence of the original will. The question of mutual mistake, therefore, is central to the disposition of this case.

Defendant's alleged negligence in searching for the original 1991 will, the absence of which formed the basis of the oral agreement to commence a lost will proceeding, is an important factor in determining whether the doctrine of mutual mistake may be invoked to rescind this otherwise valid oral agreement. "'Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible.'" (*DaSilva v Musso*, 53 NY2d 543, 551 [1981][citation

omitted]). The doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence" (*P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201 [1st Dept 1996]).

Here, at a minimum, the record presents triable issues of fact as to whether defendant was negligent in her search for the original will. Defendant acknowledged as much when she stated that, when she looked in the box for the will, "the stuff . . . was so mixed up that when I went through it I missed" the will. The parties' mistaken belief that the original of their late brother's 1991 will could not be found arose from defendant's failure to remember that her brother had given her the original and that she had placed it in a box in her house for safekeeping. Whether defendant was negligent or less than diligent in her search of the very same box where her husband subsequently found the original will are questions that should be determined by a jury. Under such circumstances, defendant was not entitled to summary judgment dismissing the complaint based on mutual mistake.

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

TOM, J.P. (dissenting)

I respectfully disagree with the majority and conclude that the oral agreement between the parties was not enforceable under the circumstances of this case.

The parties, who are sisters, assert an interest in real property comprising the substantial portion of the estate of their deceased brother, Joseph Dinko. Their dispute arises out of decedent's execution of two wills. The first, made in 1990, left a certain parcel of real property located in the County of Queens to plaintiff, defendant and a nephew in equal shares, with the rest of his estate to be divided equally between plaintiff and defendant. That instrument was superseded by a will executed in 1991 that left all of his property to defendant.

Dinko, one of 10 siblings, died on February 12, 2003, leaving neither a widow nor children. By that time, the parties had forgotten about the 1991 will and proceeded under the impression that the 1990 will, a copy of which was in plaintiff's possession, was the operative instrument. While their attempt to find the original was unsuccessful, they did locate a copy of the 1991 will. Efforts were then made by defendant to locate the original of the 1991 will but to no avail. Because the original 1991 will could not be located, the parties consulted with a lawyer, and plaintiff agreed to support defendant's effort to

probate the copy of the 1991 will and to share expenses related to the lost will proceeding; in return, defendant agreed to share the estate equally.

While the agreement was never reduced to writing nor submitted to the Surrogate, the parties do not dispute its material terms, which are mutually beneficial. If the original 1991 will could not be located, Dinko would be deemed to have died intestate, resulting in his property being divided among his nine surviving siblings rather than just the two sisters party to this action. Furthermore, Dinko had been an alcoholic, requiring hospital treatment on numerous occasions, and the parties reasoned that if they were united in the attempt to probate a copy of his 1991 will, their siblings would be less likely to challenge it.

At the time of the parties' agreement, they both believed that an original will could not be found and no discussion was had concerning what would happen if the original were found. Shortly before the scheduled commencement of trial in the lost will proceeding, plaintiff learned that defendant's husband had located the original of Dinko's 1991 will. Defendant called plaintiff and told her that the original of Dinko's 1991 will had been found, that she no longer needed to proceed with the lost will proceeding, and that she would no longer share Dinko's

estate. Defendant sent plaintiff a check representing the expenses that plaintiff had paid, plus interest, but plaintiff returned it. Defendant submitted that instrument for probate, and the entirety of the Dinko estate was awarded to her pursuant to its terms. While the proceedings before Surrogate's Court are not included in the record, it does contain a waiver of process and consent to probate the original 1991 will, executed by plaintiff in February 2005, together with a cover letter from counsel reserving plaintiff's claims against the estate in spite of her waiver.

Defendant sold the subject property for $1.2 million, and did not share with plaintiff the estate proceeds. This action for breach of contract followed. The complaint, which seeks one-half of the sale proceeds together with interest, was dismissed by Supreme Court on the ground that, at the time it was made, the parties were under the mistaken belief that the original of the 1991 will had been lost.

On appeal, plaintiff contests dismissal of the complaint, assigning error to Supreme Court's equitable finding that the agreement was subject to rescission due to the parties' mutual mistake. She argues that since the original was in defendant's possession all along and defendant concedes having searched the very location where it was ultimately found by her husband, any

mistake was unilateral on her part. Plaintiff relies on case law holding that a party may not invoke mutual mistake to avoid the consequences of that party's own negligence (citing *Da Silva v Musso*, 53 NY2d 543, 551-552 [1981]). However, I conclude that the distinction between unilateral and mutual mistake has no bearing on the parties agreement and misses the dispositive issues in this case; on this, I disagree with the majority. Here, the agreement was only contingent, and the contingent event never occurred, thus, there is no need to analyze whether there was a mistake that would excuse a party from performance.

While there is no dispute that there was an oral agreement, it was conditioned on defendant commencing and successfully concluding a lost will proceeding, making the underlying consideration of the agreement contingent on that event. This is clear from the parties' agreement to share the proceeds at the successful conclusion of the lost will proceeding. Although both parties initially assumed, incorrectly as it turned out, that a lost will proceeding would be the only manner of probating the estate and avoiding an intestate distribution, such misapprehension is not dispositive here. Rather, the explicit agreement, that plaintiff would not challenge defendant with respect to the anticipated lost will proceeding and that defendant upon its successful conclusion would pay to plaintiff

half of the estate assets, necessarily was enforceable only if a lost will proceeding was, indeed, commenced and successfully concluded. It was not. When the original 1991 will was located, all the underlying circumstances of the verbal agreement changed. The triggering event of the parties' oral agreement never materialized. To hold otherwise, I conclude, would essentially alter the terms of the oral agreement.

Nor do I see how assertions about defendant's carelessness enter into the analysis, plaintiff's apparent suspicions notwithstanding. The plaintiff alludes to the fact that even if defendant had known that she would be probating the original of the 1991 will, she may have valued plaintiff's support as against the remaining siblings in view of what is termed the decedent's alcoholism, to bridge the legal gap between the contemplation that a lost will proceeding was necessary and defendant's filing the original 1991 will to be probated. However, this, too, conflates two different kinds of proceedings. More importantly, that was not the agreement. Rather, the agreement concerns the distribution and sharing of the estate only if a lost will proceeding was pursued to its successful conclusion and not the probate of the original 1991 will. It is undisputed that during the negotiation of the agreement, the parties never discussed the probate of the original 1991 will. Moreover, the impact of the

alcoholism issue is speculative as is any outcome of a contested proceeding, especially since simply adding plaintiff's support over the presumed opposition of several other siblings would not have altered Surrogate's Court's analysis. Nor was defendant unjustly enriched, since the will, as probated, dictated the decedent's wishes as to the disposition of his assets. The result may be ungenerous, but not unjust. Hence, I do not see how this action is viable.

Furthermore, plaintiff is attempting to accomplish by indirection that which she is precluded by law from accomplishing directly (*see Broadwall Am., Inc. v Bram Will-El LLC*, 32 AD3d 748, 751 [1st Dept 2006], *lv denied* 8 NY3d 805 [2007]). It is apparent that had the parties' stipulated settlement been submitted to the Surrogate, it would not have met with approval because the effect of the agreement is to rewrite the will to avoid the unambiguous disposition made by the testator (*id.; cf. Matter of Beckley*, 63 AD2d 855 [4th Dept 1978], *appeal dismissed* 45 NY2d 837 [1978] [ambiguity as to intended beneficiary]). Unable to contest the award of Dinko's estate to defendant before the Surrogate, plaintiff has resorted to a plenary action in Supreme Court. By instituting this action, she seeks what amounts to a nullification of the Surrogate's decree. This Court has noted that interaction among judges of concurrent

jurisdiction is governed by the principle of comity (*see State of New York v Thwaites Place Assoc.*, 155 AD2d 3, 7 [1st Dept 1990], citing *Pennsylvania v Williams*, 294 US 176 [1935]). As observed in *Matter of Dondi v Jones* (40 NY2d 8, 15 [1976]), "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." The same principle applies where different actions involving the same parties and issues are prosecuted in different courts or even different jurisdictions (*see e.g. White Light Prods. v On The Scene Prods.*, 231 AD2d 90 [1st Dept 1997]).

Accordingly, the order of the Supreme Court should be affirmed.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11511 Mirta Ramos, Index 304361/11
Plaintiff-Respondent,

-against-

Renata Vanja Weber, M.D., et al.,
Defendants-Appellants.

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Widowski Law Group LLP, New York (Esther S. Widowski of counsel), for appellants.

Salzman & Winer, LLP, New York (Mitchell G. Shapiro of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 4, 2013, which denied the motion of defendants Renata Vanja Weber, M.D., The Montefiore Medical Center, Einstein Division, Moses Division and Weiler Division for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff, a 43-year-old woman with a twenty-year history of rheumatoid arthritis that had resulted in deformed and painful hands, underwent a pyrocarbon joint implantation surgery on her right hand by defendant Renata Vanja Weber, M.D. Plaintiff alleges that Dr. Weber departed from the standard of care in determining that she was a good candidate for pyrocarbon joint

implants, rather than silicone, and that Dr. Weber should have disclosed the opinion of a non-physician representative for the implant manufacturer that she "may not be the ideal candidate" for pyrocarbon implants because they require "good soft tissue support."

Defendants met their burden of showing that Dr. Weber exercised her best judgment in choosing plaintiff as an appropriate candidate for pyrocarbon, rather than silicone, joint implants, due to her relatively young age, and good bone structure, as demonstrated on x-rays (*see Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]). Defendants' expert also opined that Dr. Weber obtained informed consent by discussing the risks, benefits and alternatives to surgery and providing written product information concerning pyrocarbon implants to plaintiff. That the surgery might fail was one of the risks imparted to plaintiff, and was not the fault of defendant Dr. Weber (*see Lipsky v Bierman*, 16 AD3d 319 [1st Dept 2005]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether Dr. Weber deviated from accepted medical practices in selecting plaintiff as a pyrocarbon joint implant candidate, rather than opting for a silicone implant. There was

no support in the record for plaintiff's expert's conclusory opinion that plaintiff had "inadequate bone support" and that Dr. Weber thus departed from the standard of care. Nor was there anything in the medical records indicating that plaintiff had inadequate tissue support (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]).

Plaintiff also failed to rebut defendants' showing that she was properly informed of the surgical procedure and the alternatives, as well as the reasonably foreseeable risks and benefits, by tendering expert testimony proving the insufficiency of the information Dr. Weber disclosed to her (*see Matter of Colletti v Schiff*, 98 AD3d 887 [1st Dept 2012]).

There is no basis in the law for the dissent's conclusion that Dr. Weber had a duty to disclose to plaintiff the email from the manufacturer's representative in response to her general query. The dissent mistakenly equates that representative's conclusory email with a product's written manufacturer warning or a consulting doctor's opinion.

Plaintiff testified that if she had read the materials that Dr. Weber actually provided to her, she would not have undergone the surgery at all. However, she did not testify that she would have made any different decision if Dr. Weber had disclosed the

representative's email. Moreover, plaintiff's expert failed to controvert defendants' expert opinion that there was no evidence to suggest that use of silicone implants would have improved plaintiff's outcome (*see Colletti*, 98 AD3d at 888).

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

SAXE, J. (dissenting)

The majority reverses the motion court and grants summary judgment to defendants in this medical malpractice case. I disagree, perceiving questions of fact regarding whether defendant hand surgeon deviated from accepted medical practice based on (1) her selection of pyrocarbon joint implants rather than silicone, and (2) her failure to disclose or discuss with plaintiff information provided to the doctor by a representative of the implant's manufacturer, who indicated that a person with plaintiff's type of condition might not be a good candidate for pyrocarbon implants based on the degree of tissue damage likely to be present.

Plaintiff Mirta Ramos has a long history of rheumatoid arthritis, an autoimmune disease that leads to inflammation and destruction of the joints and surrounding tissues. By the time she consulted with defendant, Dr. Renata Vanja Weber, on March 4, 2009, the disease was advanced, and her metacarpophalangeal (MCP) joints, commonly known as her knuckles, were significantly deformed, and caused her severe pain. Plaintiff sought out and consulted with Dr. Weber to find out whether the joints could be replaced with implants in order to straighten the hand and alleviate the pain. Dr. Weber agreed to perform joint implantation surgery, which she performed on plaintiff's right

hand on July 30, 2009, removing the inflamed joints and replacing them with pyrocarbon implants. However, the surgery was not successful. It failed to ease the pain; indeed, plaintiff says she experienced greater pain after the surgery. Moreover, the implants did not perform properly; they began to stick out and her fingers to curl in.

During follow-up visits in August, 2009, Dr. Weber reviewed X-rays of the hand, and noticed a developing problem with subluxation, or misalignment of the fingers. On August 24, 2009, four fingers required repositioning during a nerve block procedure. In September, Dr. Weber began planning a second surgery, which was ultimately performed on November 5, 2009, at which time Dr. Weber realigned the fingers and centralized the tendons. However, the misalignment problem did not resolve.

Plaintiff asserts that Dr. Weber's use of pyrocarbon implants was a departure from the accepted standard of care. Further, plaintiff asserts that Dr. Weber failed to inform her about information regarding the likelihood that pyrocarbon implants would not help her. Plaintiff relies on an email exchange between Dr. Weber and Chris McLoughlin, a representative of Ascension Orthopedics, the manufacturer of the implants, one month before the surgery. Specifically, in a June 25, 2009 email Dr. Weber sent to McLoughlin, she mentioned a patient -- later

acknowledged to be plaintiff -- who was scheduled to receive MCP joint replacements and had "awful ulnar drift," i.e., deformed fingers that bend sideways toward the pinky. McLouglin replied to the email on June 29, 2009, stating that the patient with awful ulnar drift "may not be the ideal candidate for Pyrocarbon implants and would probably do better with silicone, [because] [h]er RA has probably progressed too far for pyrocarbon implants[, which] need[] good soft tissue support for optimal results. It's likely that she would present herself back in your office 12-18 months later with dislocated joints, only ultimately needing silicone joints anyway." Dr. Weber did not share with plaintiff the contents, or the gist, of that email.

In considering defendants' motion for summary judgment, I agree with the majority that defendants established their entitlement to judgment as a matter of law with the testimony of Dr. Weber and the affidavit of defendants' expert, which demonstrate that Dr. Weber exercised her best judgment in choosing plaintiff as an appropriate candidate for pyrocarbon joint implants, and that she obtained plaintiff's informed consent before undertaking the surgeries. However, unlike the majority, I believe that plaintiff's submissions were sufficient to raise triable issues of fact as to whether Dr. Weber deviated from accepted medical practices, or properly obtained plaintiff's

informed consent, precluding summary judgment.

In opposition to a defendant's showing that there was no deviation from accepted medical practice, the burden shifts to the plaintiff to "submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury" (*Bacani v Rosenberg*, 74 AD3d 500, 502 [1st Dept 2010]), *lv denied* 15 NY3d 708 [2010]). These assertions must be supported by competent evidence tending to establish the elements of the malpractice claim (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 523-524 [1st Dept 2004]).

Plaintiff's expert expressed the opinion that Dr. Weber departed from the accepted standard of care in deciding to use pyrocarbon joint implants rather than opting for silicone implants, because plaintiff had inadequate bone support for the pyrocarbon implant. While the evidentiary material in the record tending to support this assertion focuses on an absence of *tissue* support rather than bone support, in the context of a summary judgment motion, this inconsistency should not be used to invalidate the expert's assertion. Plaintiff's expert's opinion that the use of silicone implants would have improved plaintiff's

ultimate outcome is sufficiently supported by the email of the manufacturer's representative expressing a similar view.

Nor may the claim of lack of informed consent be disposed of as a matter of law. In order to make out a lack of informed consent, plaintiff must demonstrate that (1) Dr. Weber failed to fully apprise her of the reasonably foreseeable risks of pyrocarbon implant joint replacement surgery, and the alternatives to it, (2) a reasonable person would have opted against having pyrocarbon implant joint replacement surgery, and (3) the surgery was a proximate cause of plaintiff's injury (Public Health Law § 2805-d[2]; *see Eppel v Fredericks*, 203 AD2d 152 [1st Dept 1994]).

As to the first element, plaintiff's signature on a consent form, combined with Dr. Weber's testimony, constituted a prima facie showing by defendants that plaintiff was properly informed of the risks and benefits of, and alternatives to, the surgery. However, plaintiff's own assertions that she was not adequately informed of the risks of the surgery, or of the potential problems that could arise from the use of pyrocarbon rather than silicone implants, or even of the availability of silicone joint implants as an alternative, sufficiently rebuts those claims. Like the "learned intermediary" discussed in *Martin v Hacker* (83 NY2d 1 [1993]), namely, the prescribing physician who is informed

about the dangers of a drug by its manufacturer, and is expected to convey the necessary information to the patient, defendant physician here was in a comparable position. Even though the email was not a formal manufacturer's warning of the type that a physician has an obligation to pass along to the patient, it contained important, highly relevant information regarding how a patient with the type of symptoms suffered by plaintiff would likely respond to the implants the physician had decided to use. In these unique circumstances, this information from the manufacturer's representative should have been passed along to plaintiff.

Defendant argues, relying on *Dodes v North Shore Univ. Hosp.* (149 AD2d 455 [2d Dept 1989]), that plaintiff failed to allege, either in her complaint or her bill of particulars, that a reasonably prudent person with complete information would not have agreed to the pyrocarbon implants. However, the *Dodes* case looks to the complaint, the bill of particulars *or the motion papers* (*id.* at 456). The moving papers here contain plaintiff's deposition testimony in which she states that she would not have opted for the surgery if she had been fully informed. Notably, this Court indicated in *Eppel v Fredericks* that the plaintiff satisfied the "reasonable person" element of a lack of informed consent where an expert stated that a different procedure would

have been "much more medically sound," and the plaintiff testified that the other, better alternative was not discussed with her (*id.* at 154). Those same factors were established here.

Defendants also contend that plaintiff failed to show that the claimed lack of disclosure was a proximate cause of her injuries (*see Evart v Park Ave. Chiropractic, P.C.*, 86 AD3d 442 [1st Dept 2011], *lv denied* 17 NY3d 922 [2011]). They observe that while plaintiff testified that if she had understood the true risks, she would not have undergone the surgery at all, she did not testify that she would have made any different decision if the information provided by the manufacturer's representative had been disclosed. However, this reasoning imposes too strict a requirement for avoiding summary judgment; plaintiff's affirmative statement that if she had understood the true risks, she would not have undergone the surgery at all, is sufficient to create an issue of fact as to proximate causation.

Plaintiff's evidence sufficiently created issues of fact as to whether defendant deviated from accepted medical practice based on (1) her selection of pyrocarbon joint implants rather

than silicone, and (2) her failure to disclose or discuss with plaintiff information provided to the doctor by a representative of the implant's manufacturer. I would therefore affirm the motion court's denial of summary judgment.

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

ENTERED: JUNE 3, 2014

CLERK

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

11691 Christopher Pannone, Index 107932/04
Plaintiff-Appellant,

-against-

Daniel P. Silberstein, Esq.,
Defendant-Respondent,

Edward G. Delli Paoli, Esq.,
Defendant.

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Jonathan M. Landsman, New York, for appellant.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao, Peter T. Crean and Michael E. Gallay of counsel), for respondent.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered November 21, 2012, dismissing the amended complaint, unanimously affirmed, without costs.

Plaintiff retained defendants to represent him in an article 78 proceeding that was brought to challenge the termination of his employment as a police officer. The determination followed a disciplinary hearing that was conducted by the Police Department of the City of New York. Plaintiff appeared at the hearing with counsel other than defendants. The events that gave rise to the disciplinary proceeding began with plaintiff's unauthorized absence from his home while on sick report on July 22, 1998. The decision to terminate plaintiff's employment was based on a finding that he had made false statements regarding

his whereabouts to an investigating officer during a "GO-15" interview that was conducted on July 30, 1998.[1] At the hearing, plaintiff admitted that he knew he was required to remain at his residence while on sick report and that he gave a false account of the reason for his absence at the GO-15 interview.

While represented by defendants, plaintiff commenced the article 78 proceeding, which was transferred to this Court pursuant to CPLR 7804(g) on June 27, 2000. It was alleged in the article 78 petition that the penalty of dismissal was excessive and an abuse of discretion. The instant action arises out of this Court's dismissal of the article 78 proceeding upon defendants' failure to timely perfect on behalf of plaintiff.[2]

To recover damages for legal malpractice, a plaintiff must demonstrate that the attorney defendant "'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolph v Shayne, Dachs, Stanisci, Corker*

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[1]A GO-15 interview is one conducted "in connection with allegations of serious misconduct or corruption" (*Mullins v City of New York*, 626 F3d 47, 50 [2d Cir 2010]).

[2]Under this Court's rules, a petitioner in a transferred article 78 proceeding is required to file the record and a brief within nine months from the date of the transfer order (22 NYCRR 600.11[a][3]).

& Sauer, 8 NY3d 438, 442 [2007]). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*id.*). The court below granted defendants' motions for summary judgment, finding the "but for" element lacking because plaintiff would not have prevailed in the underlying article 78 proceeding. We agree.

The giving of false statements in the course of an official investigation has been upheld as a ground for dismissal from municipal employment (*see Matter of Duncan v Kelly*, 9 Misc 3d 1115[A], 2005 NY Slip Op 51558[U] [Sup Ct, NY County 2005] [also involved a GO-15 interview], *affd* 43 AD3d 297 [1st Dept 2007], *affd* 9 NY3d 1024 [2008]; see also *Matter of Loscuito v Scoppetta*, 50 AD3d 905 [2d Dept 2008], *lv denied* 13 NY3d 716 [2010]). There is no merit to plaintiff's argument that the state of the law in 2000, when the article 78 proceeding was brought, would have dictated a different result (*see e.g. Matter of Swinton v Safir*, 93 NY2d 758, 763 [1999] [dishonest statements to police department investigators constituted an independent basis for dismissal]).

The cause of action based on Judiciary Law § 487 was properly dismissed inasmuch as the record does not establish a "chronic and extreme pattern of legal delinquency" (*Kinberg v*

Opinsky, 51 AD3d 548, 549 [1st Dept 2008] [internal quotation marks omitted]). The breach of contract cause of action, which is based on defendants' alleged failure to represent plaintiff in a professional manner, was also properly dismissed. A breach of contract claim premised on an attorney's failure to exercise due care or to abide by general professional standards is nothing more than a malpractice claim (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]).

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

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

ENTERED: JUNE 3, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11905 Kathleen Gushue, Index 106645/05
Plaintiff-Appellant,

-against-

Estate of Norman Levy, et al.,
Defendants-Respondents,

EJN Corporation, et al.,
Defendants.

_____

Weitz & Luxenberg, P.C., New York (Gennaro Savastano of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Mark S. Katz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 28, 2012, which granted defendants' motion for summary judgment dismissing plaintiff's complaint, unanimously affirmed, without costs.

Plaintiff claims that she developed Parkinson's disease due to exposure to manganese fumes. However, plaintiff failed to raise a triable issue of fact to rebut defendants' prima facie showing that there is no general causation (*see Cornell v 360 W. 51st St. Realty, LLC*, _ NY3d _, 2014 NY Slip Op 02096). The scientific evidence indicates that manganese exposure can indeed

cause a related but distinct disorder called manganese-induced Parkinsonism, or manganism, but it does not show that manganese exposure can lead to the specific injury claimed, Parkinson's disease.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12632 The People of the State of New York, Respondent, Ind. 1867/01

-against-

Troy Lucas, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about May 7, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant does not dispute that the court properly assessed 125 points, which is more than enough to qualify him as a level three sex offender, and he does not request a downward departure. Instead, the only appellate relief he requests is that this Court "remove" other points that he claims were improperly assessed. We find no basis for such relief, because the contested points were not essential to the court's determination and do not affect the validity of the order on appeal (*see People v Pedraja*, 49 AD3d 325 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]).

In any event, we find that the contested points were properly assessed. Defendant's sole challenge to these points is based on the People's violation of the 10-day notice provision of Correction Law 168-n(3). However, the court provided a remedy that was sufficient under the circumstances of the case when it offered defendant an adjournment for further preparation (*see People v Inghilleri*, 21 AD3d 404, 405 [2d Dept 2005]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, JJ.

12633 James Fountain, Index 304191/11
Plaintiff-Respondent,

-against-

Daniel Anthony Ferrara, Esq., et al.,
Defendants-Appellants.

_____

Rosen Livingston & Cholst LLP, New York (Deborah B. Koplovitz of counsel), for appellants.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Stacey Haskel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered June 11, 2013, which, to the extent appealed from, denied so much of defendants' motion for summary judgment as sought dismissal of plaintiff's claim for legal malpractice, unanimously affirmed, without costs.

Plaintiff's deposition testimony that he was employed by a nursing home in 1998 when he was arrested, together with his bill of particulars, were sufficient to raise a triable issue of fact as to whether he sustained pecuniary losses resulting from the alleged legal malpractice (*see D'Agrosa v Newsday, Inc.*, 158 AD2d 229, 238 [2d Dept 1990]).

Defendants failed to preserve their argument that plaintiff may not rely upon his deposition testimony since such deposition was taken in an action in which they were not parties and were

not represented (*see Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]). In any event, the argument is unavailing, since defendants' absence at the time of the deposition merely renders the deposition transcript hearsay as to them (*see Rugova v Davis*, 112 AD3d 404 [1st Dept 2013]), and "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). Here, plaintiff also submitted his bill of particulars, and "factual allegations contained in a verified bill of particulars . . . may be considered in opposition to a motion for summary judgment" (*Johnson v Peconic Diner*, 31 AD3d 387, 388 [2d Dept 2006]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12634 In re Gracie C.,
Petitioner-Respondent,

-against-

Nelson C.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

Jeffery B. White, New York, for respondent.

_____

Order, Family Court, Bronx County (David Gilman, J.H.O.), entered on or about July 11, 2013, which, upon a fact-finding determination that respondent-appellant committed acts constituting menacing in the third degree, disorderly conduct, harassment in the second degree, aggravated harassment in the second degree and stalking in the fourth degree, and entered a two-year order of protection against him in favor of petitioner and her children, unanimously affirmed, without costs.

The finding that respondent-appellant (respondent) committed the family offenses at issue is supported by a fair preponderance of the evidence (*see* Family Ct Act § 832), and there is no basis to disturb the court's credibility determinations (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]). Respondent failed to preserve his contention that the court should not have admitted petitioner's eldest son's testimony that

he listened in on telephone conversations between respondent and petitioner (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]), and we decline to review it in the interest of justice. In any event, any error was harmless in view of the overwhelming additional evidence supporting the court's determination (*see Matter of Perry v Surplus*, 112 AD3d 1077, 1080-1081 [3d Dept 2013]).

Respondent also failed to preserve his argument that the harassment charges as applied to him violated his constitutional right to freedom of speech, and we decline to review it in the interest of justice. As an alternative holding, we find the argument unavailing given that the applicable statutes do not "prohibit speech or expression" (*People v Shack*, 86 NY2d 529, 535 [1995]). Rather, they prohibit only illegitimate communication (*id.*), and respondent's repeated and unwanted communications to petitioner were not for legitimate purposes.

Respondent failed to preserve his argument that the harassment statutes at issue are unconstitutionally vague or overbroad, and we decline to review it in the interest of justice.

The court properly exercised its discretion in issuing a two-year, rather than a one-year, order of protection (*see* Family Ct Act § 842).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12635 In re Roy Den Hollander, Index 100299/13
Petitioner-Appellant,

-against-

The City of New York Commission
on Human Rights,
Respondent-Respondent.

_____

Roy Den Hollander, New York, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered August 6, 2013, which denied the petition brought pursuant to CPLR Article 78 seeking to annul a determination of respondent City of New York Commission on Human Rights (CCHR), dated January 11, 2013, dismissing petitioner's complaint of age-based discrimination, unanimously affirmed, with costs.

Petitioner alleges that nonparty Amnesia J.V. LLC discriminated against him by requiring him to purchase a $350 bottle in order to gain admission to its nightclub. The New York State Division of Human Rights previously dismissed a complaint brought by petitioner alleging gender discrimination by Amnesia in hindering his admittance to the nightclub on January 9, 2010. Accordingly, the doctrine of election of remedies now bars

petitioner from filing with CCHR the instant claim of age discrimination with respect to the same alleged incident (*see* NYC Admin Code § 8-109[f]). This is so even though petitioner is now advancing a different theory of invidious discrimination — age discrimination as opposed to gender discrimination (*see Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 [1st Dept 2008], *lv dismissed*, 14 NY3d 880 [2010]; *Jones v Gilman Paper Co.*, 166 AD2d 294, 294 [1st Dept 1990]).

In any event, CCHR's alternative determination of "no probable cause" has a rational basis and is not arbitrary and capricious (*see David v New York City Commn. on Human Rights*, 57 AD3d 406, 407 [1st Dept 2008]; *de la Concha v Gatling*, 13 AD3d 74, 75 [1st Dept 2004]). Petitioner was afforded a "full and fair opportunity to present [his] case" (*Matter of Block v Gatling*, 84 AD3d 445, 446 [1st Dept 2011], *lv denied*, 17 NY3d 709 [2011]), and received procedural due process (*see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied*, 523 US 1074 [1997]; *Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]). There is absolutely no evidence

that CCHR's Executive Director was biased against him, let alone any showing that any such bias "affect[ed] the result" (*People v Moreno*, 70 NY2d 403, 407 [internal punctuation omitted]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12636 Whitestone Construction Company, Inc., Petitioner-Appellant, Index 652148/13

-against-

Varied Construction Corp., Respondent-Respondent.

_____

Goetz Fitzpatrick LLP, New York (Neal M. Eiseman of counsel), for appellant.

Tunstead & Schechter, Jericho (Michael D. Ganz of counsel), for respondent.

_____

Judgment (denominated an order), Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 23, 2013, denying the petition to, inter alia, declare respondent in default, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The arbitrators had repeatedly denied petitioner's applications to declare respondent in default for failing to advance its share of arbitrator compensation, the governing arbitration rule barred defaults for nonpayment, and the court properly determined that it should not intervene at this juncture (*see Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 182 [1995]; *Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276, 281 [1977]; *Asesd, LLC v Vanguard*

Constr. & Dev. Co., Inc., 79 AD3d 418 [1st Dept 2010]).

The authorities relied upon by petitioner are not persuasive. *Brandifino v CryptoMetrics, Inc.* (27 Misc 3d 513 [Sup Ct, Westchester County 2010]) and *Sanderson Farms, Inc. v Gatlin* (848 So2d 828 [Miss 2003]) did not involve arbitration rules prohibiting defaults; moreover, *Brandofino* implicated a policy concern not present here. *Sink v Aden Enterprises, Inc.* (352 F3d 1197 [9th Cir 2003]) also did not involve a prohibition on defaults, and in that case the court upheld the default remedy granted by the arbitrator.

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

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12638- 12638A The People of the State of New York, Respondent, Ind. 5602/03 1077/09

-against-

David Powell, Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, New York County (Brenda Soloff, J., at initial plea; Patricia Nunez, J., at second plea and sentencing), rendered on or about August 11, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12640 Juan Eduardo Licurgo-Cruz, Index 309467/10
Plaintiff-Appellant,

-against-

MD Ahmed, et al.,
Defendants-Respondents.

_____

The Law Offices of Joseph Monaco, PC, New York (Joseph D. Monaco of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, respondents.

_____

Order, Supreme Court, Bronx County (Mitchell Danzinger, J.), entered June 14, 2013, which denied plaintiff's motion for partial summary judgment, without prejudice to making such motion following discovery, unanimously affirmed, without costs.

Plaintiff's own motion papers failed to make a prima facie showing of entitlement to judgment as a matter of law, and so he was not entitled to summary judgment regardless of the adequacy of the opposition (*see Winegrad v New York Univ. Med. Ctr.* , 64 NY2d 851, 853 [1985]). Moreover, the court properly found that plaintiff's motion was premature, as the agreed-upon, so-ordered discovery, including plaintiff's own deposition and independent medical examination, had not yet occurred. Plaintiff has exclusive knowledge as to his speed, why he was riding his bicycle in the bus lane, and why he chose to pass defendants' cab

on the right side when it pulled over and stopped to let out a passenger, and defendants are entitled to explore these and other issues during discovery.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12641 The People of the State of New York, Ind. 152N/12
Respondent,

-against-

Eric Araus,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Leila Tabbaa and Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane Princ 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 (Laura A. Ward, J.), rendered on or about August 8, 2012,

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

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

ENTERED: JUNE 3, 2014

CLERK

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

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12642 Joshua Latimer, Index 21463/11
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

Law Offices of Alan M. Greenberg, P.C., New York (Raquel J. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 7, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was having a football catch with a friend on the handball courts at the Jerome Playground South. While running, he tripped over the raised, cracked, and uneven edge of the concrete sidewalk adjacent to the paved court. There was also a gap of approximately one inch between the two slabs.

The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks which are inherent

in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). This includes risks associated with the construction of the playing surface, including risks involving less than optimal conditions (*Bukowski v Clarkson Univ.*, 19 NY3d 353 [2012]; *Ziegelmeyer v United States Olympic Comm.*, 7 NY3d 893 [2006]; *Maddox v City of New York*, 66 NY2d 270 [1985]). "If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be" (*Brown v City of New York*, 69 AD3d 893, 893-894 [2d Dept 2010] ["plaintiff assumed the risk of injury by voluntarily participating in the football game despite his knowledge that doing so could bring him into contact with the open and obvious cement strip in the out-of-bounds area of the field"]).

The assessment of awareness must take place against a particular plaintiff's skill and experience (*see Joseph v New York Racing Assn.*, 28 AD3d 105, 111 [2d Dept 2006]). Here, the 26-year-old plaintiff was familiar with the risks inherent in the sport of football, such as the risk of falling while running to catch a ball. He had been to Jerome Playground South to play football or baseball at least 15 times previously and was generally aware of defects in the park. Although plaintiff

alleges that he did not see the particular defect that caused him to trip before he fell, cracks in the concrete were visible to a person walking by and nothing covered or concealed the open and obvious condition. Given these circumstances, the primary assumption of risk doctrine is applicable "because plaintiff was involved in an athletic activity at a designated venue and was aware of the perfectly obvious risk of playing on the cracked court" (*Williams v New York City Hous. Auth.*, 107 AD3d 530, 531 [1st Dept 2013]; *see also Felton v City of New York*, 106 AD3d 488 [1st Dept 2014]; *Lincoln v Canastota Cent. School Dist.*, 53 AD3d 851 [3d Dept 2008]).

Plaintiff's argument that the primary assumption of risk doctrine does not apply because he was involved in a leisurely game of catch, not an organized sporting event or recreational activity, is without merit. The accident involved a sporting or

recreational activity that "occurred in a designated athletic or recreational venue" (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]; *see also Filer v Adams*, 106 AD3d 1417 [3rd Dept 2013]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12644 Culligan Soft Water Co., et al., Index 651863/12
Plaintiffs-Appellants,

-against-

Clayton Dubilier & Rice LLC, et al.,
Defendants-Respondents.

_____

Singler & Dillon, LLP, Sebastopol, CA (Brian W. Dillon of the bar of the State of California, admitted pro hac vice, of counsel), and Einbinder & Dunn, LLP, New York (Michael Einbinder of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 18, 2013, which granted defendants' motions to dismiss the complaint without prejudice, unanimously modified, on the law, to vacate the order as to claims asserted against any defendant not a current officer, director, or shareholder of nominal defendant Culligan Ltd. and as to claims based on sections of the Business Corporation Law enumerated in Business Corporation Law §§ 1317 and 1319, and the matter remanded for consideration of the motion to dismiss those claims under New York law, and otherwise affirmed, without costs.

Plaintiffs – minority shareholders of Culligan Ltd. – bring this derivative action on behalf of that entity, a Bermuda company that does business in New York. Supreme Court granted

the motion to dismiss upon finding that Bermuda law applied to the case pursuant to the "internal affairs" doctrine. That doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders" (*Edgar v MITE Corp.*, 457 US 624, 645 [1982]; *see also Hart v General Motors Corp.*, 129 AD2d 179, 184 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]). Since the internal affairs doctrine does not apply to those defendants who are not current officers, directors, and shareholders of Culligan Ltd., namely, Angelo, Gordon & Co., L.P., Silver Oak Capital, L.L.C., Centerbridge Special Credit Partners, L.P., CCP Credit Acquisition Holdings, L.L.C., CCP Acquisition Holding, L.L.C., and Clayton Dubilier & Rice LLC, Bermuda law does not apply to claims asserted against them.

Nor does the internal affairs doctrine apply to claims based on sections of the Business Corporation Law (BCL) enumerated in BCL §§ 1317 and 1319. BCL § 1319(a)(1) expressly provides that BCL § 626 (shareholders' derivative action) shall apply to a foreign corporation doing business in New York. Thus, the issue of plaintiffs' standing to bring a shareholder derivative action is governed by New York law, not Bermuda law (*see Pessin v Chris-*

Craft Indus., 181 AD2d 66, 70-71 [1st Dept 1992]; *Norlin Corp. v Rooney, Pace Inc.*, 744 F2d 255, 261 [2d Cir 1984]). We note that *Matter of CPF Acquisition Co. v CPF Acquisition Co.* (255 AD2d 200 [1st Dept 1998]) held that the plaintiff's standing to sue was governed by Delaware law because Delaware was the State of the corporation's incorporation. However, there is no indication that the plaintiff in that case raised BCL § 1319.

Pursuant to *German-American Coffee Co. v Diehl* (216 NY 57, 62-64 [1915]) and BCL §§ 1319(a)(1), 719(a)(1), and 510, New York law applies to the second cause of action, which alleges that the directors of Culligan Ltd. declared illegal dividends.

To the extent plaintiffs allege violations of BCL § 720 (e.g. waste and unlawful conveyance), which is made applicable to foreign corporations doing business in New York by BCL § 1317(a)(2), those claims are also governed by New York law (*see Seghers v Thompson*, 2006 WL 2807203, *5-6, 2006 US Dist LEXIS 71103, *16, *18 [SD NY, Sept. 27, 2006, 06 Civ 308 (RMB) (KNF)]). However, to the extent plaintiffs allege a violation of a section of the Business Corporation Law not enumerated in BCL § 1317 (e.g. § 717, which is part of plaintiffs' breach of fiduciary duty claim), New York law does not apply (*see e.g. Seghers*, 2006 WL 2807203 at *5, 2006 US Dist LEXIS 71103 at *16). Those claims are governed by Bermuda law (*see e.g. Kikis v McRoberts Corp.*,

225 AD2d 455 [1st Dept 1996]), and were thus correctly dismissed.

BCL § 1317 permits plaintiffs to sue Culligan Ltd.'s directors and officers. However, defendant Clayton Dubilier & Rice Fund VI Limited Partnership (CDR Fund VI) is neither a director nor an officer of Culligan Ltd.; it is Culligan Ltd.'s majority shareholder. Hence, there is no basis for applying New York law to the claims against CDR Fund VI. It is undisputed that, under Bermuda law, plaintiffs' claims against CDR Fund VI, as currently pleaded, were correctly dismissed.

Because it found that Bermuda law applied to this case, the motion court did not reach defendants' arguments that the complaint should be dismissed even if New York law applied. We remand so that the court may consider those arguments.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12647 Val Karan, et al., Index 16736/07
Plaintiffs-Appellants,

-against-

The First Paradise Theaters Corp., et al.,
Defendants,

Riverdale Jewish Center,
Defendant-Respondent.

_____

Bernstone & Grieco, LLP, New York (Matthew A. Schroeder of counsel), for appellants.

Callan, Koster, Brady & Brennan LLP, New York (Arshia Hourizadeh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 22, 2013, which, to the extent appealed from, granted defendant Riverdale Jewish Center's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant Riverdale made a prima facie showing of its entitlement to judgment as a matter of law by submitting evidence that it had no duty to maintain the subject theater or the stairs upon which plaintiff Val Karan allegedly tripped (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]), and that it did not cause, create or have notice of the alleged hazardous condition — namely, a wire over the stairs (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Perez v Bronx*

Park S. Assoc., 285 AD2d 402, 403 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]). Indeed, the evidence shows that defendant The First Paradise Theaters Corp. owned the theater, that First Paradise leased the theater to defendant Paradise Theater Productions, Inc. (PTP), and that PTP assigned the lease to defendant Mossberg Credit Services, Inc. Further, Riverdale submitted, among other things, an agreement between it and defendant Mossberg Credit Adjusters, Inc. showing that Riverdale was permitted to use the theater for only 24 hours and that Mossberg Credit Adjusters was responsible for the lighting and agreed to construct the temporary platform that led to the subject stairs. Riverdale also submitted deposition testimony showing that Mossberg built the temporary stairs and that Riverdale was unaware of any complaints about the facility, stairs, stage or wiring prior to plaintiff's accident.

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs improperly argue for the first time on appeal that Riverdale occupied, controlled or made special use of the

premises (*see Botfeld v Wong*, 104 AD3d 433, 433-434 [1st Dept 2013]). In any event, the argument is unavailing.

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

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12648 Dragon Head LLC, Index 650192/12
Plaintiff-Appellant,

-against-

Steven Munro Elkman, et al.,
Defendants-Respondents,

Deutsche Bank Alex Brown, etc.,
Defendant.

_____

Russ & Russ, P.C., Massapequa (Jay E. Russ of counsel), for appellant.

Robert E. Michael & Associates PLLC, Bronx (Robert E. Michael of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 23, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While plaintiff is correct that separate writings can be considered together when they evince an intent to forward the same transaction or purpose (*see Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]), that does not avail it, since two of the written agreements at issue expressly contradict the overarching purpose it seeks to establish through parol evidence (*see Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 56-57 [1953]).

The third writing is characterized by precatory language, such as, "It is the intention of [the parties]" and "The goal is" to effect certain acts. Given this language, combined with the number of agreements yet to be negotiated that this third writing contemplates, the third writing is an unenforceable agreement to agree (*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009]). Even if the third writing were an enforceable contract, we would affirm the dismissal of the complaint, since plaintiff failed to show a breach of the "break-up" provision. The plain language of that provision demonstrates that the provision is triggered only by the death or incapacity of one of the signatories.

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12649 In re Jonathan Polayes, Index 156710/12
Petitioner-Appellant,

-against-

City of New York, at al.,
Respondents-Respondents.

_____

Glass Krakower LLC, New York (John Hogrogian of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 18, 2013, which denied the petition to vacate an arbitration award imposed pursuant to Education Law § 3020-a, finding petitioner guilty of teacher misconduct and terminating his employment with respondent New York City Department of Education, and granted respondents' cross motion to dismiss the proceeding and confirm the award, unanimously reversed, on the law, without costs, the petition granted, the cross motion denied, and the arbitration award vacated.

The evidence presented at the arbitration hearing established that petitioner, while acting as a substitute teacher covering a double-period class for high school senior students, participated in conversation with a group of the students concerning their college choices and post-graduation internship

plans. The class took place during the height of the college application process, and right before the winter break. During the conversation, petitioner offered to serve as a contact point for a potential internship at a media company for a female student who had expressed an interest in film and media. The student testified that she appreciated this and was not offended by the offer. When a male student then indicated that he did not want to do an internship or work during the summer after graduation, petitioner whispered to the female student something to the effect of "watch how they react to this," and proceeded to tell the students about a valuable internship experience he had before he went to college. The female student also was not offended by this. When another male student expressed his interest in attending a college that was widely reported to be a "party school," petitioner asked him something to the effect of, "so you're the type to party with," or "you want to go to school to party." The student testified that he was "not offended in any way" by the comment. Rather, the several students who testified generally indicated that they enjoyed the class and found it to have been more interesting than expected from a substitute.

Respondent has not identified any rule or statute that classifies such statements and action as teacher misconduct.

Under all the circumstances, the finding that petitioner's actions constituted teacher misconduct is not supported by adequate evidence, and is arbitrary and capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]).

We note that petitioner had a disciplinary history including findings of non-sexual touching of students, and that two prior disciplinary awards expressly warned him not to touch his students again. However, it is undisputed that petitioner did not touch any of his students in the case at bar. Thus, contrary to the arbitrator's finding, the evidence did not indicate that petitioner failed to heed prior warnings (*cf. Matter of Forte v Mills*, 250 AD2d 882. 884 [3d Dept 1998]; *Matter of Jerry v Board of Educ. of City School Dist. of City of Syracuse*, 50 AD2d 149, 157 [4th Dept 1975], *appeal dismissed* 39 NY2d 1057 [1976]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Andrias, Freedman, Clark, JJ.

12650N- 12650NA
Joanne Torchia, et al., Plaintiffs-Respondents,

-against-

Richard C. Garvey, M.D., et al., Defendants-Appellants.

Index 306233/10

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellants.

Peter E. Tangredi & Associates, White Plains (Stephen D. Chakwin, Jr. of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 10, 2012, which granted plaintiffs' motion to amend their claim for medical malpractice and to add a claim for lack of informed consent, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered February 4, 2013, which denied defendants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiffs failed to proffer an expert medical affidavit of merit in support of their proposed claim for medical malpractice, which stemmed from a prior surgery separate and distinct from the one originally pleaded (*see e.g. Lopez v City of New York*, 80 AD3d 432, 433 [1st Dept 2011]; *compare Gambles v Davis*, 32 AD3d 224, 225 [1st Dept 2006]).

In any event, the proposed amendments are untimely. Although the court sua sponte determined that the continuous treatment doctrine applied to the medical malpractice claim, the record contains no evidence, such as medical records or an affidavit attesting to dates of treatment, that would support such a finding. Further, the continuous treatment doctrine cannot apply to the derivative claim of plaintiff husband (*see Otero v Presbyterian Hosp. in City of N.Y.*, 240 AD2d 279 [1st Dept 1997]). Nor did the proposed claim of lack of informed consent relate back to the original claim for medical malpractice (*see Raymond v Ryken*, 98 AD3d 1265 [4th Dept 2012]; *Pagan v Quinn*, 51 AD3d 1299, 1301 [3d Dept 2008]; *Jolly v Russell*, 203 AD2d 527, 529 [2d Dept 1994]).

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

ENTERED: JUNE 3, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12651N Adamou Moumouni, Index 304214/12
Plaintiff-Respondent,

-against-

Tappen Park Associates, Inc., et al.,
Defendants-Appellants.

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Gabor & Marotta, LLC, Staten Island (Daniel C. Marotta of counsel), for appellants.

Richard L. Giampa, P.C., Bronx (Zachary Giampa of counsel), for respondent.

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Order, Supreme Court, Bronx County (John Barone, J.), entered October 23, 2012, which denied defendants' motion pursuant to CPLR 510(3) to change venue to Richmond County, unanimously affirmed, without costs.

Plaintiff properly placed venue in Bronx County, where he resides. In seeking a discretionary change of venue, defendants failed to make the required "detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue" (*Rodriguez v Port Auth. of N.Y. & N.J.*, 293 AD2d 325, 326 [1st Dept 2002]). General statements that the witnesses would be inconvenienced by traveling to Bronx County are insufficient to warrant a change of venue, given the

relatively short distance between Richmond and Bronx Counties (*see Gersten v Lemke*, 68 AD3d 681 [1st Dept 2009]). Furthermore, the fact that plaintiff has a pending personal injury action in Richmond County against a nonparty relating to a work-place accident is irrelevant in determining the proper venue for this action, in which he alleges that defendants improperly terminated his employment for discriminatory or retaliatory reasons.

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

ENTERED: JUNE 3, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11611 Ji Sun Jennifer Kim, Index 153013/12
Plaintiff-Respondent,

-against-

Goldberg, Weprin, Finkel,
Goldstein, LLP, et al.,
Defendants-Appellants.

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L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Marie A. Hoenings of counsel), for appellants.

Karpf, Karpf & Cerutti, P.C., Astoria (Adam C. Lease of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered April 25, 2013, modified, on the law, to grant the motion to the extent of dismissing the claims of gender discrimination and hostile work environment, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman,
Dianne T. Renwick,
Helen E. Freedman,
Rosalyn H. Richter, JJ.

11611
Index 153013/12

_____x

Ji Sun Jennifer Kim,
Plaintiff-Respondent,

-against-

Goldberg, Weprin, Finkel,
Goldstein, LLP, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Louis B. York, J.), entered April 25, 2013, which, to the extent appealed from, denied their motion to dismiss, or for summary judgment dismissing, the complaint alleging gender/pregnancy discrimination, hostile work environment, and retaliatory termination under the State and City Human Rights Laws.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Marie A. Hoenings and Nicole Feder of counsel), for appellants.

Karpf, Karpf & Cerutti, P.C., Astoria (Adam C. Lease of counsel), for respondent.

RICHTER, J.

In this appeal, we are asked to decide whether plaintiff's claims of retaliatory termination under the New York State and New York City Human Rights Laws (Executive Law § 290 *et seq.*; Administrative Code of City of NY § 8-107 *et seq.*) are barred by collateral estoppel based on a federal court's dismissal of plaintiff's claims of retaliation asserted under the Family and Medical Leave Act (29 USC § 2601 *et seq.*) (FMLA). We conclude that collateral estoppel does not apply because the state and city retaliation claims asserted in this action are entirely distinct from the FMLA retaliation claims raised and decided in the federal action. On the merits, we find that issues of fact exist as to whether the employer's stated reason for plaintiff's discharge was a pretext for retaliation. We grant summary judgment, however, dismissing plaintiff's claims of gender discrimination and hostile work environment.

In January 2008, plaintiff Ji Sun Jennifer Kim was hired as an associate attorney in the tax certiorari department of defendant law firm Goldberg, Weprin, Finkel, Goldstein, LLP. In January 2009, plaintiff learned she was expecting a child and informed the law firm of her pregnancy. In June 2009, while visibly pregnant, plaintiff was reprimanded by a partner at the law firm for allegedly reading a book during work hours.

According to plaintiff, the partner stood extremely close and screamed at her, causing plaintiff to fear that she would be hit.

Plaintiff promptly emailed a complaint about the incident to defendants Arnold Mazel and Barry Zweigbaum, both partners in the law firm. In that complaint, plaintiff alleged that two other attorneys, both male, were engaging in similar behavior at the same time but were not admonished. Plaintiff's email expressed concern that she was singled out and treated unfairly due to her pregnancy. Defendant Andrew Albstein, the law firm's managing partner, wrote an email to plaintiff reiterating that reading a book during work hours was inappropriate, and denying that plaintiff was reprimanded due to her pregnancy. Plaintiff also alleges that Mazel told her that she made her situation worse by complaining.

In September 2009, plaintiff took 12 weeks' maternity leave. Upon her return to work in December 2009, plaintiff began to express breast milk at the office. At some point in February 2010, Zweigbaum, within earshot of plaintiff, is alleged to have made an inappropriate gender-based comment. The next day, plaintiff complained to Zweigbaum and another partner about the offensive remark. Plaintiff alleges that after she complained, Zweigbaum barely spoke to her.

At around the same time, plaintiff asked if she could work a reduced schedule so she could take care of her baby at home, but Mazel denied the request. According to Mazel, February was the tax certiorari department's busy season, and firm policy did not allow lawyers to work a reduced work schedule. Albstein confirmed that in the previous 10 years, the law firm had never allowed any associate attorney to work part-time. In April 2010, the law firm terminated plaintiff's employment, purportedly for budgetary reasons.

In August 2010, plaintiff commenced an action against defendants in the United States District Court for the Southern District of New York. In her amended complaint, plaintiff asserted that defendants had violated the FMLA. Specifically, plaintiff alleged that defendants interfered with her FMLA rights by denying her February 2010 request for a reduced work schedule (the FMLA interference claim). Plaintiff also claimed that the law firm retaliated against her by terminating her for taking the 12 weeks of maternity leave in 2009, and for requesting the reduced work schedule in 2010 (the FMLA retaliation claim).[1] The federal complaint also included claims of gender/pregnancy

[1] Under the FMLA, a plaintiff may raise separate claims for interference with FMLA rights and for retaliation against the exercise of those rights (*see Di Giovanna v Beth Israel Med. Ctr.*, 651 F Supp 2d 193, 198-199 [SD NY 2009]).

discrimination, hostile work environment and retaliation under the New York State Human Rights Law and the New York City Human Rights Law.

Defendants moved for summary judgment in the federal action, and in an opinion dated May 4, 2012, the federal court granted the motion (*see Kim v Goldberg, Weprin, Finkel Goldstein, LLP*, 862 F Supp 2d 311 [SD NY 2012]). The court dismissed the FMLA interference claim, finding that, under the circumstances, the FMLA did not entitle plaintiff to take intermittent leave in the form of a reduced work schedule (*id.* at 317). The court also dismissed the FMLA retaliation claim to the extent it was based on plaintiff's request for a reduced work schedule (*id.* at 318). The court concluded that because plaintiff was not entitled to intermittent leave under the FMLA, she was not exercising rights under the FMLA, and thus could not establish a prima facie case for retaliation based on her request for a reduced work schedule (*id.*).

The court also dismissed the FMLA retaliation claim based on plaintiff's having taken maternity leave, finding that she could not establish a prima facie case (862 F Supp 2d at 318). Specifically, the court concluded that there were insufficient facts to support a causal link between the 2009 leave and plaintiff's termination (*id.*). The court also found that even if

a prima facie case was made out, plaintiff had failed to assert sufficient facts showing that the law firm's proffered nondiscriminatory reason for her termination was pretextual (*id.* at 319-321). Having disposed of plaintiff's federal FMLA claims, the court declined to exercise supplemental jurisdiction over the causes of action under the State and City Human Rights Laws, and dismissed them without prejudice (*id.* at 321). The federal court's decision contains no factual or legal findings with respect to the state and city claims.

In 2012, plaintiff commenced this action asserting, as relevant here, causes of action under the State and City Human Rights Laws. In the amended complaint, plaintiff alleged that defendants discriminated against her based on gender/pregnancy, created a hostile work environment, and discharged her in retaliation for complaining about the alleged discrimination. Defendants moved to dismiss these claims pursuant to CPLR 3211(a)(7) and 3211(a)(5) for failure to state a cause of action and as barred by collateral estoppel, and for summary judgment pursuant to CPLR 3211(c). In a decision entered April 25, 2013, the court denied the motion, and this appeal ensued.

On appeal, defendants maintain that plaintiff's state and city claims are barred by collateral estoppel. Under the doctrine of collateral estoppel, a party is precluded from

relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action (*Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). To successfully invoke this doctrine, two requirements must be met. First, the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action. Second, the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007]). Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel can still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims (*see Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 [1st Dept 2013]). The party seeking to invoke collateral estoppel bears the burden of establishing identity of issue (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

Applying these principles, we conclude that defendants have not met their burden of showing that plaintiff's state and city claims of retaliatory termination are barred by collateral estoppel. The retaliation claims asserted here are entirely distinct from those raised and decided in the federal action.

There, the court only decided whether plaintiff was retaliated against for exercising her FMLA rights. Here, however, plaintiff does not claim retaliation based on her exercise of FMLA rights, but instead alleges retaliation, under the State and City Human Rights Laws, based on entirely different instances of protected activity. Specifically, plaintiff alleges she was discharged for filing a written complaint about her reprimand for allegedly reading a book during work hours, and for verbally complaining about an alleged inappropriate comment. Because the federal court's decision did not address either of these claimed bases for retaliation, it cannot be said that the federal action "necessarily decided" the same issues raised by the State and City retaliation claims, and thus collateral estoppel does not apply (*Welsbach Elec. Corp.*, 9 NY3d at 128 [internal quotation marks omitted]).

Defendants argue that collateral estoppel applies because the federal court, in addressing whether there was an FMLA violation, found insufficient facts to conclude that discrimination played a role in the law firm's decision to terminate plaintiff. A careful reading of the federal opinion makes clear that the court's finding was made solely in the context of analyzing the discrete claim of retaliation under the FMLA. Indeed, this was the only question adjudicated by the

federal court. Notably, the court's statement, relied on by defendants, is contained in the part of its opinion entitled "Retaliation for [plaintiff's] 2009 leave" (862 F Supp 2d at 318), and the only protected activity addressed by the court was plaintiff's taking her maternity leave. As noted, the court did not mention, let alone engage in any analysis of, the distinct instances of protected activity that form the basis of plaintiff's state and city claims. Because the federal court never addressed the retaliation claims asserted in this action, and never addressed the issue of pretext in the context of those claims, its conclusions cannot serve as a collateral estoppel bar.

Our decision in *Jordan v Bates Adv. Holdings* (292 AD2d 205 [1st Dept 2002]) compels this result. In *Jordan*, the plaintiff brought an action in federal court alleging age, sex and disability discrimination under federal, state and city antidiscrimination laws (*id.* at 205). The federal court dismissed the federal sex and disability claims on procedural grounds as untimely, and dismissed the federal age claim on the merits, finding that there was insufficient evidence to defeat the defendant's showing of a nondiscriminatory motive for the plaintiff's discharge (*id.* at 205-206). The federal court declined to exercise jurisdiction over the state and city claims

and dismissed them without prejudice (*id*. at 205).

The plaintiff in *Jordan* then brought an action in state court alleging age, sex and disability discrimination under state and city laws (292 AD2d at 206). The motion court dismissed these claims, finding, inter alia, that the plaintiff was collaterally estopped based on the federal court's findings as to the nondiscriminatory reasons for her termination (*id*.). We reversed, to the extent appealed from as limited by the briefs, concluding that the plaintiff was not collaterally estopped from litigating her sex and disability claims because the federal court made no specific factual determination as to those claims (*id*. at 207). We further found that the federal court's findings as to the motive behind the plaintiff's termination were made solely in the context of the age discrimination issue, and could not collaterally estop her from asserting her sex and disability claims in state court (*id*.). A similar result is warranted here, and the federal court's dismissal of the FMLA retaliation claims cannot collaterally estop plaintiff from litigating her distinct state and city retaliation claims.

On the merits, the motion court properly denied defendants' motion to dismiss the retaliation claims. There is no dispute that plaintiff engaged in protected activity by making two complaints opposing discriminatory treatment. Similarly, there

is no question that the law firm's termination of her constitutes an adverse or disadvantageous employment action (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). After the first complaint, plaintiff alleges she was told by Mazel to refrain from complaining in the workplace, and following the second complaint, plaintiff claims that Zweigbaum barely spoke to her again. In addition, plaintiff's termination two months after the second complaint may establish the necessary causal nexus between the protected activity and her discharge (*see Ashok v Barnhart*, 289 F Supp 2d 305, 315 [ED NY 2003] ["A period of only two months between a protected activity and an adverse action may permit a reasonable jury to find the acts to be temporally proximate and causally related"]); *Lamberson v Six West Retail Acquisition, Inc.*, 122 F Supp 2d 502, 512 [SD NY 2000] [employee's discharge two months after making complaints was sufficiently close in temporal proximity to infer a causal connection]).

Although defendants articulated a nonretaliatory reason for plaintiff's termination, namely a workforce reduction, triable issues of fact exist as to whether that stated reason was a pretext for retaliation, and whether, absent a retaliatory motive, the law firm's decision to terminate her would have occurred (*see Sandiford v City of N.Y. Dept. of Educ.*, 22 NY3d

914, 916 [2013]). The record contains evidence that at the time plaintiff was terminated, the law firm's tax certiorari department was expanding. According to plaintiff, at the time she was let go, the department was "busier than ever." Mazel confirmed this, testifying that the department had filed a record number of applications in 2010, more than in each of the previous 10 years. Plaintiff also points to evidence showing that the law firm hired a new attorney to work in her department shortly before her termination, that she was subsequently replaced by an attorney transferred from another department, and that the firm hired another attorney for the tax certiorari department a few months after she was discharged. Viewed in the light most favorable to plaintiff, this evidence is sufficient to defeat summary judgment on the retaliation claims.

However, dismissal of the hostile work environment claim is warranted. There is no view of the evidence that any conduct by defendants was severe or pervasive enough to create an objectively hostile or abusive environment, within the meaning of the State Human Rights Law (*see Chin v New York City Hous. Auth.*, 106 AD3d 443, 444-445 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]). Plaintiff cites only isolated remarks or incidents, and her being reprimanded for reading a book. Plaintiff's claim that she was treated differently after returning from maternity leave

is too vague to constitute evidence of a hostile work environment. Nor can plaintiff's hostile work environment claim be sustained even under the City Human Rights Law, since a reasonable person would consider the complained-of conduct nothing more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 13 NY3d 702 [2009]).

Finally, plaintiff's claim of gender/pregnancy discrimination should be dismissed. In her brief on appeal, the only discriminatory act alleged is the denial of plaintiff's request for a modified work schedule. However, the evidence in the record establishes that the law firm's policy did not allow for a reduced schedule for any attorney, and that the firm had not permitted any associate attorney to work part-time in the past 10 years. Thus, plaintiff is unable to establish that she suffered unequal treatment in the terms and conditions of her employment under the State Human Rights Law, or that she was treated less well than other employees under the City Human Rights Law (*see Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503 [1st Dept 2010]).

Accordingly, the order of the Supreme Court, New York County (Louis B. York, J.), entered April 25, 2013, which, to the extent

appealed from, denied defendants' motion to dismiss, or for summary judgment dismissing, the complaint alleging gender/pregnancy discrimination, hostile work environment, and retaliatory termination under the State and City Human Rights Laws, modified, on the law, to grant the motion to the extent of dismissing the claims of discrimination and hostile work environment, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JUNE 3, 2014

CLERK