SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 10, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11792 In re Social Service Employees Union, etc., Petitioner-Respondent, Index 111219/11

-against-

City of New York, et al., Respondents-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellants.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered November 9, 2012, which granted the petition to confirm the arbitration award issued on remand that reinstated petitioner's member Bowana Robinson to any eligible civil service position in which he would not have the responsibility to voucher property, and awarded him back pay, seniority and pension benefits as if he had never been terminated, reversed, on the law, without costs, the petition denied, the cross motion to vacate the award granted, and the matter remanded to a different arbitrator for reconsideration of an appropriate penalty.

The award issued upon remand by the arbitrator was irrational (*see* CPLR 7511[b][1][iii]), as it was not in accord with our directive that petitioner member's criminal conviction mandated a finding of employee misconduct warranting a penalty (82 AD3d 644, 645 [1st Dept 2011]). The reinstatement of petitioner's member to a civil service position with certain limitations of responsibility, along with an award of full back pay, seniority and benefits, effectively did not impose any penalty. We disagree with the dissent that limiting petitioner's member to a position that does not permit him to voucher property is a penalty consistent with our prior decision. Furthermore, remand to a different arbitrator for reconsideration of the appropriate penalty, which can be any penalty within the range of penalties available to the arbitrator, is warranted under the circumstances presented (*see e.g. Matter of Social Servs. Empls. Union Local 371 v City of N.Y. Admin. for Children's Servs.*, 100 AD3d 422, 423 [1st Dept 2012]).

All concur except Saxe and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows:

FREEDMAN, J. (dissenting)

I respectfully dissent and would affirm Supreme Court's confirmation of the arbitrator's award in this article 75 proceeding. I find that the award was rational and complied with this Court's directions in its prior order in this matter (82 AD3d 644 [1st Dept 2011]).

The relevant facts are as follows: respondent Department of Juvenile Justice (DJJ), a New York City agency, employed grievant Bowana Robinson, a member of union petitioner, as an Institutional Aide at a DJJ facility from March 1988 until his termination in April 2005. Robinson mainly worked as a janitor at the facility, but one of his additional duties included vouchering the personal property of individuals who were staying there.

In June 2003, Robinson was arrested and charged with larceny for overdrawing funds from his account with the Municipal Credit Union of New York City. In November 2004, Robinson pleaded guilty to petit larceny to resolve the criminal case. He was sentenced to probation and made restitution.

In February 2005, respondents served Robinson with the disciplinary charge that he had engaged in "misconduct that would bring negative criticism upon [Robinson] or [DJJ]." Respondents terminated Robinson effective April 25, 2005 on the ground that

he knowingly overdrew funds from his credit union account.

Petitioner thereafter filed a request for arbitration on Robinson's behalf to challenge his discharge. Arbitration proceedings were held in April and May 2008 before Arbitrator Randi Lowitt of the NYC Office of Collective Bargaining. By stipulation, the parties submitted as the sole issue whether Robinson's discharge was "a wrongful disciplinary action" under the collective bargaining agreement between petitioner union and respondents.

In September 2008, Arbitrator Lowitt issued an Opinion and Award sustaining Robinson's grievance and directing respondents to reinstate him to his position with back pay and to adjust his seniority and pension benefits as if there had no been break in his employment. The Arbitrator found that respondents had failed to prove that Mr. Robinson engaged in the conduct that "[respondents] alleged," had failed to prove that Robinson had stolen money from the credit union, and had not made any showing that "Mr. Robinson is neither qualified to continue working as an Institutional Aide nor that Mr. Robinson is likely to engage in nefarious practices while working as an Institutional Aide."

Thereafter, petitioner brought an article 75 proceeding to confirm the award and respondents cross-moved to vacate it. By order entered May 18, 2009, Supreme Court confirmed the award,

finding that it was not inherently irrational and did not violate public policy. The court also found that it was reasonable for the Arbitrator to hold that Robinson's plea to a petit larceny charge was inconclusive as to whether he had actually stolen the funds from the credit union.

On respondents' appeal from the May 2009 order, we reversed, holding that "[t]he arbitrator's failure to give preclusive effect to Robinson's guilty plea of petit larceny was irrational," and that "[t]he arbitrator's award places Robinson back into a position where he has the responsibility to voucher property of individuals being brought into a juvenile [justice] facility" (82 AD3d at 645). We remanded the matter to the arbitrator for "an appropriate penalty" (*id.*).

Upon remand, Arbitrator Lowitt heard arguments from counsel at a second hearing and issued an award acknowledging that, pursuant to this Court's determination, she "should have given consideration to Mr. Robinson's guilty plea to petit larceny before ordering his return to work, which return could have encompassed jobs where he would be responsible to voucher materials and/or property." The arbitrator then directed respondents to return Robinson within 30 days "to a position for which he is eligible, which position is NOT to include any position in which Mr. Robinson would have the responsibility to

voucher property of individuals being brought into a juvenile facility." As previously, the Arbitrator awarded Robinson back pay from the date of his discharge and adjustment of his seniority and other benefits.

In the order under appeal, Supreme Court confirmed the award. The court noted that this Court, in its prior decision, did not find Robinson disqualified from employment with respondents, and that the Arbitrator had addressed our concern that Robinson not be responsible for vouchering property at the DJJ facility. The court concluded that it was neither irrational nor a violation of public policy for the Arbitrator to determine that Robinson could continue his main duties as a janitor at the facility.

I see no basis to disturb the arbitration award and its confirmation by Supreme Court. A court may vacate an arbitrator's award when it violates a strong public policy, is irrational, or exceeds a limitation of the arbitrator's power under CPLR 7511(b)(1) (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). An arbitrator is not compelled to uphold the termination of an employee who has been convicted of a crime, and may instead impose a lesser penalty (*see City School Dist. of City of N.Y. v Lorber*, 50 AD3d 301 [1st Dept 2008]). Although

the majority finds that the Arbitrator disregarded our direction that an "appropriate penalty" be imposed because the Arbitrator directed the reinstatement of Robinson with back pay, this was not the case. By limiting Robinson's reinstatement to a position for which he is eligible but which does not permit him to voucher private property, a penalty was imposed. Vouchering property had been part of his job heretofore. Accordingly, the Arbitrator placed restrictions on his future employment that would likely disqualify him from resuming his present position and force him to accept a reassignment. Thus, the award is neither irrational nor at odds with our prior decision because, after the Arbitrator gave preclusive effect to Robinson's conviction and weighed the other evidence before her, she fashioned an appropriate penalty.

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12698-
12698A In re David L. Jr., and Others,

Children Under Eighteen Years
of Age, etc.,

David L., etc.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Aleza Ross, Patchogue, attorney for the children.

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about February 11, 2013, which, upon a fact-finding determination that respondent sexually abused his daughter and a child for whom he was legally responsible and derivatively neglected the four other subject children, released the children to the custody of their respective mothers, ordered respondent to be in a sex offender program, and issued a one-year order of protection against him on behalf of the children, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot. Appeal from order of fact-finding,

same court and Judge, entered on or about January 14, 2013, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

The determination that respondent sexually abused two of the subject children, and thereby derivatively neglected the four other subject children, is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The out-of-court statements of sexual abuse made by respondent's daughter were corroborated by the medical evidence and testimony of her counselor (*see* Family Ct Act § 1046[a][vi]; *Matter of Estefania S. [Orlando S.]*, 114 AD3d 453, 453 [1st Dept 2014]). In addition, each child's statement detailing the abuse served to corroborate the other's (*see e.g. Matter of Nicole V.*, 71 NY2d 112, 124 [1987]). We perceive no basis to disturb the court's credibility determinations (*see Matter of Mia B. [Brandy R.]*, 100 AD3d 569, 569-570 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

The court properly exercised its discretion in striking the testimony of respondent's daughter after she failed to return to complete it (*Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582, 583 [1st Dept 2011]) and in declining to admit an alleged CD recording of his daughter (*see Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]).

Respondent's arguments regarding the terms of the dispositional order are moot, since the terms have expired (*see Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550, 551 [1st Dept 2013]).

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

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12699 291 Broadway Realty Associates, etc., et al., Plaintiffs-Appellants, Index 702513/08

-against-

Weather Wise Conditioning Corp., Defendant-Respondent,

Gabe Construction Corp., Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Faust Goetz Schenker & Blee LLP, New York (Jeffrey Rubinstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 24, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on their contractual indemnification claim against defendant Weather Wise Conditioning Corp., unanimously affirmed, without costs.

The underlying action, in which nonparty Edwin Martinez asserted Labor Law claims against the plaintiffs herein, was settled before trial. Plaintiffs now seek contractual indemnification from Martinez's employer, defendant Weather Wise, pursuant to an indemnification provision included in Weather Wise's HVAC service contract with plaintiff Starbucks

Corporation, which required Weather Wise to indemnify Starbucks for all claims, damages, liability, and expenses incurred by reason of its breach of its contractual warranties and obligations to Starbucks and its "negligent and/or willful acts or omissions in carrying out its obligations under th[e] [HVAC] Agreement."

The indemnity provision at issue does not violate General Obligations Law § 5-322.1, as it does not require Weather Wise to indemnify plaintiffs for their own negligence (*see Purcell v Metlife Inc.*, 108 AD3d 431, 433 [1st Dept 2013]). Nonetheless, the court properly denied plaintiffs' motion for summary judgment, because plaintiffs failed to make a prima facie showing that Martinez's injuries were caused by Weather Wise's breach of the HVAC contract and/or negligent performance of the contract (*cf. 385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.*, 81 AD3d 475, 476-477 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]). The deposition testimony submitted by plaintiffs of Martinez and his coworker contained conflicting accounts of the material facts surrounding the underlying accident, thus raising triable issues of fact as to whether Martinez was negligent and, if so, whether such negligence was a proximate cause of his injuries.

Even if plaintiffs met their burden, Weather Wise raised triable issues of fact as to whether plaintiffs were negligent,

by submitting an affidavit from defendant Gabe Construction Corp.'s president indicating that Starbucks created, or at least had constructive notice of, the condition that purportedly caused Martinez's injuries. It was not necessary for Weather Wise to show that Starbucks exercised supervisory control over the injury-producing work, because the underlying negligence claims were based on a dangerous condition on the site and not on Martinez's employer's methods or materials (*see Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12700 Heyda Soto, Index 300500/10
Plaintiff-Appellant,

-against-

New Frontiers 2 Hope Housing Development Fund Company, Inc., et al.,
Defendants-Respondents.

_____

The Law Office of Thomas J. Lavin, P.C., Bronx (Damien Rodriguez of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Tracy P. Hoskinson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 16, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff, a postal worker, when the mailbox receptacle unit in defendants' building fell into the wall as she was closing the unit after placing the mail in the individual mail boxes, the motion court properly granted defendants' motion for summary judgment. Defendants sustained their initial burden of demonstrating that they did not cause, create or have actual or constructive notice of a defect in the mailbox receptacle unit, that the defect was not visible or apparent, and that a

reasonable inspection would not have revealed that the box was loose (*see Giaccio v 179 Tenants Corp.*, 45 AD3d 454, 455 [1st Dept 2007]).

Contrary to plaintiff's argument, the doctrine of res ipsa loquitur is inapplicable because defendants did not have exclusive access to the mailbox receptacle unit. It is undisputed that only postal employees, like plaintiff, were given a key *(see Cohen v Interlaken Owners*, 275 AD2d 235, 237 [1st Dept 2000]).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12703 The People of the State of New York, Respondent, Ind. 2216/05

-against-

Manolo Calderon, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered December 11, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not

demonstrate any mitigating factors, not already taken into account in the risk assessment instrument, that would warrant a downward departure, given the egregiousness of defendant's sexual offenses. We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, JJ.

12704 Pac Fung Feather Co. Ltd., Index 600865/10
Plaintiff-Appellant, 590549/10

-against-

Porthault NA LLC,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

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Benowich Law, LLP, White Plains (Leonard Benowich of counsel), for appellant.

Press Law Firm PLLC, New York (Matthew J. Press of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered on or about December 12, 2013, which denied plaintiff's motion to strike defendant's jury demand, unanimously affirmed, without costs.

Defendant did not waive its right to a jury by seeking, in a third-party action, the equitable remedy of disgorgement since its claims in the third-party action are primarily legal in

nature and monetary damages would afford a full and complete remedy (*see Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316 [1st Dept 1991]; *see also Le Bel v Donovan*, 96 AD3d 415 [1st Dept 2012]).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12705 Francisca Brito, Index 306485/09
Plaintiff-Respondent,

-against-

Stratford Five Realty, LLC,
Defendant-Respondent,

Triumph Construction Corp.,
Defendant-Appellant,

Nextg Networks of New York, Inc, et al.,
Defendants.

_____

Rubin, Fiorella & Friedman LLP, New York (Tracey Mapou of counsel), for appellant.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for Francisca Brito, respondent.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for Stratford Five Realty, LLC, respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered December 27, 2012, which, to the extent appealed from, denied the motion of defendant Triumph Construction Corp. (Triumph) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured in March 2009, when she allegedly fell on uneven, broken sidewalk. It is undisputed that defendant Triumph had performed work at the subject intersection starting in September 2008. Contrary to Triumph's contention that it had

not performed any work on the sidewalk at the northwest corner where plaintiff fell, its daily work report for September 4, 2008 includes a sketch suggesting the northwest sidewalk as an area of work. Furthermore, beginning in January 2009, Triumph excavated an area adjacent to where plaintiff fell using a backhoe, van, compressor, and 10-wheel dump truck. Although Triumph argues that this work did not encroach on the sidewalk where plaintiff fell, the work area was in sufficient proximity to the fall as to create a triable issue of fact as to whether such work created the sidewalk condition on which plaintiff fell (*see McNeill v LaSalle Partners*, 52 AD3d 407, 411 [1st Dept 2008]).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12706 Amy Fischer, Index 100990/06
Plaintiff-Appellant,

-against-

River Place I LLC, et al.,
Defendants-Respondents,

Advantage Security Inc., et al.,
Defendants.
- - - - -
[And A Third-Party Action]

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O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Kevin J. Murtagh of counsel), for appellant.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Thomas F. Maher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered April 19, 2013, which granted the motion of defendants River Place I LLC and Silverstein Properties, Inc. (defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Following defendants' showing of entitlement to judgment as a matter of law, plaintiff failed to raise a triable issue of fact as to whether the assault upon her by a person she had previously invited into her apartment was foreseeable (*see Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 492 [1st Dept 2010]). The record shows that plaintiff's electronic access key had been

stolen by her assailant on the day he had visited her apartment, and although plaintiff was aware that the key had been missing for approximately one week, she never reported it to building management or requested that the key be deactivated.

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

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12707 The People of the State of New York, SCI 3808/11
Respondent,

-against-

Joseph Biggs, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J. at plea; Eugene Oliver, Jr., J. at sentence), rendered on or about August 2, 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 10, 2014

CLERK

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

**Corrected Order - June 16, 2014**

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12708 La Rock & Perez, LLP, Index 100320/12
Plaintiff-Respondent,

-against-

Sang Joon Sim, etc.,
Defendant-Appellant,

Sim & Park, LLP, et al.,
Defendants.

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Sang Joon Sim, Bayside, appellant pro se.

Law Offices of Raul P. Meruelo, New York (Raul P. Meruelo of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 23, 2013, which, to the extent appealed from as limited by the briefs, denied defendant Sang Joon Sim's motion to dismiss the complaint as against him, unanimously reversed, on the law, **without costs**, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff sues individual partner, Peter Sim, Esq., for a percentage of the legal fee obtained as part of the recovery for a personal injury suit that plaintiff handled at trial for defendant LLP pursuant to an oral contract. Plaintiff avers that at the time of the filing of the lawsuit, Sim & Park, LLP was in dissolution and had not demonstrated that it was sufficiently solvent to pay a judgment. The narrow exceptions to Partnership

Law § 26(b)'s shield of the partners of an LLP from direct or indirect liability for the debts, obligations and liabilities of the LLP do not include the LLP's inability to pay (*see* Partnership Law § 26[c], [d]; *We're Assoc. Co. v Cohen, Stracher & Bloom*, 65 NY2d 148, [1985]; *see also Idearc Media LLC v Siegel, Kelleher & Kahn LLP* [2013 WL 1879535, *2, 2013 US Dist LEXIS 64136, *4-7 [WD NY 2013]). Cases recognizing such liability either predate the enactment of Partnership Law § 26(b) or do not involve LLPs (*see e.g. Belgian Overseas Sec. Corp. v Howell Kessler Co.*, 88 AD2d 559 [1st Dept 1982]).

Nor does the complaint contain specific nonconclusory allegations of wrongful conduct by defendant to state a cause of action for liability pursuant to Partnership Law § 26(c).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12709 Eastside Exhibition Corp., Index 604492/02
Plaintiff-Respondent,

-against-

210 East 86th Street Corp.,
Defendant-Appellant.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 26, 2013, which denied defendant landlord's motion for an award of attorneys' fees in connection with the underlying action, unanimously affirmed, with costs.

The court providently exercised its discretion in denying defendant's motion for attorneys' fees, as neither party prevailed in the action (*see 54 Greene St. Realty Corp. v Shook*, 8 AD3d 168 [1st Dept 2004], *lv denied* 4 NY3d 704 [2005]; *1711 LLC v 231 W. 54th Corp.*, 7 AD3d 261 [1st Dept 2004]).

In 2002, plaintiff tenant commenced an action against the landlord seeking a permanent injunction barring the landlord from doing further renovation work in the premises, an order directing the landlord to remove what was already done, a full abatement of rent, compensatory and punitive damages, and permanent injunctive

and declaratory relief preventing the landlord from terminating the lease based on a default notice. The landlord amended its answer to include a counterclaim for attorneys' fees and unpaid rent.

The trial court dismissed the tenant's claim for damages and a rent abatement, and entered judgment for the landlord for unpaid rent, finding that the landlord's alteration to the premises was de minimis and did not interfere with the operation of the tenant's business. The court further found that neither party could be deemed a prevailing party in the matter, and dismissed all claims for attorneys' fees. This Court modified to the extent of remanding the matter to determine actual damages to the tenant (23 AD3d 100, 105 [1st Dept 2005]).

Upon remand, the landlord did not seek attorneys' fees, and the hearing court determined that the tenant was not entitled to any damages award; this Court affirmed the order (79 AD3d 417, 418 [1st Dept 2010], *affd on other grounds* 18 NY3d 617 [2012], *cert denied* _ US _, 133 S Ct 654 [2012]).

The tenant then appealed to the Court of Appeals, which affirmed this Court's order on different grounds, finding that although the remedy for a partial eviction is not monetary damages, but a complete rent abatement, the tenant's partial eviction was so "trivial" that it failed to demonstrate any

actual damages or loss of enjoyment of the premises (*Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, 18 NY3d 617, 622, 624, *cert denied* _ US _, 133 S Ct 654 [2012]).

Here, the decisions rendered on appeal subsequent to this Court's 2005 decision did not disturb the trial court's finding that neither party prevailed. The procedural history of this case demonstrates that this Court considered the landlord's application for attorneys' fees and rejected it, thus agreeing with the Supreme Court that neither the tenant nor the landlord was a "prevailing party" in this action, noting that our decision constituted the law of the case and was binding on the Supreme Court on remand (79 AD3d 417, 418 [1st Dept 2010]; *see also 54 Greene St. Realty Corp.*, 8 AD3d at 168).

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12710 Anjali Augustine, et al., Index 102360/09
Plaintiffs-Appellants,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Kramer & Pollack, LLP, Mineola (Joshua D. Pollack of counsel), for appellants.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

_____

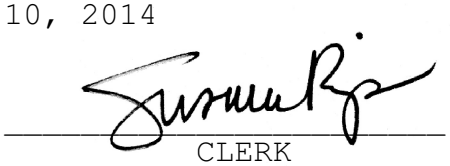
Order, Supreme Court, New York County (Cynthia Kern, J.), entered February 27, 2012, which denied plaintiffs' motion to set aside the jury's verdict in favor of defendant, unanimously affirmed, without costs.

The motion court properly found that the verdict was not against the weight of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). The jury weighed the credibility of the witnesses and the evidence, and

its determination was based upon a fair interpretation of the evidence (*see Williams v City of New York*, 109 AD3d 744 [1st Dept 2013]; *White v New York City Tr. Auth.*, 40 AD3d 297 [1s Dept 2007]).

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

ENTERED: JUNE 10, 2014



CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12712 Brittney King, Index 308608/09
Plaintiff-Respondent,

-against-

City Bay Plaza, LLC,
Defendant-Respondent-Appellant,

Toys "R" Us-NY Limited
Partnership, et al.,
Defendants-Appellants-Respondents.

_____

McAndrew Conboy & Prisco LLP, Melville (Mary C. Azzaretto of counsel), for appellants-respondents.

Kaufman Dolowich & Voluck, LLP, Woodbury (Kenneth B. Danielsen of counsel), for respondent-appellant.

Elliot Ifraimoff & Associates, P.C., Forest Hills (Dmitriy Shulman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 14, 2013, which denied the motion of defendants Toys "R" Us-NY Limited Partnership, Toys "R" Us-Delaware, Inc. and Toys "R" Us Property Company II, LLC's (collectively Toys R Us) for summary judgment dismissing the complaint and cross claims as against them and for summary judgment on their cross claims against codefendant City Bay Plaza, LLC (City Bay), and denied City Bay's motion for summary judgment dismissing the complaint and cross claims as against it, and for summary judgment on its cross claims against Toys R Us,

unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by plaintiff when she tripped and fell on an uneven condition between two concrete slabs in the sidewalk as she was exiting the Toys R Us store located in the City Bay Plaza Shopping Center, the motion court properly denied the motions made by defendants, the landlord and commercial tenant, insofar as they sought dismissal of the complaint based on the purported trivial nature of the defect. The photographs submitted by plaintiff and landlord City Bay showing the subject condition and its location approximately a foot from the doorway, along with the disputed proof as to whether the height differential was 0.5 or 1.5 inches, raise an issue of fact as to whether the condition is actionable (*see Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *Herrera v City of New York*, 262 AD2d 120 [1st Dept 1999]). The photographs also raise a triable issue of fact as to constructive notice of the condition (*see Molinari v 167 Hous. Corp.*, 103 AD3d 507, 507 [1st Dept 2013]; *Denyssenko v Plaza Realty Servs.*, Inc., 8 AD3d 207, 208 [1st Dept 2004]).

The motion court also properly declined to grant defendants' motions for summary judgment dismissing the claims and cross claims insofar as asserted against each of them respectively. While both Toys "R" Us and City Bay both argue that they did not

owe a duty to maintain the subject area under the lease, the evidence raises a triable issue of fact as to whether the area where plaintiff fell was part of the demised premises, for which tenant Toys R Us is responsible under the lease, or a common area, for which landlord City Bay is responsible. Given this fact issue, the defendants' motions for summary judgment on their respective cross claims for contractual indemnification were also properly denied (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301-302 [1st Dept 2004]), as was City Bay's motion for summary judgment on its breach of contract cross claim (*see Amato v Rock-McGraw, Inc.*, 297 AD2d 217, 219 [1st Dept 2002]), and Toys R Us's motion for summary judgment on its common law indemnification claim (*see Chevalier v. 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 414 [1st Dept 2011]).

We have reviewed the remaining arguments, including the parties' challenges to consideration of certain evidence, and find them unavailing.

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

ENTERED: JUNE 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12713 The People of the State of New York, Respondent, Ind. 2681/10

-against-

Emanuel Francis, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about August 9, 2012, 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 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12716N Mary Fix, et al., Index 22868/12E
Plaintiffs-Respondents,

-against-

B&B Mall Associates, Inc.,
Defendant-Appellant,

The Great Atlantic and Pacific
Tea Company, Inc., etc.,
Defendant.

_____

Burke, Gordon & Conway, White Plains (Stephane D. Martin of counsel), for appellant.

Michael J. Lombardi, White Plains, for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 15, 2013, which denied the motion of defendant B&B Mall Associates, Inc. (B&B Mall) to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

Plaintiff Mary Fix was injured when she slipped and fell in a parking lot of a mall located in Westchester County. Plaintiffs designated venue in Bronx County on the basis of B&B Mall's principal place of business (*see* CPLR 503).

In support of its motion, B&B Mall submitted an affidavit of its president averring that its principal place of business at the relevant time was in Westchester County and that it does not

maintain a place of business or office in Bronx County. The conclusory affidavit, unsupported by any documentary evidence or other showing that it had designated Westchester County as its principal office, was insufficient to establish that plaintiffs' selection of Bronx County was improper (*see Broderick v R.Y. Mgt. Co., Inc.*, 13 AD3d 197 [1st Dept 2004]; *Carey v Anheuser-Busch, Inc.*, 63 AD3d 1094, 1094-1095 [2d Dept 2009]).

Even assuming that B&B Mall met its initial burden, plaintiffs submitted documentary evidence in opposition suggesting that B&B Mall has an office address in Bronx County and had designated Bronx County as its principal place of business with the state. B&B Mall's further submissions in reply did not refute that information, but included a receipt from the New York State Department of State, which also indicated that it had designated Bronx County as its principal place of business.

We have considered B&B Mall's remaining contentions and find them unavailing.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Sweeny, Saxe, Feinman, JJ.

9826 In re Aurelina Leonor, Index 401034/12
Petitioner,

-against-

New York State Board of Parole,
Respondent.

_____

A proceeding having been commenced by the above-named petitioner and having been transferred to this Court by order of the Supreme Court, New York County (Cynthia Kern, J.), entered on or about July 2, 2012,

And said proceeding having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 14, 2014,

It is unanimously ordered that said proceeding be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 10, 2014

CLERK

Friedman, J.P., DeGrasse, Freedman, Kapnick, JJ.

12277 In re Renata Forti, File 3926/11
Deceased.
- - - - -
Micol Mion-Gordon,
Petitioner-Respondent,

-against-

Susetta Mion,
Respondent-Appellant.

_____

Havkins Rosenfld Ritzert & Varriale, LLP, New York (Abraham E. Havkins of counsel), for appellant.

McCarter & English, LLP, New York (Gerard G. Brew of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about February 7, 2013, which, to the extent appealed from, granted petitioner's petition for letters of administration, unanimously affirmed, without costs.

The court had jurisdiction pursuant to SCPA 206(1) and properly granted letters of administration to petitioner, pursuant to SCPA 2103, given the evidence that property of the nondomiciliary decedent may have been left in New York; *see Matter of Obregon*, 230 AD2d 47, 52 [1st Dept 1997], *affd* 91 NY2d 591 [1998]). This is so, even if the property was brought and left here by someone other than decedent and without decedent's consent, so long as the property was not brought here through

fraud and collusion merely for the purpose of establishing jurisdiction (*see Matter of De Camillis*, 66 Misc 2d 882, 893 [Sur Ct, NY County 1971], *affd* 38 AD2d 687 [1971]). Therefore, the court providently exercised its discretion in granting the petition, as there was no evidence of forum shopping or bad faith by petitioner (*see Matter of Nevai*, 7 Misc 3d 188, 190 [Sur Ct, Westchester County 2005], *affd* 28 AD3d 561 [2d Dept 2006]).

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

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

ENTERED: JUNE 10, 2014

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Freedman, Kapnick, JJ.

12283N Eric Frankel, as Executor of the Estate of Gloria Frankel, deceased, Plaintiff-Appellant, Index 603449/07

-against-

Vernon & Ginsburg, LLP, et al., Defendants-Respondents.

_____

Garvey Schubert Barer, New York (Maurice W. Heller of counsel), for appellant.

Gordon & Rees LLP, New York (Bran C. Noonan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 24, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' pretrial motion in limine to preclude plaintiff from offering the testimony of his legal malpractice expert, the testimony of the alleged tortfeasors in the underlying action, evidence relating to defendants' alleged negligence in prosecuting the underlying action, and evidence of post-settlement damages, unanimously modified, on the law, to deny the motion except as to post-settlement damages, and otherwise affirmed, without costs.

The order is appealable, since it did not merely determine the admissibility of evidence, but also limited the scope of issues to be tried (*see Rott v Negev, LLC*, 102 AD3d 522 [1st Dept

2013]; CPLR 5701[a][2][iv], [v]).

Supreme Court incorrectly precluded plaintiff's legal malpractice expert from testifying on the ground that the initial disclosure was insufficiently detailed. Defendants objected to the disclosure's sufficiency for the first time in their omnibus motion in limine, presented to the court on the day trial was to begin. Any deficiency was cured by plaintiff's service of a more detailed supplemental disclosure four days later. Moreover, defendants were aware of the substance of the expert's proposed testimony because plaintiff had previously submitted the expert's affidavit in opposition to their motion for summary judgment. As Supreme Court found, defendants have not established that they were prejudiced by receipt of the expert disclosures 4 days after the 30-day minimum set by local rule, or that the delay was willful or intentional (*see Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439, 440 [1st Dept 2013]).

To establish causation in this legal malpractice action, plaintiff must show that his decedent would have prevailed in the underlying action but for the attorney defendants' negligence (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). In the underlying action, plaintiff's decedent asserted causes of action for breach of the warranty of habitability against her cooperative apartment building and for

private nuisance against her upstairs neighbors. Accordingly, at trial, to demonstrate the merit of the underlying claim of private nuisance, plaintiff should be permitted to prove, among other things, that his decedent's neighbors intended to cause the nuisance (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570-571 [1977]). The neighbors' testimony is relevant to the issue of intent. Therefore, the court improperly precluded that testimony.

On a prior appeal, this Court affirmed the denial of defendants' motion for summary judgment dismissing the legal malpractice cause of action (*see* 101 AD3d 447 [1st Dept 2012]). Accordingly, Supreme Court should not have precluded all evidence relating to plaintiff's claim that defendants improperly prosecuted the underlying action, since it essentially granted summary judgment dismissing that portion of the legal malpractice claim (*see generally Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 811 [2d Dept 2003]).

Supreme Court properly precluded evidence of damages incurred after the October 2004 settlement of the underlying

action. Although plaintiff seeks compensatory damages for attorneys' fees allegedly incurred in filing a post-settlement Housing Court action seeking relief he unsuccessfully sought in the underlying action, that action was dismissed on the merits.

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

ENTERED: JUNE 10, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12460 Michael G. O'Hara, et al., Index 100984/12
Plaintiffs-Appellants-Respondents,

-against-

The New School, et al.,
Defendants-Respondents-Appellants,

Skidmore Owings & Merrill, LLP, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for appellants-respondents.

Shaub Ahmuty Citrin & Spratt, LLP, New York (Steven J. Ahmuty, Jr. of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered July 10, 2013, which denied plaintiffs' motion for partial summary judgment against defendants-respondents as to plaintiffs' cause of action alleging breach of Administrative Code of the City of New York § 3309.4, and denied defendant-respondent Urban Foundation/Engineering, LLC's cross motion for partial summary judgment dismissing plaintiffs' claims to recover damages for injury to common elements of a condominium building for lack of standing, unanimously modified, on the law, to grant Urban's cross motion to the extent of dismissing the portions of the amended complaint that seek damages for injury to the common

elements of the building, and otherwise affirmed, without costs.

Plaintiffs failed to make a prima facie showing that defendants-respondents violated Administrative Code § 3309.4 and that the violation proximately caused plaintiffs' alleged injuries (*Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242, 243 [1st Dept 1990]). In particular, plaintiffs did not proffer evidence showing that they granted defendants the requisite license under the statute. In any event, defendants sharply contest that a license was given, which is enough to raise a genuine issue of material fact. Further, there is an issue of fact as to the proximate cause of plaintiffs' injuries, since defendants have pointed to evidence of unforeseen leaking utilities next to the construction site that could have been the cause of the injuries. Moreover, the motion court properly denied plaintiffs' pre-discovery motion on the basis of prematurity, since there are facts upon which the motion is predicated that are "clearly not within the knowledge of [defendants]" (*Antunes v 950 Park Ave. Corp.*, 149 AD2d 332, 333 [1st Dept 1989] [internal quotation marks omitted]).

As the motion court noted, plaintiffs' verified amended complaint seeks damages for injury allegedly suffered to the entire condominium building, common elements and all. It is uncontested that plaintiffs lack standing to seek such damages;

accordingly, defendant Urban's cross motion for partial summary judgment should have been granted to the extent indicated (*Bd. of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010]).

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

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

ENTERED: JUNE 10, 2014

CLERK

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

12481 Peter Daou, et al., Index 651997/10
Plaintiffs-Respondents,

-against-

Arianna Huffington, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 14, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 19, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12718 Milagros Garcia, Index 305472/10
Plaintiff-Respondent,

-against-

La Fortuna Restaurant, Inc., et al.,
Defendants-Appellants,

John Doe, et al.,
Defendants.

_____

Rubin, Fiorella & Friedman, LLP, New York (Leila Cardo of counsel), for appellants.

Law Offices of John P. Grill, P.C., Carmel (John P. Grill of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered April 8, 2013, which denied the motion of defendants La Fortuna Restaurant, Inc. and Raymond Portoreal for leave to renew the prior order, same court and Justice, entered December 20, 2011, granting plaintiff's motion to strike their answer, unanimously affirmed, without costs.

On a prior appeal, we affirmed the motion court's order striking defendants La Fortuna Restaurant and Portoreal's answer (102 AD3d 638 [1st Dept 2013]). The motion court properly determined that the transcript of Portoreal's partial deposition and his affidavit explaining the reason for his failure to appear for a continued deposition are not new facts that could not have

been offered on the prior motion (*see* CPLR 2221[e][2] and [3]). In any event, the alleged new facts, even if considered, would not have changed the prior determination (*see* CPLR 2221[e][2]; *Burgess v Charles H. Greenthal Mgt. Corp.*, 37 AD3d 151 [1st Dept 2007]). Indeed, Portoreal only attempts to excuse his failure to appear for a continued deposition on December 12, 2011, based upon a conflict which he had not reported to his attorneys, and does not address his earlier failures to appear in defiance of three court orders.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12721 Ray Volpe, Index 652308/12
Plaintiff-Appellant,

-against-

The Interpublic Group of Companies, Inc., etc.,
Defendant-Respondent.

_____

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman and David E. Bamberger of counsel), for appellant.

Cadwalader, Wickersham and Taft LLP, New York (Hal S. Shaftel of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered September 17, 2013, dismissing the complaint and awarding defendant costs in the amount of $425.00 pursuant to an order, same court and Justice, entered August 5, 2013, which denied plaintiff's motion to compel arbitration and granted defendant's motion to dismiss the complaint in its entirety, unanimously affirmed, without costs.

The language in the employment agreement between the parties provides that New York law governs the agreement and its enforcement. Thus, as the motion court determined, the question of waiver of arbitration is properly decided by the court, not an arbitrator (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 253 [2005]). As the motion

court found, plaintiff's commencement of this action and his conduct in actively litigating it by defending against defendant's motion constitutes a waiver of his arbitration rights with respect to all of his claims (*see Tengtu Intl. Corp. v Pak Kwan Cheung*, 24 AD3d 170, 172 [1st Dept 2005]; *Ciao Europa v Silver Autumn Hotel (N.Y.) Corp.*, 290 AD2d 216 [1st Dept 2002]).

The motion court properly dismissed plaintiff's complaint in its entirety. The terms of plaintiff's employment agreement bar his claim for breach of a side deal, as well as his ancillary claims, and plaintiff's conclusory allegations are insufficient to state a claim for breach of the employment agreement.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12724 In re Jose S.,
Petitioner-Respondent,

-against-

Stella T.,
Respondent-Appellant.

_____

Gillian Lewter, Forest Hills, for appellant.

Bruce A. Young, New York, for respondent.

_____

Order, Family Court, Bronx County (Juanita E. Wing, Referee), entered on or about December 12, 2012, which denied the mother's motion to dismiss the petition for improper service, and granted the father an extension of time to serve the mother at her last known address and place of employment, unanimously affirmed, without costs.

Family Court providently exercised its discretion in extending the father's time to serve process in the "interest of justice" (see CPLR 306-b). The court properly considered that the father had a meritorious cause of action, and that a denial of the extension request would extremely prejudice the father, who, due to the passing of time and the child's removal from New York by the mother, would no longer be able to invoke the jurisdiction of New York courts to obtain custody and/or visitation.

We have considered the mother's remaining claims and find them unavailing.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12725 The People of the State of New York, Respondent, Ind. 4621/10

-against-

Kentrel Whitaker, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered March 12, 2012, as amended April 17, 2012, convicting defendant, after a jury trial, of attempted rape in the first degree and assault in the second degree, and sentencing him, as a second felony offender, to consecutive terms of 15 years and seven years, respectively, unanimously modified, on the law, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

Concurrent sentences were required because the two convictions were based on the same act (*see* Penal Law § 70.25[2]

Defendant's act of punching the victim in the face while he was on top of her was the force necessary to subdue her in furtherance of the attempted rape (*see e.g. People v Carmona*, 205 AD2d 443 [1st Dept 1994], *lv denied* 84 NY2d 866 [1994]; *People v Bolden*, 83 AD2d 921 [1st Dept 1981], *affd* 58 NY2d 741 [1982]).

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12726 Edwin Alamo, Index 304900/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for appellant.

Hill & Moin, LLP, New York (Cheryl R. Eisberg Moin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered November 4, 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.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when he fell as he descended the interior stairs of defendant's building. Defendant submitted evidence showing that it did not have notice of the allegedly hazardous condition upon which plaintiff slipped. Defendant's caretaker testified that pursuant to a schedule, the stairwell was cleaned twice daily, including on the day of the accident, and that no unusual conditions were found (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471-472

[1st Dept 2012]; *compare Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant had notice of a dangerous recurring condition that was routinely left unaddressed by defendant (*see DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [1st Dept 2008], *affd* 11 NY3d 889 [2008]). The affidavits of plaintiff's brother and mother are not considered, as the brother's affidavit contradicts his prior sworn testimony (*see Paucar v Solaro*, 111 AD3d 569 [1st Dept 2013]), and the mother's name was not provided in responses to discovery and was disclosed only in plaintiff's opposition papers (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481 [1st Dept 2009]). Furthermore, the affidavits, even if considered, do not raise triable issues of fact to defeat defendant's prima facie showing.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12727 Arrin C., etc., Index 7324/03
Plaintiff-Appellant-Respondent,

-against-

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

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant-respondent.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 10, 2011, after a jury trial, which, to the extent appealed from as limited by the briefs, denied so much of defendants' posttrial motion as sought to set aside the verdict as to liability, and granted so much of the motion as sought to set aside the verdict as to damages, to the extent of ordering a new trial on the issue of damages unless plaintiff consents to reduce the amount awarded for past and future pain and suffering from $4.6 million to $250,000, unanimously affirmed, without costs.

Plaintiff, then 11 years old, sustained injuries to his mouth while in school. One of his teeth was knocked out, and another was knocked into his upper jaw, requiring extraction.

Plaintiff, who is autistic, did not testify at trial. Defendants presented no evidence at trial.

The evidence presented by plaintiff, inter alia, showed that the individual defendants, a teacher and a paraprofessional, did not know how plaintiff, who required intensive supervision, injured himself. The evidence is sufficient to support the jury's finding that defendants are liable for negligent supervision, and the finding accords with the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Thus, we reject defendants' contention that the verdict was based solely on negative inferences drawn by the jury from the fact that the individual defendants did not testify (*see Laffin v Ryan*, 4 AD2d 21, 26-27 [3d Dept 1957]).

The reduced award of $250,000 for past and future pain and suffering does not deviate materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Garber v Lynn*, 79 AD3d 401 [1st Dept 2010]; *Dansby v Trumpatori*, 24 AD3d 192 [1st Dept 2005]; *Atkinson v Buch*, 17 AD3d 222 [1st Dept 2005]).

We have reviewed defendants' remaining contentions, including their challenges to the trial court's evidentiary rulings, and find them unavailing.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12728 Fatumata B., As Mother and Natural Guardian of Ansumana B., an Infant, Plaintiff-Appellant, Index 350251/08

-against-

Pioneer Transportation Corp., et al., Defendants,

Jorge A. Soto, Defendant-Respondent.

_____

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

Saretsky Katz Dranoff & Glass, New York (Allen L. Sheridan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 15, 2013, which, insofar as appealed from, granted defendant Jorge A. Soto's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Soto and other witnesses testified that the infant plaintiff ran into the path of Soto's car from between two parked school buses. Although Soto did not expressly plead the applicability of the emergency doctrine as an affirmative defense, he did plead, as parts of his affirmative defenses, that the accident was solely the result of the infant plaintiff's negligence in

"walking into the path" of his vehicle "at a place other than a crosswalk." Accordingly, the motion court "providently exercised its discretion in determining that it could consider the emergency doctrine affirmative defense" (*Mendez v City of New York*, 110 AD3d 421, 421 [1st Dept 2013]).

By producing evidence that he was not speeding and was driving only about 15 miles per hour, that none of the parked school buses had their flashing lights on, and that the infant plaintiff darted out from between two parked school buses into the path of his car, Soto established his entitlement to judgment as a matter of law (*see Ramirez v Molina*, 114 AD3d 540 [1st Dept 2014]; *Brown v Muniz*, 61 AD3d 526, 527 [1st Dept 2009], *lv denied* 13 NY3d 715 [2010]).

In opposition, plaintiff failed to raise a triable issue of fact. The infant plaintiff's testimony that he walked, rather than ran, into the street, does not avail him, as he also testified, consistent with the other witnesses' accounts, that Soto did not have any opportunity to stop, that he proceeded out from between two buses, and that he did not see the car before it hit him.

Furthermore, no issues of fact exist as to whether Soto's low speed of 15 miles per hour was excessive. It is undisputed that the parked school buses did not have any flashing lights on,

and there is no evidence indicating that children were actively entering or exiting the buses. A driver in an area where children are present "need not exercise extreme care or caution, although [he or] she must exercise the care that a reasonably prudent person would exercise under the circumstances" (*DeJesus v Alba*, 63 AD3d 460, 463 [1st Dept 2009], *affd* 14 NY3d 860 [2010]). In this regard, the comment of one of the witnesses, a school bus driver, that she thought Soto was driving "a little fast" does not suffice to raise an issue of fact that he was driving at an unreasonably high rate of speed (*see Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]; *Murchison v Incognoli*, 5 AD3d 271 [1st Dept 2004]).

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

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12729 Samantha G., an Infant by Her Grandmother and Legal Guardian, Ana R., Plaintiff-Appellant, Index 350631/08

-against-

Concilio de Iglesias de Pentecostales Vision Para Hoy, Inc., Defendant,

1460 Grand Concourse Co., LLC, Defendant-Respondent.

_____

The Fitzgerald Law Firm, PC, Yonkers (Mitchell L. Gittin of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered November 5, 2012, which granted defendant 1460 Grand Concourse Co. LLC.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court correctly concluded the plaintiff failed to demonstrate the existence of an issue of fact concerning whether: (1) defendant Concourse had notice of her residency in the apartment prior to June 2005; (2) defendant Concourse had notice of any hazardous lead condition which it failed to abate prior to the notice from the Department of Health in or about April 2005; and (3) plaintiff's exposure to lead in defendant Concourse's

apartment, if any, proximately caused her injuries (*see e.g. Michaud v Lefferts 750, LLC,* 87 AD3d 990, 991-993 [2d Dept 2011]).

We have considered plaintiff's remaining argument and find it unavailing.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12730 The People of the State of New York, Ind. 2532N/10
Respondent,

-against-

Jose Delorbe, also know as Ramon
Paulino, also know as Culebra,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about January 20, 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 10, 2014

CLERK

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

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12731 Khalada Chowdhury, Index 300377/11
Plaintiff,

Arime U. Mohammed,
Plaintiff-Appellant,

-against-

Clemente Matos Jr., et al.,
Defendants-Respondents.

_____

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellant.

Law Offices of Frank J. Laurino, Bethpage (Calvin Weintraub of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 28, 2013, which, to the extent appealed from, denied the motion of plaintiff Arime U. Mohammed for summary judgment dismissing the counterclaim against him, unanimously reversed, on the law, without costs, and the motion granted.

Dismissal of the counterclaim asserted against Mohammed is warranted in this action where Mohammed, while driving his vehicle in which plaintiff Chowdhury was a passenger, was stopped at a red light when his vehicle was struck from behind by a vehicle driven by defendant Collazo and owned by defendant Matos (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]*; Francisco v Schoepfer*, 30 AD3d 275 [1st Dept 2006]). Contrary to

defendants' contention that Mohammed's alleged abrupt stop raises an issue of comparative negligence, "an assertion that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of negligence on the part of the offending vehicle" (*Francisco* at 276). Furthermore, even crediting the testimony of defendant Collazo that Mohammed abruptly stopped in the middle of the intersection and not for a red light, defendants have failed to proffer a nonnegligent explanation for the rear-end collision (*see Malone v Morillo*, 6 AD3d 324 [1st Dept 2004]).

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Gische, Clark, JJ.

12732 Gregory Kuras, Index 108537/11
Plaintiff-Appellant,

-against-

Cornell University, et al.,
Defendants-Respondents.

_____

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 30, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his entitlement to judgment as a matter of law through his testimony that, while attempting to descend from the third to the second rung of an unsecured wooden A-frame ladder, the ladder (which had worn legs and no rubber tips) suddenly slipped and collapsed, causing him to fall and sustain injuries (*see Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465 [1st Dept 2013]*; Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]).

In opposition, defendants failed to raise a triable issue of fact. There is no support for defendants' argument that the record contains inconsistent accounts as to how the accident occurred (*see e.g. Marrero v 2075 Holding Co. LLC*, 106 AD3d 408 [1st Dept 2013]). There is no evidence that plaintiff fell simply because he lost his balance (*see e.g. Carchipulla v 6661 Broadway Partners*, LLC, 95 AD3d 573 [1st Dept 2012]), and regardless of whether a lift and another ladder were available at the job site, "there was no showing that plaintiff was expected, or instructed, to use those [devices] and for no good reason chose not to do so" (*Dwyer* at 884).

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12733 The People of the State of New York, Respondent, Ind. 1957/11

-against-

Carlos Febres, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered January 26, 2012, convicting defendant of criminal possession of marijuana in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of two years, unanimously reversed, on the law, the motion to suppress granted and the indictment dismissed.

The People did not establish exigent circumstances justifying a search of a closed container incident to arrest (*see People v Jimenez*, 22 NY3d 717 [2014]). The police detained defendant in a subway station for violating Transit Authority regulations. Because a warrant check revealed that defendant had an active warrant, the police decided to arrest him rather than

issue a summons. Defendant was holding a plastic bag in his hand, and put it on the ground next to him before being handcuffed. An officer picked up the bag, which felt heavy, and looked inside to check for weapons or contraband. Inside the bag was another plastic bag, which contained a canvas bag. The officer then noticed a strong odor of marijuana, opened the canvas bag, and found nearly a pound of marijuana.

The People failed to meet their burden of showing exigency. The officers did not testify that they feared for their safety, or that they were concerned that the bag contained evidence that defendant could destroy, and the circumstances did not suggest that any exigency required an immediate search. Defendant was being arrested for minor nonviolent offenses and was not suspected of any crimes, he was handcuffed and guarded by several officers, he was fully cooperative and voluntarily placed the bag on the ground, his demeanor and actions were not threatening, and there was no indication that he might try to grab or kick the bag, which was no longer in his possession. Furthermore, there was no indication that the bag might contain a weapon and, given the nature of the transit violations, there was no possibility that the bag could contain evidence to support those charges.

Based on all these circumstances, we find that *Jimenez* requires suppression of the marijuana. Nor could the fact that

the officer smell marijuana provide a basis for searching the bag since he did not smell marijuana until after he opened the bag.

We have considered and rejected the People's remaining arguments.

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12734 Susan Lax, et al., Index 105299/11
Plaintiffs-Respondents-Appellants,

-against-

Design Quest, NY Ltd., et al.,
Defendants-Appellants-Respondents.

_____

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for appellants-respondents.

Law Office of Jack M. Platt, New York (Neal R. Platt of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 19, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion to renew their prior motion to dismiss the breach of contract claim, to dismiss the fraud and unjust enrichment claims, and to amend the caption, and denied plaintiffs' motion for sanctions, unanimously affirmed, with costs.

The "new facts" defendants presented on their motion to renew were their own invoices, which obviously were in their possession at the time of the prior motion (*see* CPLR 2221[e]). What is new on this motion is an argument based on those invoices. Given that the argument as to an oral contract was advanced by plaintiffs in opposition to the prior motion, and plaintiffs attached one of the invoices to their papers, there

can be no "reasonable justification" for defendants' failure to present and make their argument as to the invoices on the prior motion (CPLR 2221[e][3]; *see e.g. Telep v Republic El. Corp.*, 267 AD2d 57 [1st Dept 1999]).

Defendants' argument that the fraudulent billing claim was not pleaded with the requisite particularity is barred by this Court's order in the prior appeal, holding that, although plaintiffs failed to allege which invoices were inflated, the claim was "otherwise meritorious" (101 AD3d 431, 431 [1st Dept 2012]). Since the amended complaint includes precisely the information required by this Court, the motion court correctly declined to dismiss the claim.

Contrary to defendants' contention, this Court did not dismiss the complaint as against the individual defendants. Those defendants are named on the causes of action for breach of contract and fraudulent billing, which we sustained (*see id.*).

The unjust enrichment claim was correctly sustained because the parties dispute the existence of the various alleged express contracts (*see Henry Loheac, P.C. v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]; *Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225 [1st Dept 1993]).

We agree with the motion court that sanctions were not warranted (*see* 22 NYCRR 130-1.1).

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12735 The People of the State of New York, Respondent, Ind. 4080/10

-against-

Evencio Gonzalez, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about March 22, 2011, 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 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12736 Carlos Puello, as Administrator of the Estate of Christina Sanchez, deceased, et al., Plaintiffs-Appellants, Index 13940/98

-against-

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

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Fotopoulos, Rosenblatt & Green, New York (Dimitrios C. Fotopoulos of counsel), for appellants.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Bradley M. Wanner of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about November 7, 2012, which granted defendants' motion to renew its prior motion to dismiss the complaint, and upon renewal, granted the motion, unanimously affirmed, without costs.

In this action arising out of the murder of plaintiffs' decedent by a former boyfriend, the court properly granted renewal pursuant to CPLR 2221(e)(2), based on the Court of Appeals decision in *Valdez v City of New York* (18 NY3d 69 [2011]), which provided a clarification of the decisional law (*see Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272 [1st Dept 2003]). Upon renewal, dismissal of the complaint was proper, since plaintiff failed to allege or provide

the factual predicate for the special relationship theory in her notice of claim and complaint (*see Blackstock v Bd. of Educ. of the City of N.Y.*, 84 AD3d 524 [1st Dept 2011]). Further, the record establishes that plaintiff cannot prove all of the necessary elements of that theory (*see Valdez*, 18 NY3d at 80-81; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

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

ENTERED: JUNE 10, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12737N Arkin Kaplan Rice LLP, et al., Index 652316/12
Plaintiffs-Respondents,

-against-

Howard Kaplan, et al.,
Defendants-Appellants,

Arkin Kaplan Rice LLP, etc.,
Nominal Defendant.

_____

Kaplan Rice LLP, New York (Christopher J. Roche of counsel), for appellants.

Kasowitz, Benson, Torres & Friedman LLP, New York (Joseph A. Piesco, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 12, 2013, which granted plaintiff Lisa C. Solbakken's motion for, among other things, disclosure of a legal file maintained by a nonparty law firm (the Ciampi firm) in connection with a prior joint representation of the individual defendants and Solbakken, to the extent of ordering that the file shall be disclosed to Solbakken and may be used by her in the prosecution of her case against defendants and that any documents in the file on the specific subject addressed in emails dated March 29, 2012 and April 2, 2012 shall be disclosed to all of the plaintiffs, unanimously modified, on the law, to the extent of denying disclosure to plaintiff law firm and plaintiff Stanley S.

Arkin of any documents in the file on the specific subject addressed in the email dated April 2, 2012, and the matter remanded to allow the IAS court to promulgate rules on Solbakken's use of the privileged documents in the file so as to protect the attorney-client privilege, and otherwise affirmed, without costs.

The parties agree that, to the extent the attorney-client privilege has not been waived, the documents in the joint-representation file are privileged with respect to persons other than Solbakken and the individual defendants. The email dated April 2, 2012, which forwarded to Solbakken, defendant Howard Kaplan, and the Ciampi law firm an email from defendant Michelle Rice to a mediator, was a mere transmittal email that transmitted a third-party communication. Accordingly, the IAS court erred in implicitly finding that defendants' disclosure of the email waived the privilege with respect to any documents in the file pertaining to the specific subject matter addressed in the email (*see P. & B. Marina, Ltd. Partnership v Logrande*, 136 FRD 50, 54 [ED NY 1991], *affd* 983 F2d 1047 [2d Cir 1992]; *Eisic Trading Corp. v Somerset Mar.*, 212 AD2d 451 [1st Dept 1995]). However, the email dated March 29, 2012, which revealed part of Solbakken's understanding of a call with the mediator and the information he relayed, was a privileged communication (*Spectrum*

*Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378 [1991]). Therefore, the IAS court correctly held (albeit implicitly) that defendants' disclosure of that email waived the privilege with respect to any documents in the file pertaining to the subject matter of the email. Accordingly, Solbakken's coplaintiffs are entitled to only those documents in the file pertaining to the subject matter of the March 29, 2012 email.

This Court has already noted that the documents in the joint-representation file are not privileged as to Solbakken, and that she may use them in her litigation against the individual defendants (*Arkin Kaplan Rice LLP v Kaplan*, 107 AD3d 502, 502 [1st Dept 2013]). However, this Court also noted that the documents in the file are privileged as against Solbakken's coplaintiffs, who were not jointly represented by the Ciampi firm, and that she cannot unilaterally waive the privilege "so as to benefit her coplaintiffs" (*id.* at 502-503). Therefore, we remand to the IAS court to set forth guidelines and procedures

for Solbakken's use in this litigation of the privileged documents in the file (i.e., those documents that do not pertain to the subject matter of the March 29, 2012 email) so as to protect the privilege.

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

ENTERED: JUNE 10, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11635 Greater New York Taxi Association, et al., Petitioners-Respondents, Index 101083/13

-against-

The New York City Taxi and Limousine Commission, etc., et al., Respondents-Appellants,

Nissan Taxi Marketing, N.A., LLC, et al., Respondents-In-Intervention-Appellants.

- - - - -

Design Trust for Public Space; Bryant Park Corporation and 34th Street Partnership; Global Gateway Alliance; Paul Herzan; Sarah Holloway; Lily Auchincloss Foundation, Inc.; Manhattan Chamber of Commerce; Eric Rothman; Elliot "Lee" Sander; John E. Sherman, M.D.; Smart Design; and Transportation Alternatives, in Support of Respondents-Appellants, Amici Curiae.

_____

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for The New York City Taxi and Limousine Commission and David Yassky, appellants.

Jenner & Block LLP, New York (Peter J. Brennan of counsel), for Nissan Taxi Marketing, N.A., LLC and Nissan North America, Inc., appellants

Mintz & Gold LLP, New York (Steven G. Mints of counsel), for respondents.

Kostelanetz & Fink, LLP, New York (Claude M. Millman of counsel), for amici curiae.

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 11, 2013, reversed, on the law, without costs, and it is declared that the Revised Taxi of Tomorrow Rules and Hybrid Specifications are valid.

Opinion by Saxe, J. All concur except Acosta, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Karla Moskowitz, JJ.

11635
Index 101083/13

_____x

Greater New York Taxi
Association, et al.,
Petitioners-Respondents,

-against-

The New York City Taxi and
Limousine Commission, etc., et al.,
Respondents-Appellants,

Nissan Taxi Marketing, N.A., LLC, et al.,
Respondents-In-Intervention-Appellants.

- - - - -

Design Trust for Public Space;
Bryant Park Corporation and 34th
Street Partnership; Global Gateway
Alliance; Paul Herzan; Sarah Holloway;
Lily Auchincloss Foundation, Inc.;
Manhattan Chamber of Commerce; Eric
Rothman; Elliot "Lee" Sander; John E.
Sherman, M.D.; Smart Design; and
Transportation Alternatives, in Support
of Respondents-Appellants,
Amici Curiae.

_____x

Respondents appeal from a order and judgment (one paper) of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 11, 2013, declaring invalid the amendments to Title 35, Chapters 67 and 51 of the Rules of the City of New York that created the "Taxi of Tomorrow" project mandating that the Nissan NV200 would be New York City's "Official Taxicab Vehicle" effective October 2013.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Elizabeth I. Freedman, Leonard Koerner and Nicholas R. Ciappetta of counsel), for The New York City Taxi and Limousine Commission and David Yassky, appellants.

Jenner & Block LLP, New York (Peter J. Brennan and Harold M. Greenberg of counsel), for Nissan Taxi Marketing, N.A., LLC and Nissan North America, Inc., appellants

Mintz & Gold LLP, New York (Steven G. Mints, Lisabeth Harrison and Richard H. Topaz of counsel), for respondents.

Kostelanetz & Fink, LLP, New York (Claude M. Millman and Caroline Rule of counsel), for amici curiae.

SAXE, J.

We hold that the iconic "Taxi of Tomorrow" – the Nissan NV200 – developed and implemented by New York City's Taxi and Limousine Commission (TLC) after years of public vetting, is a legally appropriate response to the agency's statutory obligation to produce a twenty-first century taxicab consistent with the broad interests and perspectives that the agency is charged with protecting. Accordingly, we reverse Supreme Court's grant of the petition brought by certain taxi fleet owners challenging the TLC's designation of an "Official Taxicab Vehicle," based on its finding that the agency exceeded its grant of authority under the New York City Charter and violated the separation of powers doctrine.

Background

The TLC was created in 1971 to license and regulate vehicles for hire in New York City, including yellow taxis, livery cabs, limousines, paratransit vehicles and commuter vans. The first sentence of the New York City Charter provision creating the TLC states that the TLC's overall purpose is "the continuance, further development and improvement of taxi and limousine service in the City of New York" (New York City Charter § 2300). More importantly, the same provision states that "the further purpose of the commission, consonant with the promotion and protection of

the public comfort and convenience[, is] to adopt and establish an overall public transportation policy governing taxi, coach, limousine, wheelchair accessible van services and commuter van services" (*id.*). This language could hardly be stronger or more expansive; the TLC's assigned mission is to *establish public transportation policy* to develop and improve New York City taxi service.

One element of that broad mission is contained in the Charter's directive that the TLC establish rates and standards for service, insurance, minimum coverage, driver safety, equipment safety and design, noise and air pollution control, and for the licensing of vehicles, drivers, owners and operators engaged in such services (*see* New York City Charter § 2303). Notably, the provisions directing the setting of standards and specifications are merely a part of the overall directives of the Charter. The Charter specifies a limit to the TLC's authority in only one respect: "Additional taxicab licenses may be issued from time to time only upon the enactment of a local law providing therefor" (*see* New York City Charter § 2303[b][4]).

Since its inception, the TLC has performed its prescribed duties without further legislative direction, with one exception. In 2005, based on findings that the TLC's specifications for taxicabs had "prevented many promising alternative fuel vehicles

... from being used as taxicabs" merely because they failed to meet TLC specifications "by minimal amounts," the New York City Council enacted a law requiring the TLC to "approve one or more hybrid electric vehicle models for use as a taxicab within ninety days after the enactment of this law" (*see* Admininstrative Code of City of NY § 19-533). The TLC abided by this direction, and the fleet of New York City taxicabs now includes thousands of hybrid vehicles, with eight different models currently in use.

With the exception of the 2005 legislative direction, however, the TLC has exercised its expansive authority unchallenged. Indeed, at the beginning of the last decade, following a collaboration with Ford, the TLC set its taxicab vehicle specifications to match the stretch version of the Ford Crown Victoria. Consequently, the Ford Stretch Crown Victoria became the dominant vehicle in the taxi fleet for a time. The TLC did, however, also allow medallion owners to alter other vehicle models to meet the specifications it set; such alteration was termed "hacking up" the vehicle.

The "Taxi of Tomorrow" Program

By 2007, the Ford Stretch Crown Victoria was still the dominant car in the New York City taxi fleet, followed by the Ford Escape SUV hybrid. However, production of both of those models was about to be discontinued, which would create

substantial uncertainty among medallion and vehicle owners about new vehicles that would meet, or could be modified to meet, TLC specifications. The TLC convened an advisory committee in August 2007 to solicit input from the various stakeholders, including owners, drivers and riders, as well as disability advocates and environmental advocates. Based upon that input, the TLC determined that instead of simply setting standards and specifications for New York City medallion taxicabs, thereby leaving each owner responsible for purchasing a vehicle and having it "hacked up" to meet the agency's specifications, it would best meet the needs of all taxi industry stakeholders and the public if the City entered into an arrangement with a single automobile manufacturer that could design a vehicle that would meet all the TLC's specifications without any need for modification.

The TLC did not do this alone or in a vacuum. It acted in conjunction with other elements of City government, in a very public, and widely publicized, process that took years, and involved obtaining substantial input from the public as well as from groups representing all interested parties.

To begin the process, on February 20, 2008, the TLC issued a Request for Information, which introduced the "Taxi of Tomorrow" concept. Following the compilation of the information received,

on December 17, 2009, New York City's Department of Citywide Administrative Services issued a Request for Proposals (RFP), stating that the TLC was seeking a highly qualified "Original Equipment Manufacturer" to develop a vehicle with high safety standards, superior passenger experience, superior driver comfort and amenities, appropriate purchase price and maintenance and repair costs, minimal environmental impact during the life of the vehicle, minimal physical footprint with more useable interior space, accessibility for disabled users, and an iconic design. In response to the RFP, the City received seven proposals, which were reviewed by an evaluation committee. Three finalists were selected: the Nissan NV200, the Ford Transit Connect, and the Karsan USA V1. The three finalists were announced on November 15, 2010 on the TLC's website and in the media; the Mayor's Office issued a press release, and photographs were made available on the City's website. Members of the public could provide feedback and vote on their desired taxi design features.

A thorough review of the three finalists' proposals was conducted, including several rounds of interviews. The Nissan model received the highest rating and had the lowest ownership cost.

Following the lengthy and comprehensive evaluation process, on May 3, 2011, Mayor Bloomberg announced the selection of the

Nissan NV200 as the Taxi of Tomorrow. The TLC and Nissan executed a Letter of Intent with respect to a contractual agreement regarding the use of the Nissan NV200 vehicles as New York City taxicabs.

After months of negotiations, the City and Nissan agreed on a 10-year manufacture and supply contract, titled "Vehicle Supply Agreement," which granted Nissan the exclusive right to manufacture and supply the "Official Taxicab Vehicle" and replacement parts to holders of unrestricted New York City medallions. The agreement requires, among other things, that the vehicles be tested in accordance with federal safety standards and meet detailed specifications. The agreed-on model was to have enhanced driver and passenger comfort features, including ample legroom, dual manual sliding doors, rear passenger entry steps, passenger reading lights, adjustable driver and passenger seats, built-in GPS navigation system, rear passenger HVAC controls, USB charge ports, transparent roof panel, and floor lighting. The agreement also requires Nissan to modify the Taxi of Tomorrow upon request, to make it fully wheelchair accessible; the vehicle has other features designed to aid passengers with disabilities, including grab handles and deployable side steps.

After a hearing, the TLC amended the rules codified in RCNY Title 35, Chapter 67, entitled "Rules for Taxicab Hack-up and

Maintenance." The new rules, entitled the "Original Taxi of Tomorrow Rules," required that after October 31, 2013, holders of unrestricted medallions issued prior to January 2, 2012, who were scheduled to replace their taxi vehicles due to age or condition, purchase the Nissan NV200.

The Previous Action

However, those rules were vacated by Supreme Court, New York County, for failure to allow for the purchase and use of hybrids for unrestricted medallions, as required by Administrative Code § 19-533, enacted by the City Council in 2005 (*see Committee for Taxi Safety, Inc. v City of New York*, 40 Misc 3d 930 [Sup Ct, NY County 2013]). Responding to that decision, on May 20, 2013, the TLC drafted a revision of its "Taxi of Tomorrow Rules" to provide that owners of unrestricted medallions acquiring a new vehicle after the set Activation Date could purchase either the Taxi of Tomorrow or an approved hybrid meeting the standards set forth in the TLC's rules, until such time as Nissan developed a hybrid model compliant with section 19-533. Following a public hearing, the TLC formally adopted the Revised Taxi of Tomorrow Rules and Hybrid Specifications, authorizing, in addition to the Nissan NV, purchase of the hybrid vehicles the Toyota Highlander, the Lexus RX, and the Toyota Prius V.

The Present Action

This combined declaratory judgment action and special proceeding was then commenced by petitioners, an association of fleet owners and a fleet owner that owns both restricted and unrestricted medallions, for a judgment declaring the Revised Taxi of Tomorrow Rules and Hybrid Specifications invalid. Petitioners contend that the challenged rules were beyond the TLC's authority and constituted an improper usurpation of the legislative authority of the City Council. Notably, the fleet owners' challenge was not joined by any member of the general public or its legislative representatives.

Supreme Court agreed with petitioners, and declared the Revised Taxi of Tomorrow rules invalid.

Discussion - The Agency's Authority

An administrative agency such as the TLC derives its authority from the express dictates of the legislative body that creates it (*see Suffolk County Bldrs. Assn. v County of Suffolk*, 46 NY2d 613, 620 [1979]). Of course, it may not act or promulgate rules in contravention of its enabling statute or charter (*Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480 [1978]). Nevertheless, an administrative agency "is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication" (*Matter of City of New York v State of*

*N.Y. Commn. on Cable Tel.*, 47 NY2d 89, 92 [1979]).

"Where an agency has been endowed with broad power to regulate in the public interest, we have not hesitated to uphold reasonable acts on its part designed to further the regulatory scheme" (*id.*). "[T]he propriety of its action often depends upon the nature of the subject matter and the breadth of legislatively conferred authority" (*id.* at 92-93).

Here, as in the *Commission on Cable Television* matter, "far-reaching control has been delegated to a commission charged with implementing a pervasive regulatory program" (*id.* at 93). This "far-reaching control" granted to the TLC by the New York City Charter gave the agency full authority for its actions. Although the Charter's directions *included* establishing standards and specifications, the agency was not *limited* to establishing standards and specifications. The language of the Charter provision reflects an expansive mandate to develop and improve taxi and limousine service, expressly including a direction "to adopt and establish an overall public transportation policy governing taxi [] service[]."

Yet the dissent concludes that despite its grant of authority to the TLC to set policy, the Charter actually limits the TLC to adopting only the standards and specifications that are specifically listed in the Charter. That position simply

ignores the broad language of the Charter that makes clear that the directive that the TLC establish rates and standards in such areas as service, insurance, minimum coverage, driver safety, equipment safety and design, noise and air pollution control, and for the licensing of vehicles, drivers, owners and operators engaged in such services (*see* New York City Charter § 2303) merely specifies one aspect of the agency's broad mission.

It is also puzzling that the dissent points to Administrative Code § 19-533 to demonstrate that a code provision is required to empower the TLC to approve a vehicle for use as a taxi. Before and since that 2005 legislative direction, the TLC has exercised its expansive authority unchallenged. It even collaborated with Ford to set its taxicab vehicle specifications to match the stretch version of the Ford Crown Victoria.

The TLC carried out its assigned mission with an exacting process lasting from 2007 to 2011, obtaining input from all conceivable interests and concerns, to ensure a final decision that would best satisfy taxi passengers, owners, and drivers, as well as the general public. The agency's selection and authorization of a specific, specially designed model as the exclusive model for New York City taxis, was well within the agency's purview of establishing the policy governing taxi service.

Petitioners do not challenge the agency's right to adopt a list of specifications so thorough and so exacting that only one vehicle would satisfy them, as it did with the Ford Stretch Crown Victoria, although adopting specifications that only one model would satisfy would make that one model the de facto official New York City taxi. Therefore, there can be no question that the TLC could have prescribed specifications that would leave medallion owners with only one non-hybrid purchase option: the Nissan NV200.

Yet, petitioners distinguish between the permissible adoption of specifications that are only satisfied by one model of vehicle, and what they view as the impermissible selection of a specific, specially designed vehicle as the sole model to be used as New York City (non-hybrid) taxis. In reality, however, the only real difference between the issuance of such detailed specifications, on one hand, and the adoption of the Taxi of Tomorrow project, on the other, is that the Taxi of Tomorrow project set the detailed specifications before the car was manufactured, and then ensured the manufacture of a vehicle that would satisfy all its requirements, rather than providing specifications as a basis for required aftermarket retrofitting.

By proceeding as it did, the TLC actually benefited all concerned. The agency was able to wield negotiating power

unavailable to individual medallion owners, to arrange for the creation of a taxi possessing all the qualities it sought, along with price caps and other protections. Having the cars manufactured to specifications rather than hacked-up after manufacture provides additional benefits for driver safety and comfort, since only in this manner are partitions installed as part of the manufacturing process, rather than afterwards, which allows for the driver's seat to be adjustable, and avoids the problem of the partition interfering with the deployment of side curtain airbags. In sum, the TLC's selection of the Taxi of Tomorrow does not represent a significant departure from its past practice, except insofar as it provided substantial additional benefits to riders, drivers, owners, and the public, while ensuring that future New York City taxis will be the best possible vehicle for the job. It should be recognized that if the TLC had proceeded in the manner that the dissent suggests, and adopted a set of specifications that mirrored the attributes of the Nissan NV200 without making exclusive arrangements for the manufacture of that exact vehicle, there would exist no such vehicle, nor would such a vehicle necessarily be created. While in theory more than one manufacturer or vehicle could satisfy those specifications, in reality the agency would have succeeded only in setting a standard that no currently existing vehicle

could meet, that no post-manufacture hack-up could fully achieve, and that *no manufacturer would undertake in the absence of certainty as to the market for the product*.

Nor do we agree with the motion court that the TLC's actions were unauthorized because entering into the Vehicle Supply Agreement was not "within the ambit of the TLC's typical administrative 'interstitial' rule-making function." Importantly, the agreement was entered into, not by the TLC, but by the New York City Department of Citywide Administrative Services, which, under City Charter § 823(d), is authorized "to procure, supply and manage contractual services ... for the use of city agencies."

In concluding that the TLC exceeded its authority, the motion court reasoned that recent case law approving other actions by the TLC were inapposite, because dictating the use of a single vehicle is on a different order of magnitude than adopting regulations (citing e.g. *Matter of New York City Commn. for Taxi Safety v New York City Taxi & Limousine Commn.*, 256 AD2d 136 [1st Dept 1998] [financial disclosure rules]; *Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 40 Misc 3d 1062 [Sup Ct NY County 2013] [credit card processing rules]; *Black Car Assistance Corp. v City of New York*, 2013 NY Slip Op. 30824[U] [Sup Ct NY County 2013] [e-hail pilot program], *affd* 110

AD3d 618 [1st Dept 2013]). However, the mere absence of case law addressing a similar program does not constitute grounds for rejecting the program.

The motion court analogized this case to two old cases involving the actions of the New York City Commissioner of Licenses, *Acorn Empl. Serv. v Moss* (292 NY 147 [1944]) and *Matter of Executive Serv. Corp. v Moss* (256 App Div 345 [1st Dept 1939]). However, those cases are distinguishable, because the enabling legislation that gave the Commissioner of Licenses the authority to award or deny licenses did not include the type of broad, policy-making mandate that the Charter gave to the TLC.

While not dispositive of the issue, it is notable that the City Council did not seem to believe that the TLC was exceeding the authority it had granted. No City Council member or representative appears in this proceeding to claim that the Council's authority was bypassed; nor is there any indication that over the years during which the TLC engaged in the elaborate, public process leading to the adoption of the final Taxi of Tomorrow program, the City Council gave any indication that it believed its authority was being usurped. The dissent echoes petitioners' assertion that the City Council is "actively debating" the issue of the composition of the taxicab fleet, implying that the City Council has undertaken consideration of

whether a particular single vehicle should be adopted as the official City taxicab. However, petitioners' submissions to support this assertion are limited to the City Council's focus on the issues of compliance with the Americans with Disabilities Act, the proportion of the fleet that should be handicap-accessible, and air quality and the number of vehicles that should be required to be hybrid or electric. Nothing in the record reflects an intent on the part of the City Council to concern itself with whether or not a single vehicle should be adopted as the official taxi of New York City.

Ultimately, the key to determining whether an agency has exceeded the scope of its authority is not in examining other cases, but in examining the enabling legislation. The scope of the mandate established by City Charter § 2300 is sufficiently expansive to permit the TLC to act as it did.

Separation of Powers

A related, although separate, issue is whether the TLC's adoption of the revised Taxi of Tomorrow rules violated the separation of powers doctrine. That doctrine holds that "[b]ecause of the constitutional provision that '[t]he legislative power of this [s]tate shall be vested in the [s]enate and the [a]ssembly (NY Const, art III, § 1), the Legislature cannot pass on its law-making functions to other bodies" (*Matter*

*of Levine v Whalen*, 39 NY2d 510, 515 [1976]). However, the Legislature *may* delegate to an agency the power to administer the law as enacted by the Legislature (*id.*).

The TLC's actions were not violative of the doctrine. In *Levine v Whalen*, the Court found that there was no constitutional infirmity in the Legislature's delegation to the New York State Department of Health of "comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services" (Public Health Law § 2800), although the Court annulled the State Commissioner of Health's revocation of a hospital's operating certificate on other grounds. The Court explained:

> "There was and is good reason to expect that officials of the Department of Health would be vastly more familiar with and more competent to cope with hospitals and related services throughout the State than individual legislators. Practical necessities compelled the Legislature to assign broad functions to the department and to leave to it the duty of bringing about the result pointed out by statute" (39 NY2d at 516-517).

The equivalent reasoning is applicable here, in view of the City Council's delegation to the TLC of comprehensive responsibility for policy relating to all aspects of the City's for-hire transportation services.

In *Boreali v Axelrod* (71 NY2d 1 [1987]), the Court struck down a rule adopted by the Public Health Council, prohibiting smoking in a variety of indoor public locations, but exempting certain types of establishments such as bars and small restaurants. The agency had explained that it included the exemptions to strike a balance between protecting public health and causing economic difficulties to businesses; by conducting this type of "cost-benefit" analysis, the Court ruled, the agency was "'acting solely on [its] own ideas of sound public policy' and was therefore operating outside of its proper sphere of authority" (*id.* at 12). Another important factor in the Court's conclusion was that the Legislature had repeatedly tried, and failed, to enact legislation to the same effect; its difficulty in coming to terms on this issue served to highlight that the challenged regulation constituted an attempt by the agency to resolve a difficult social problem, making choices among competing considerations, which is the essence of the Legislature's province (*id.* at 13). Two years later, the Court elaborated: "[A] key feature of [*Boreali*] ... was that the Legislature had never articulated a policy regarding the public smoking controversy" (*Matter of Campagna v Shaffer*, 73 NY2d 237, 243 [1989]).

The *Boreali* Court acknowledged that the line between administrative rule-making and legislative policy-making can be difficult to define, and that its determination was based on the presence of a number of "coalescing circumstances" (71 NY2d at 11). Similarly, when this Court found a violation of the separation of powers doctrine, in the New York City Board of Health's promulgation of the Sugary Drinks Portion Cap rule, it found that all four factors that had, together, established an invalid exercise of legislative power in *Boreali* were present (*see Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 110 AD3d 1 [1st Dept 2013], *lv granted* 22 NY3d 853 [2013]).

The same is not true in the present case. Importantly, here, unlike the situation in both *Boreali* and *Coalition of Hispanic Chambers of Commerce*, the Legislature had clearly articulated its policy regarding the TLC's assigned task, namely, the goal of ensuring and optimizing the comfort of riders, while protecting the public, the environment, the drivers, and the rights of medallion owners. The TLC was not left to take action based on its own ideas of sound public policy. Even if, arguendo, the TLC's adoption of the revised Taxi of Tomorrow rules may be characterized as involving policy-making, here, the parameters of that policy-making were set by the City Council in

the City Charter.

Another important *Boreali* factor was absent here: the decision regarding which cars should be permitted to serve as taxis in New York City was never "an area in which the legislature had repeatedly tried – and failed – to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (71 NY2d at 13). On the contrary, that decision has been the prerogative of the TLC, without challenge, since the TLC's creation.

The other two factors considered in *Boreali* do not require extensive analysis. The motion court characterized the challenged rules as improper because they did more than "fill in the details of broad legislation describing the over-all policies to be implemented," but instead "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*Boreali*, 71 NY2d at 13). However, unlike the situation in *Boreali*, here there is clear legislative guidance. The TLC was to create policy and to adopt regulations and specifications relating to the New York City taxi fleet in ways that maximized the comfort and safety of passengers and drivers, while protecting the environment and the needs of the public. The "interstices" of these directives are quite broad in nature, but the Legislature's outline could not have been clearer, and

its intent was properly carried out by the agency.

The final *Boreali* consideration, namely, whether the adoption of the challenged rules required special expertise in the field of public transportation policy governing taxi service, does not warrant the rejection of the revised rules. The TLC, having been assigned the task of becoming knowledgeable about all aspects of the for-hire transportation field, has now, as a practical matter, become the possessor of unique expertise in the field, and is far better equipped than the City Council to decide which vehicle, or vehicles, will best serve as New York City taxis.

Since the four factors needed to determine that the separation of powers doctrine has been violated are not present, petitioners have failed to establish that the TLC engaged in a violation of the separation of powers doctrine by promulgating the challenged rules.

Petitioners' repeatedly expressed concerns about the Nissan NV200 being a "non-hybrid, non-handicap-accessible vehicle" do not justify a rejection of the TLC's rules. Petitioners do not even suggest that a better, wheelchair-accessible taxi option presently exists. Almost all vehicles currently require retrofitting to become fully wheelchair accessible, and the Nissan NV200, along with all its other advantages, is modifiable

by the manufacturer so that it can become fully wheelchair accessible. The model in its unmodified form also includes many features that address a number of other disabilities, such as grab handles, a wide seating area that allows for service animals, and an integrated hearing loop system.

Nor does the adoption of the Nissan NV200 violate Administrative Code § 19-533, which only required the TLC to approve at least one hybrid vehicle for purchase, whereas the TLC has already approved three. Administrative Code § 19-533 did not require the TLC to limit the entire fleet to hybrid vehicles, or preclude its approval of a non-hybrid for use as taxis.

The City Council's delegation to the TLC of comprehensive responsibility for implementing its stated public policy in regard to the City's for-hire transportation services was a valid delegation to an agency most competent to cope with the details of optimizing taxi service while considering the concerns of all interested parties as well as the general public. We therefore uphold the TLC's adoption of the Taxi of Tomorrow program.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 11, 2013, declaring invalid the amendments to Title 35, Chapters 67 and 51 of the Rules of the City of New York that created the "Taxi of Tomorrow" project mandating that the Nissan

NV200 would be New York City's "Official Taxicab Vehicle" effective October 2013, should be reversed, on the law, without costs, and it should be declared that the Revised Taxi of Tomorrow Rules and Hybrid Specifications are valid.

All concur except Acosta, J. who dissents in an Opinion as follows:

ACOSTA, J (dissenting)

At issue in this case is whether the Taxi and Limousine Commission (TLC) exceeded its authority under the New York City Charter and violated the separation of powers doctrine by enacting amendments to title 35, chapters 67 and 51 of the Rules of the City of New York (RCNY) that created the "Taxi of Tomorrow" project mandating that the Nissan NV200 would be New York City's "Official Taxicab Vehicle," effective October 2013. I believe that despite the delegation to TLC of broad policy-making powers and extensive specified duties to implement its policies and to regulate and supervise the taxi industry, in issuing the Revised Taxi of Tomorrow rules, TLC exceeded its statutory authority in a manner that infringed on the City Council's legislative domain.

As relevant to the issues on appeal, the Charter provides:

> "It shall be the further purpose of [TLC], consonant with the promotion and protection of the public comfort and convenience to adopt and establish an overall public transportation policy governing taxi . . . services as it relates to the overall public transportation network of the city; to establish certain rates, standards of service, standards of insurance and minimum coverage; standards for driver safety, standards for equipment safety and design; standards for noise and air pollution control; and to set standards and criteria for the licensing of vehicles, drivers and chauffeurs, owners and operators engaged in

> such services; all as more particularly set forth herein" (§ 2300).

In addition, the Charter provides that "[t]he jurisdiction, powers and duties of [TLC] shall include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city, pursuant to provisions of this chapter" (§ 2303[a]), and that such regulation and supervision shall extend to "[t]he regulation and supervision of standards and conditions of service" (§ 2303[b][2]), "[r]equirements of standards of safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles" (§ 2303[b][6]).

Finally, the Charter provides TLC with the power to "formulat[e], promulgat[e] and effectuat[e] . . . rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter" (§ 2303[b][11]).

Initially, to the extent respondents and the majority cite Charter § 2300 in support of their broad claim of authority, while that provision does state TLC's purpose of adopting an overall transportation policy relating to taxi service, it also sets forth specific tasks in connection with that purpose, and other provisions further define TLC's duties as the "regulation and supervision of standards and conditions of service"

(§ 2303[b][2]) and "[r]equirements of standards of safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles" ( §§ 2303 [b][6]). Thus, the Charter does not confer on TLC the unfettered authority to take any action with respect to establishing an overall policy for taxi service (*see Matter of City of New York v State of N.Y. Commn. on Cable Tel.*, 47 NY2d 89, 92 [1979] ["Where an agency has been endowed with broad power to regulate in the public interest, we have not hesitated to uphold reasonable acts on its part designed to further the regulatory scheme. *This is not to say, of course, that an administrative tribunal may operate outside its lawfully designated sphere*"] [internal citations omitted] [emphasis added]). Rather, in connection with that policy-making power, TLC has the specified authority to promulgate rules regulating the taxi industry, including by setting standards for vehicle design that involve vehicle design specifications, and to be valid, the revised rules must fall within that specified authority.

Indeed, respondents further contend that TLC's specified powers in the Charter encompass the power to issue the revised rules, arguing that TLC has set a new "standard" for safety, design, comfort and convenience – the Taxi of Tomorrow. Respondents and the majority maintain that the only difference

between the Taxi of Tomorrow project and TLC's accepted past practices with respect to vehicle design rules is that the detailed specifications here are set before the car is manufactured rather than applicable to aftermarket retrofitting, and that there is little practical difference between the revised rules, which mandate a single vehicle for use, and prior rules that set requirements so specific that only one vehicle met the specification. Contrary to these arguments, TLC's authority under the Charter to make rules with respect to vehicle design is limited to rules regulating "standards" of design, and this does not include the power to issue rules mandating the exclusive use of one purpose-built vehicle manufactured by a single company.

Although TLC has, in practice and without legal challenge, at least for the last 12 years, exercised its power to regulate the requirements of standards of vehicle design in various ways, including by setting particular and detailed vehicle design specifications, even assuming courts would conclude that TLC properly issued such rules pursuant to its powers under the Charter, the Revised Taxi of Tomorrow Rules are of a different category. The other rules cited by TLC established design specifications that constituted "standards" in that they could, at least in theory, be satisfied by more than one product/manufacturer. In contrast, the revised rules go beyond

setting standards, and require that a particular product designed by a specific manufacturer be used to the exclusion of all others. Thus, the revised rules differ, for example, from TLC design specifications that may have had the practical effect of making the stretch Crown Victoria the dominant vehicle in the market, because in that circumstance, it remained possible for other vehicles to be designed to meet the required specified standards (as was the case), whereas the revised rules entirely preclude that possibility. This distinction is significant, and it provides a sufficient basis for the conclusion that TLC exceeded its delegated authority in issuing the revised rules, regardless of whether the Taxi of Tomorrow project is rational and consistent with TLC's objectives. While TLC has broad power to set overall taxi policy and extensive specified powers with respect to setting standards of vehicle design, which includes the power to create detailed specifications as to what design features must be included in a vehicle, by not only creating such specifications, but mandating the exclusive use of a specific make, model and manufacturer, TLC took a step beyond even the broad powers provided for it in the Charter.[1]

[1]While Nissan points out that had "TLC merely passed a rule that adopted the specifications of the Nissan NV200 taxi as minimum requirements, only the Nissan NV200 taxi would have satisfied those standards," the point remains that even if that

Indeed, while respondents point to the fact that in Administrative Code of the City of NY § 19-533, the City Council specifically provided that the TLC "shall approve one or more hybrid electric vehicle models for use as a taxicab within ninety days after the enactment of this law," this cuts against their position. Rather than showing that the Charter grants TLC the broad authority to choose a particular vehicle for use as a taxi, it suggests that a separate grant of authority in the form of a code provision is required to empower TLC to approve a single vehicle model for use as a taxi. In fact, in its legislative findings, the City Council noted that TLC's previous specifications for taxicabs, "while important to passenger comfort, have prevented many promising alternative fuel vehicles, which do not meet specifications by minimal amounts, from being used as taxicabs."

I believe there is no merit to respondents' argument that the revised rules are analogous to prior TLC rule-making that

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were true at the time, other manufacturers could have decided to compete with Nissan by building a vehicle that met the same precise specifications, and by issuing the revised rules limiting the vehicle market in this manner, TLC went beyond a reasonable reading of its powers under the Charter. Also, to the extent TLC has previously authorized only certain vehicle makes as permitted for "hack-up," it does not appear that this policy may be distinguished from the revised rules, which allow for only a single model.

courts have found to be within TLC's delegated authority. For example, nothing in this Court's decisions approving of TLC's "e-hail pilot program" pursuant to Charter § 2303(b)(9) (*see Matter of Black Car Assistance Corp. v City of New York*, 110 AD3d 618 [1st Dept 2013]) and TLC's financial disclosure rules under Charter § 2303(b)(3) (*see Matter of New York City Commission for taxi Safety v New York City Taxi & Limousine Comm.*, 256 AD2d 136 [1st Dept 1998]) provide support for the claim that the Revised Taxi of Tomorrow Rules are a proper exercise of TLC's power under the Charter.

Thus, while the revised rules involve concerns of safety, design, comfort and convenience, to the extent TLC did not simply set standards in these regards, but specifically mandated the purchase of a designated vehicle, the revised rules went beyond the TLC regulation of "standards of design" permitted under the Charter, and the rule making constitutes an exercise of power that is neither expressly conferred on TLC by any provision in the Charter nor required by necessary implication (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 823-824 [2003], *cert denied* 540 US 1017 [2003]; *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 110 AD3d 1, 7-8 [1st Dept 2013], *lv granted* 22 NY3d 853 [2013]).

TLC's issuance of the Revised Taxi of Tomorrow Rules also violated separation of powers principles by usurping the legislative authority of the City Council. First, as discussed above, despite stating TLC's purpose to establish an overall taxi-service policy, the Charter, read as a whole, specifies the actions that TLC, as an executive agency, may take in order to effectuate this policy, and rather than explicitly or implicitly authorizing TLC to issue the revised rules, a fair reading of the Charter shows that the revised rules are beyond the powers granted to TLC. Second, as discussed below, to the extent the Charter does confer on TLC broad policymaking authority, this policy-making authority must be interpreted pursuant to the principles set forth in *Boreali v Axelrod* (71 NY2d 1 [1987]), and based on those principles, TLC's issuance of the revised rules was policy-making that violated the separation of powers doctrine by usurping the legislative power of the City Council (*see Matter of Mayfield v Evans*, 93 AD3d 98, 106 n * [1st Dept 2012], quoting Locke, *The Second Treatise of Civil Government*, ch XI, ¶ 134 [1690] [regarding the supremacy of the elected legislative branch as closer to the people]).

Initially, *Boreali* makes clear that "enactments conferring authority on administrative agencies in broad or general terms . . . must be construed, whenever possible, [as] no broader than

that which the separation of powers doctrine permits," and that to determine when "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed," courts must consider whether certain factors, "when viewed in combination, paint a portrait of an agency that has improperly assumed for itself '[t]he open-ended discretion to choose ends'" (71 NY2d at 9-11).

The factors identified in *Boreali* are (1) whether the agency has "constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns" (71 NY2d at 11-12); (2) whether the agency "did not merely fill in the details of broad legislation describing the overall policies to be implemented" ("'interstitial' rule-making"), but "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*id.* at 13); (3) whether "the agency acted in an area in which the Legislature had repeatedly tried – and - failed to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (*id.*); and, (4) whether the development of the regulations involved the agency's "special expertise or technical competence" (*id.* at 14).

Here, as Supreme Court found, the revised rules mandating the exclusive use of the Nissan NV200 as a taxi vehicle do not

"come within the ambit of the TLC's typical administrative 'interstitial' rule-making function which had historically entailed setting standards for the technical composition of the taxicab and the medallion owners' resulting responsibility to meet such standards in the selection of their vehicles."

Even though broad policy-making authority has been delegated to TLC under the Charter, that delegation reflects the City Council's basic policy decision that the transportation policy established by TLC should be consonant with "the promotion and protection of the public comfort and convenience" (Charter § 2300) and the Charter specifies TLC's duties in that regard (establishing rates and various standards). Accordingly, TLC's policy must be implemented pursuant to rules that are necessary to fulfill the City Council's basic policy choice and that fall within the Charter's grant of specified powers. While the Revised Taxi of Tomorrow Rules are consistent with the basic policy decision in the Charter, as discussed above, they do not constitute a strict exercise of TLC's delegated rule-making powers. Instead, they reflect a determination by TLC that the traditional exercise of its power to set detailed vehicle design specifications in service of the stated policy goals is not enough, and that transportation policy would benefit from a rule providing for a single manufacturer to create a single iconic

taxi vehicle for use in New York City. Since the specified power to establish design and other standards differs from and does not require or encompass the unspecified power to mandate the use of a single vehicle, this choice to promulgate the revised rules was a policy choice outside TLC's purview and properly remained with the Legislature. It was not interstitial rule-making that merely filled in the details of TLC's delegated legislative authority.

This conclusion is supported by the fact that the City Council has, in recent years, directly involved itself in taxi policy, including by passing a code provision (Administrative Code § 19-533) requiring TLC to approve one or more hybrid vehicles, and considering options to increase the number of wheelchair-accessible vehicles. As cited earlier, in connection with section 19-533, the City Council noted that TLC's specifications for taxicabs, "while important to passenger comfort, have prevented many promising alternative fuel vehicles." To the extent the revised rules fail to promote, and arguably contradict, the City Council's recently stated policy preferences in favor of TLC's policy concerns of comfort, convenience and uniformity, this is a conflict in policy making that indicates a separation of powers violation. An action taken by an administrative agency that is not consistent with the policies contemplated by the Legislature, may not survive

constitutional scrutiny under the doctrine of separation of powers (*see Hispanic Chambers of Commerce*, 110 AD3d at 9).

Finally, while the details of the Request for Proposals, the selection of the vehicle, and the negotiated specifications may have entailed the special knowledge of TLC, respondents fail to show that TLC's decision to alter its traditional practice of setting forth detailed vehicle specifications and to mandate the replacement of the diverse taxi fleet with a single "Taxi of Tomorrow" manufactured by one company, was based on TLC's specialized knowledge and expertise, rather than based on a policy decision that should have been made by the legislative body. TLC states that its decision was "the product of a deep understanding of the deficiencies in the vehicles that comprise the existing taxi fleet, and the recognition that simply setting a broad set of specifications has failed to improve the quality of the vehicles in the fleet," but it is unclear whether TLC expertise was necessary for its conclusion that those deficiencies could not have been adequately resolved by setting detailed specifications for the ideal taxi vehicle that medallion owners would have to meet either by purchasing a conforming vehicle or by aftermarket hacking, or whether this determination was based primarily on broader policy-driven considerations.

Based on the above considerations, I believe that Supreme Court correctly found that despite the delegation to TLC of broad policy-making powers and extensive specified duties to implement its policies and to regulate and supervise the taxi industry, in issuing the Revised Taxi of Tomorrow rules, TLC exceeded its statutory authority in a manner that infringed the City Council's legislative domain.

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

ENTERED: JUNE 10, 2014

CLERK