SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 12, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11916 Hermitage Insurance Company, Index 100691/10
Plaintiff-Appellant,

-against-

Evans Floor Specialist, Inc.,
Defendant,

Miguel Luis, et al.,
Defendants-Respondents.

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Mound Cotton Wollan & Greengrass, New York (Tania A. Gondiosa of counsel), for appellant.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered March 18, 2013, which denied plaintiff's motion for a default judgment against defendant Evans Floor Specialist, Inc., and granted defendants Miguel Luis, Judy Luis, Jean Joseph Bruneau, and Venita Bruneau's motion for summary judgment declaring that plaintiff must defend and indemnify Evans in their underlying personal injury action, unanimously reversed, on the law, without costs, plaintiff's motion granted, defendants' motion denied, and it is declared that plaintiff is not required

to defend and indemnify Evans in the underlying personal injury action.

Plaintiff, Hermitage Insurance Company, issued a commercial general liability policy to defendant flooring contractor Evans Floor Specialist, Inc. Although the policy covered property damage and bodily injury for which the insured was held liable due to an accident, it contained an exclusion for bodily injury to an employee of the insured "arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business."

Evans Floor Specialist was retained to refinish wood floors in an apartment on Sedgewick Avenue in the Bronx, and it assigned its employees, defendants Miguel Luis and Jean Joseph Bruneau, to perform the work. On June 27, 2008, Luis and Bruneau were applying a floor finish when a spark caused the finish to catch fire.

A year later, on July 23, 2009, Luis (and his spouse) and Bruneau (and his spouse) brought a personal injury action against Evans. Hermitage then commenced the present action, seeking a declaration that its policy did not cover the claims. Evans defaulted in the action; the Luis and Bruneau defendants answered, and contended that Hermitage's disclaimer of coverage

was untimely. The motion court denied Hermitage's motion for a default judgment against Evans, and, granting the Luis and Bruneau defendants' cross motion, declared that Hermitage was required to defend and indemnify Evans in the personal injury action. Citing, inter alia, *Those Certain Underwriters at Lloyds, London v Gray* (49 AD3d 1 [1st Dept 2007]), it relied on Hermitage's failure to promptly investigate the claim.

Those Certain Underwriters states:

> "An insurer must serve written notice on the insured of its intent to disclaim coverage under its policy 'as soon as is reasonably possible' (Insurance Law § 3420[d]). The reasonableness of the timing of a disclaimer is measured from the date when the insurer knew or should have known that grounds for the disclaimer existed. If such grounds were, or should have been, 'readily apparent' to the insurer when it first learned of the claim, any subsequent delay in issuing the disclaimer is unreasonable as a matter of law. *If it is not readily apparent, the insurer has the right, albeit* [sic] *the obligation, to investigate, but any such investigation must be promptly and diligently conducted*" (49 AD3d at 4 [emphasis added] [internal citations omitted]).

We conclude that the claim filed by Evans did not trigger any obligation on the part of Hermitage to investigate the possibility of a bodily injury claim. The notice of occurrence/claim supplied to Hermitage on June 30, 2008 merely stated, in the box provided for a description of the occurrence, "insd states that one of his employees started at first [sic] at

insds residence by pulling a vacuum cord." In the box provided for the name and address of injured persons or damaged property, it stated, "unknown, sedwick ave bronx." If a claim were being made to cover bodily injury, that is where the insured would have been expected to provide, at least, the names of the individuals injured, as well as the other information for which space was provided in the form. The information that was provided indicated only the possibility of a property damage claim by the owner of the apartment; it contained nothing to indicate that anyone was injured in the fire. The mere references in the claim form's information section to the policy's "Employment Related Practices Exclusion" and its "Contractors Professional Liability Exclusion" were insufficient to make the possibility of bodily injury readily apparent to Hermitage and thus to warrant imposing on it an affirmative obligation to investigate whether any individuals were injured in the fire.

It was certainly not readily apparent to Hermitage when it received the claim form that it had grounds for disclaiming; it was not even apparent that it could anticipate a bodily injury claim. The rule relied on by the motion court for imposing on Hermitage a duty to investigate the possibility that people were injured in the fire (*see GPH Partners, LLC v American Home Assur.*

Co., 87 AD3d 843, 844 [1st Dept 2011]; *Those Certain Underwriters*, 49 AD3d at 4-5) is inapposite. The rule is applied where the claim form provides the insurer with enough information about the nature of the claim to prompt an investigation to determine whether there are grounds to claim an exclusion.

Because Hermitage received a claim form that only indicated the potential for a property damage claim by the owner of the apartment, and nothing to indicate that anyone was injured in the fire, and learned of the bodily injury claim only when it received a letter dated July 2, 2009 from the Luis and Bruneau defendants' counsel, its disclaimer on July 30, 2009, after it conducted an initial investigation and determined that the two men were Evans's employees and were injured in the course of their work, was timely.

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

ENTERED: JUNE 12, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11660 In re Crystal Hawkins, Index 400782/12
Petitioner-Appellant,

-against-

Elizabeth Berlin, etc., et al.,
Respondents-Respondents.

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

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for state respondent.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for municipal respondent.

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered November 30, 2012, denying the CPLR article 78 petition seeking, inter alia, to annul respondents' determination that petitioner is not entitled to a distribution of certain child support payments collected by respondents, and dismissing the proceeding, affirmed, without costs.

Petitioner began receiving a grant of public assistance (PA) in December 1989 and continued to receive PA until her case was closed in February 2007. Petitioner reapplied for and received PA from June 2009 until December 2011 when she was determined to be eligible for Supplemental Security Income (SSI). Petitioner's

son, Michael Jackson, was added to her PA case as of the date of his birth in May 1990. At that time, respondent the New York City Human Resources Administration (HRA) obtained an assignment of petitioner's rights to child support paid on Michael's behalf (*see* Social Services Law § 158[5]). In July 1991, HRA obtained a court order for support payments by Michael's father. In 2000, petitioner also began receiving PA on behalf of J.S., her other son, who was born that year. In 2000, pursuant to another assignment of petitioner's rights, HRA obtained a separate court order for the payment of child support by J.S.'s father. Michael was a part of petitioner's active PA case from May 1990 to February 28, 2007 and from August 1, 2009 to October 14, 2009. J.S. was included on petitioner's PA case from the date of his birth in 2000 through February 28, 2007, from June 1, 2009 through July 31, 2009 and from November 1, 2009 through the date of the petition.

In August 2005, the Social Security Administration (SSA) determined Michael to be eligible for SSI. On September 18, 2007, HRA received from SSA a check in the amount of $1,232.50 for reimbursement of interim assistance provided on behalf of Michael for the period covering September 2005 through January 2007. On December 13, 2011, SSA reimbursed HRA for interim

assistance provided for petitioner from September 2010 through December 2011.

On or about June 27, 2011, petitioner requested a first-level desk review. A desk review is "an accounting of the collections and disbursements made on behalf of a current or former recipient of public assistance (PA) who is or was receiving child support enforcement services (recipient)" (18 NYCRR 347.25[a][1]). In the case of a family, such as petitioner's, that has ceased receiving aid to dependent children, a desk review may be sought where it is claimed that the amount of child support collected exceeded the amount of unreimbursed past assistance (*see* 18 NYCRR §§ 347.13[f][3], and 347.25[a][2]). Petitioner's request for a desk review pertained to an alleged cumulative excess support payment, a term defined on the request form as the "amount of payment in excess of total temporary assistance paid to you for past months." The time period identified by petitioner ran from September 2005 to August 2011. Upon reviewing all of its PA and child support records for the life of the case, HRA notified petitioner of its determination that she was owed nothing for excess payments.[1] As

[1]HRA did determine that petitioner was entitled to a "pass-through" payment of $100 that was made pursuant to Social

required by 18 NYCRR 347.25(f), HRA's notice was accompanied by copies of the worksheets underlying its determination.

Through counsel, petitioner filed with respondent Office of Temporary and Disability Assistance (OTDA) a request for a second-level desk review (*see* 18 NYCRR 347.25[g]). In requesting the second-level desk review, petitioner asserted that "any support collected [through the Child Support Management System] for Michael Jackson for the period from September 2005 through August 2011 should have been paid over to Crystal Hawkins since Michael Jackson was not in receipt of public assistance since January, 2007, and any public assistance provided for his needs for September 2005 through January, 2007 was reimbursed from retroactive SSI paid on his behalf in September, 2007." In the determination that is under review, OTDA confirmed HRA's first-level desk review determination on the basis of OTDA's calculation of cash assistance received under petitioner's case number in the amount of $112,588.83 for the duration of her case (December 1, 1989 through August 1, 2011), minus the $1,232.50 received from SSA as reimbursement of interim assistance, and minus $57,524.00 from assigned child support, leaving $53,832.33

Services Law §§ 111-c(2)(d) and 131-a(8)(a)(v) and is not a subject of this appeal.

in unreimbursed assistance. OTDA's notification was accompanied by copies of the relevant worksheets.

In the instant article 78 petition, petitioner alleged that HRA "was fully reimbursed for public assistance paid on behalf of Michael Jackson during the period from September, 2005 through January 2007 from Michael Jackson's retroactive SSI benefits." The requested relief includes a judgment directing respondents to distribute the child support collected or due on behalf of Michael for that period. After issue was joined, the court below dismissed the petition upon finding that OTDA's level-two desk review determination was not arbitrary and capricious. We affirm.

In this State, the receipt of public assistance is conditioned upon the assignment of an applicant's or recipient's support rights to the State and the respective social services district (*see* Social Services Law § 111-c[1], [2][a]). Since December 1, 2001, petitioner's PA benefits were issued under the State's Safety Net Assistance (SNA) program (*see* Social Services Law § 157 *et seq.*). A person, such as petitioner, who applies for or receives SNA is required "to assign to the state and the social services district any rights to support that accrue during the period that a family receives safety net assistance" (Social

Services Law § 158[6][i]). The assignment terminates with respect to current support upon a determination by the social services district that the applicant, recipient or family member for whom the applicant or recipient is applying for or receiving assistance is no longer eligible for safety net assistance, "except with respect to the amount of any unpaid support obligation that has accrued during the period that a family received safety net assistance" (Social Services Law § 158[5]).

As set forth above, under the statutory scheme, the assignment of child support is suspended only with respect to current support. Although it could have, the Legislature has chosen not to suspend the assignment of child support with respect to child support due or collected on behalf of Michael while he and petitioner's family received benefits, which is the interpretation urged by petitioner. Omissions in a statute cannot be supplied by construction (McKinney's Cons Laws of NY, Book 1, Statutes § 363). The claims set forth in the amended petition are therefore precluded by the application of the statute.

Petitioner cites to Social Services Law § 131-c(1) for the proposition that the assignment of her right to recover child support arrears was improper with respect to Michael because his

needs were excluded from petitioner's PA budget as of the time he became eligible for SSI. Petitioner misconstrues Social Services Law § 131-c(1) because its application is limited in scope to "the purposes of determining eligibility for and the amount of assistance payable . . ." (*id.*). The statute has nothing to do with the assignment of petitioner's right to child support. Accordingly, there is no merit to petitioner's argument that respondents' interpretation of Social Services Law § 158 is at odds with the provisions of Social Services Law § 131-c(1).

We disagree with the concurrence/dissent's position that there is no rational basis for respondents' determination that "petitioner's assignment of child support is permanent, lasting for the duration of the family's public assistance case, even for a period of time when Michael was not part of that household . . . ." The concurrence/dissent also posits that this matter should be remanded "for a recalculation of support paid for the family to exclude those periods of time after 2007 . . . ." The amended petition calls for relief that is limited to a judgment "reversing the State respondent's determination of petitioner's request for a second level desk review, and directing the city agency to distribute child support collected or due on behalf of Michael Jackson for the period from September 2005 through

January 2007 . . . ." Therefore, petitioner has not preserved any request for the post-2007 review urged by the concurrence/dissent (*see e.g. People ex rel. Rodriguez v Warden, Rikers Is. Correctional Facility*, 61 AD3d 494 [1st Dept 2009]).

We conclude that OTDA's determination is correct for the reasons set forth above. To be sure, citing to Social Services Law §§ 158(5) and 348(2) and (3), petitioner has acknowledged in her brief and submissions below that the "[r]ights to child support are *permanently* assigned to the state and social services district as long as the support payments received do not exceed the total amount of assistance paid to the family as of the date the family no longer receives public assistance" (emphasis added). Here, since the total amount of PA paid to petitioner and her family exceeded the amount of child support collected by HRA when her PA case closed in February 2007, no excess support payment was owed to petitioner (*see* 18 NYCRR 347.13[f]; *see also Matter of Pringle v Johnson*, 158 AD2d 982 [4th Dept 1990]). Further, as provided by 18 NYCRR 347.13[f][3], "only amounts collected . . . which exceed the amount of unreimbursed past assistance shall be paid to the family." Accordingly, petitioner is not entitled to any child support arrears that HRA has not yet collected.

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

All concur except Feinman and Gische, JJ. who concur in part and dissent in part in a memorandum by Gische, J. as follows:

GISCHE, J. (concurring in part and dissenting in part)

I write separately because while I agree with the majority that petitioner was not entitled to a credit for certain child support payments collected by the City Human Resources Administration (HRA) on her behalf for the period encompassing September 2005 through January 2007, I do not believe that petitioner's assignment of child support is permanent, lasting for the duration of the family's public assistance case, even for a period of time when the subject child (Michael Jackson) is not a part of that household. Thus, I would modify the agency's determination to the extent of remanding the matter back for a recalculation of benefits paid for the family to exclude those periods of time after 2007 when Michael was not statutorily considered part of petitioner's family. I would also credit petitioner for $1,588.20, which represents the monies HRA received from the Social Security Administration (SSA) on her own behalf.

Petitioner brought this article 78 petition challenging respondents' determination that she is not entitled to share in any of the outstanding child support arrears owed on behalf of her son Michael. HRA claims that because the child support owed exceeds the assistance paid to the family, petitioner is not

entitled to any of the outstanding arrears, if and when they are collected. According to respondents, HRA made cash assistance payments to the family totaling $112,588.83 from the date petitioner first applied for public assistance in 1989 through August 1, 2011.

Petitioner also claims that respondents failed to properly credit her for the $1,588.20 that HRA received from SSA when she herself qualified for SSI benefits. Petitioner applied for public assistance in December 1989, and when Michael was born in May 1990, petitioner also began to receive public assistance on his behalf. Although petitioner has another, younger child born in 2000 (J.S.), for whom she also obtained public assistance, the children have different fathers and only the child support collected or due by Michael's father is the subject of this summary proceeding.

Since 2001, petitioner has been receiving public assistance under the Safety Net Assistance Program (SNA). Pursuant to Social Services Law § 131-c(1), when an application for public assistance is made on behalf of a minor, the other minor siblings residing in the same dwelling with that minor are required to also apply "for assistance and be included in the household for purposes of determining eligibility and grant amounts, if such

individuals reside in the same dwelling unit as the minor applying for assistance." With respect to budgeting, "[a]ny income of or available for such parents, brothers and sisters which is not disregarded under subdivision eight of section one hundred thirty-one-a of this article, shall be considered available to such household" (§ 131-c[1]). The provisions of [§ 131-c(1)] shall not apply to individuals who are recipients of federal supplemental security income benefits or additional state payments pursuant to [Chapter 55 of the Social Services Law]" (*id.*). As a condition of receiving SNA, the applicant must apply for federal SSI benefits if it "reasonably appears" he or she may be qualified for such benefits (Social Services Law § 158[2]; 18 NYCRR 370.2[b][5][ii]). Social Services Law § 158(5) provides that an application for "safety net assistance [SNA] shall operate as an assignment to the state and [HRA] of any rights to support that accrue during the period that a family receives [SNA]." It is undisputed that petitioner complied with each of these requirements, first by executing an assignment of her right to child support from Michael's father and then by applying for SSI on Michael's behalf in August 2005.

While Michael's SSI application was being processed, HRA continued to pay benefits on his behalf. Those interim

assistance payments were terminated by HRA in January 2007 when Michael was approved for SSI in January 2007 with benefits retroactive to September 2005. HRA recouped the sum of $1,232.50 from Michael's initial SSI payment, as it was permitted to do under Social Services Law § 158(5). During that same time, HRA also collected child support from Michael's father. Once Michael began receiving SSI, he was no longer eligible for public assistance (Social Services Law § 158[2]) and his case was closed on January 19, 2007. Petitioner began receiving child support payments directly from Michael's father via income execution once Michael's case was closed and she continued collecting those payments until Michael turned 21 in May 2011. At that time an order was entered in Family Court ending Michael's father's prospective support obligation, without prejudice to arrears. Petitioner's own public assistance case was closed in February 2007 and she later reapplied for SNA benefits in June 2009. She continued to receive SNA until the end of December 2011 when she became eligible for SSI, retroactive to September 2010.

Petitioner contends that she is entitled to the child support payments HRA collected during the period of September 2005 through January 2007 because HRA recouped its interim assistance payments from Michael's first SSI check. She

characterizes this as "double dipping" because her assignment of child support terminated in September 2005 when Michael became eligible for SSI, not when his case was closed in January 2007. Since HRA is not limited or prohibited by law or regulation from enforcing petitioner's assignment of child support simply because it has also obtained reimbursement from SSA for the same period of time, I agree with the majority, that respondents' determination as to the period encompassing September 2005 through January 2007 has a rational basis and petitioner has no valid claim to the child support that HRA collected on Michael's behalf through January 2007. There was no "double dipping" by HRA in collecting monies from both sources because HRA's recoupment of monies from these independent sources did not exceed the amount of unreimbursed past public assistance. The monies HRA received from Michael's initial SSI check and his father's child support payments were properly credited towards the public assistance provided to the petitioner's family through January 2007 while Michael was still eligible for public assistance and considered a member of that household. The interim assistance that HRA provided that household included money to meet Michael's basic needs and those needs were factored into the budget for its members during that time (18 NYCRR

353.2[a][1][i]).

The situation is different, however, after January 2007 when Michael began receiving SSI benefits and his case was closed. It is at this critical juncture where I depart from the majority's analysis and dissent with their interpretation and application of these and other applicable laws.

Pursuant to state regulations, "[f]or budgetary purposes, the number of persons in the public assistance household are those persons who the applicant, recipient or a representative indicates wish to receive public assistance and who reside together in the same dwelling unit" (18 NYCRR 352.30[a]). However, "children and adults residing with an SSI beneficiary must be considered a separate household from the SSI beneficiary with whom they live" (18 NYCRR 352.2[b]). Someone receiving federal SSI payments "shall not be eligible for safety net assistance" (Social Services Law § 158[2]). "[P]arents and siblings who are SSI recipients" and others who are ineligible for public assistance "are not required to apply [for public assistance] in accordance with {18 NYCRR 35230(a)]" (18 NYCRR 352.30[a]).

Notwithstanding these statutes and regulations, the majority agrees with respondents' determination that petitioner's

assignment of child support payments to them did not expire when Michael's case closed, because petitioner's assignment of rights to Michael's child support is permanent, lasting for the duration of the family's case, regardless of whether Michael's case closed sooner. Phrased differently, HRA argues that the assignment extends not just to current support payments collected while Michael received public assistance, but continued while the rest of the household he was once a part of received public assistance.

Respondents rely on the assignment of support language found in Social Services Law § 158(5) and 18 NYCRR 347.13(f), the latter of which provides that "[w]hen a family ceases receiving [public assistance], the assignment of support rights terminates, except with respect to the amount of any unpaid support obligation that has accrued under such assignment." According to respondents, "family" means all the members of the petitioner's family, even though statutorily Michael was a separate "household" once he began receiving SSI. Although the majority points out that no excess support payment is presently owed to petitioner because HRA's payments "to petitioner and her family" exceeded the amount of child support collected when Michael's case closed, HRA's desk review, which is a final reconciliation,

does not accurately reflect that once it recoups the child support attributable to Michael's support while he was statutorily considered a part of that household, any excess is due to petitioner.

Although petitioner and her younger son, J.S., continued to receive public assistance after Michael became eligible for SSI, and although petitioner reapplied for public assistance in June 2009, HRA notified her in June 2009 that the benefits it had approved were only for her and J.S. There is no indication that petitioner received SNA benefits on Michael's behalf after June 2009. In fact, although petitioner and both children were found qualified for and received food stamps, HRA specifically denied Michael benefits on the basis that his "SSI payment amount exceeds the individual's budget," referencing 18 NYCRR 352.1 and 352.29(b), the latter of which pertains to budget deficits.

The payment worksheets that respondents relied upon in performing their desk reviews and in support of their determination are uninformative and inconclusive, in large part because they do not differentiate between the benefits paid to the family when Michael was a part of petitioner's household and receiving public assistance and subsequently when he became his own separate household and his case was closed. According to

respondents, petitioner and J.S. received benefits totaling $10,704.42 between June 2009 and August 2011 and that sum is included in respondents' computation of unreimbursed public assistance. Although there was a brief two month period in 2009 when Michael apparently either lost or had his SSI benefits reduced and respondents provided him with temporary public assistance, Michael was a separate household from his mother and brother's household once he began receiving SSI. The benefits paid to petitioner's family are lumped together and the family treated as a single household unit for the entire period of time under review encompassing 1989 to 2011. The worksheet also does not appear to credit petitioner for the sum of $1,588.20 that HRA recovered from petitioner's initial SSI check when she qualified for her own SSI benefits effective December 2011, retroactive to September 2010.

Respondents' findings are arbitrary and capricious and erroneous as a matter of law to the extent that they seek to retain child support paid for an SSI recipient whose needs were not included in the public assistance grant once his cased closed in January 2007 (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Upon examination

of the applicable laws and regulations, it is evident that the term "family" as used in Part 347 of the Department of Social Services Regulations has to mean the child or children for whom there is a support order allowing HRA to collect the child support that otherwise would have gone to the custodial parent who has assigned his or her rights to receive such support directly. Otherwise reference to "paternity" and "enforcement of child support" in this regulation would be meaningless. The terms "family" and "families" are also used throughout Social Services Law § 131 in connection with eligibility for benefits based upon the size of the family.

Respondents' determination, that they are entitled to all of the outstanding child support and that petitioner's assignment of child support is permanent, lasting for the duration of the family's public assistance case, even for a period of time when Michael was not a part of that household, is without a rational basis and their interpretation of the applicable laws and regulations is inconsistent with their mandate that once a recipient qualifies for SSI, that person is ineligible for public assistance. Since HRA's calculation of the recoupment amounts it is due included monies paid to petitioner's household at a time when Michael was not a recipient of benefits, I would remand this

matter for a recalculation of the unreimbursed assistance amount so as to involve only the period of time Michael received public assistance as part of petitioner's household (*Matter of Police Benevolent Assn of N.Y. State Troopers v Vacco*, 253 AD2d 920, 921 [3d Dept 1998] ["We unquestionably have the right under CPLR 7806 to remit a matter to an administrative agency when further agency action is necessary to cure deficiencies in the record . . ."] *lv denied 92 NY2d 818[1998]; also Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 204 [1st Dept 2011] ["remand may be appropriate where the agency has made the type of substantial error that constitutes an 'irregularity in vital matters' . . ."].

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

ENTERED: JUNE 12, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12587-
12588 Index 654332/12

Thor Properties, LLC,
Plaintiff-Appellant,

-against-

Willspring Holdings LLC,
Defendant-Respondent.

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Matalon Shweky Elman PLLC, New York (Joseph Lee Matalon of counsel), for appellant.

Jones Day, New York (Robert C. Micheletto of counsel), for respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about October 10 and October 25, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Thor Properties brought this action for breach of contract to compel specific performance by defendant Willspring Holdings to sell it a mixed-used building in Manhattan. However, Willspring established that the parties' series of written and oral communications, made by their authorized principals, never formed a binding agreement, and, in light of the evidence in the record, Thor's unsupported allegations to the contrary are insufficient to raise a material issue of fact (*see European Am.*

Bank & Trust Co. v Schirripa, 108 AD2d 684 [1st Dept 1985]).

The following events are not in dispute. On December 5, 2012, Thor emailed Willspring a letter of intent (LOI) offering to buy the property for $111 million under terms that included Willspring's transfer of the property free of liens. The December 5th LOI also provided that, unless Willspring countersigned and returned it by December 7, Thor's offer would "be deemed withdrawn in its entirety."

The same day, Willspring emailed Thor to reject its offer, noting that Thor's purchase price fell short of other bids. Willspring also refused to transfer the property free of liens because it demanded Thor assume the existing mortgage on the property.

The parties continued negotiations on December 5 and 6. On the morning of the 6th, Willspring emailed Thor that it expected a modified LOI would be issued under which Thor increased its offer to $115 million and agreed to assume the mortgage, execute a long-form purchase agreement by December 11, 2012, and close by the end of the year.

Later on the 6th, Thor emailed a second LOI which increased the purchase price, but did not commit to executing the purchase agreement by December 11 or closing in 2012, and still required

Willspring to deliver the property free of liens. The new LOI also required Willspring's countersignature and delivery by December 7.

Thereafter, Willspring responded by sending Thor a copy of its December 6th LOI which Willspring had marked up by hand and signed. Willspring deleted Thor's requirement that the seller convey title free of liens, and added the December 11 deadline for an executed purchase agreement. Modifying its demand for a closing by year's end, Willspring provided that the closing must occur within 30 days after the purchase agreement was signed but also provided that "[time was of the essence]" for closing.

Minutes later, Willspring's principal emailed Thor that he was "pleased that we have been able to agree [to] terms." He cautioned, however, that if there were any "[renegotiating]" then Willspring would "walk away promptly." About one hour thereafter, however, Thor emailed Willspring that "[w]e will be getting our response to your proposed changes to the [December 6th] LOI shortly."

While the parties continued discussions on the evening of December 6, on the morning of December 7 Willspring's principal emailed Thor that "[p]er our conversation last night . . . I understand our changes to [the December 6th] LOI are NOT

acceptable to Thor as presented. Please send me a revised LOI with your suggested changes so I can have our attorney review them."

Later on December 7, Thor sent Willspring a new or third LOI which changed the terms of the marked-up December 6th LOI by giving Thor a unilateral right to adjourn the closing date by 10 days, despite time being of the essence. The December 7th LOI sent by Thor also extended the deadline for a signed purchase agreement by two days, but limited Thor's assumption of the mortgage to the only exception to Willspring's obligation to deliver the property free of liens. The December 7th LOI stated that it required Willspring's countersignature and return by that day.

On the afternoon of December 7, a Friday, Willspring's principal emailed Thor that the "LOI changes you have put forth . . . [are] not what we agreed to" because "[w]e were very clear on the need to sign a contract early next week and . . . to close by year end." The Willspring principal acknowledged that Thor's offer expired that day but promised that he would contact Thor the following Monday, December 10, to "discuss where we go."

On December 10, however, Thor emailed Willspring a copy of the December 6th LOI that Willspring had marked up and signed,

which now bore Thor's initials by Willspring's handwritten changes purportedly to show Thor's acceptance of the agreement that it had previously sought to modify. Willspring, however, contracted to sell its property to a third party.

The record demonstrates that the parties never came to terms and instead proposed a series of offers and counteroffers to which they never mutually agreed. Moreover, Thor's belated attempt to form a binding contract on December 10 was a nullity. To enter into a contract, a party must clearly and unequivocally accept the offeror's terms (*S.S.I. Invs. Ltd. v Korea Tungsten Min. Co.*, 80 AD2d 155, 158 [1st Dept 1981], *affd* 55 NY2d 934 [1982]). If instead the offeree responds by conditioning acceptance on new or modified terms, that response constitutes both a rejection and a counteroffer which extinguishes the initial offer (*Woodward v Tan Holding Corp.*, 32 AD3d 467 [2d Dept 2006]). The counteroffer extinguishes the original offer, and thereafter the offeree cannot, as Thor attempted on December 10, unilaterally revive the offer by accepting it (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 299 [1st Dept 2006]).

While oral acceptance of a written offer can form a binding contract for the sale of real property (*Tymon v Linoki*, 16 NY2d 293, 298 [1965]), the record does not support Thor's claim that

it unequivocally accepted the counteroffer that Wellspring set forth in the mark-up of the December 6th LOI, before that counteroffer terminated. Thor's email that it would respond to Willspring's changes to the December 6th LOI indicates that Thor had not accepted those changes and intended further negotiation.

Moreover, Willspring's email on the morning of December 7 confirms that Thor had rejected Willspring's counteroffer. At the time, Thor did not claim that an agreement had been reached, but instead responded to Willspring's email by submitting the December 7th LOI, which it described as another "offer." The December 7th LOI neither refers to the marked-up December 6th LOI as a binding agreement nor unconditionally accepts the counteroffer embodied in Willspring's handwritten changes.

Thor claims that on December 6 it orally accepted Willspring's changes to the December 6th LOI, but asked Willspring to consider some "slight modifications" that Thor would put into writing the next day. However, the changes in the December 7th LOI were not, as Thor claims, "immaterial," because they afforded Thor the unilateral right to adjourn the closing. If a real estate contract provides that the time of closing is of the essence, "performance on the specified date is a material element . . . and failure to perform on that date constitutes

. . . a material breach" (*New Colony Homes, Inc. v Long Is. Prop. Group, LLC*, 21 AD3d 1072, 1073 [2d Dept 2005]). By modifying a material term in Willspring's counteroffer, Thor rejected it and proposed a counteroffer that Willspring never accepted. Accordingly, the complaint for breach of contract was properly dismissed.

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

ENTERED: JUNE 12, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12686 The Lansco Corporation, Index 650608/13
Plaintiff-Appellant,

-against-

83 Wooster LLC,
Defendant-Respondent.

_____

Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for appellant.

Seiden & Schein, P.C., New York (David F. Yahner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 9, 2013, which, inter alia, denied plaintiff real estate broker's motion for summary judgment awarding it the balance of its commission and attorneys' fees and dismissing defendant landlord's counterclaims and affirmative defenses, unanimously affirmed, with costs.

Whether the landlord's acceptance of the tenant's surrender frustrated performance of the condition requiring the tenant to be in possession on the date the commission installment was due is a disputed issue of fact (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty, Co.*, 37 AD3d 43, 53 [1st Dept 2006]). In addition, there is an issue of fact as to whether the landlord was entitled to rely on the condition that there be no rent

default by the tenant when the commission was due. While the tenant's repudiation prior to the rent due date would be a default as a matter of law (*see generally American List Corp. v U.S. News & World Report*, 75 NY2d 38, 44 [1989] [repudiation generally]; *Pitcher v Benderson-Wainberg Assoc. II, Ltd. Partnership*, 277 AD2d 586 [3d Dept 2000], *lv dismissed* 96 NY2d 792 [2001] [doctrine of anticipatory breach applies to continuing obligations under lease]), it is unclear under the circumstances whether the tenant's attorney's representations regarding the January 2013 rent constituted a repudiation.

There were issues of fact precluding summary dismissal of the counterclaim alleging that plaintiffs assisted the tenant in breaking the sublease.

At this juncture, neither side was entitled to attorneys' fees.

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

ENTERED: JUNE 12, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12690-
12691 In re American Country Insurance Company, Petitioner-Appellant, Index 150423/13

-against-

Jennifer Mariany, Respondent-Respondent.

Dwyer & Taglia, New York (Joshua T. Reece of counsel), for appellant.

Finkelstein & Partners, LLP, Newburgh (George A. Kohl, II of counsel), for respondent.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 14, 2013, awarding respondent the principal sum of $50,000, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 1, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

An arbitration award is not subject to vacatur pursuant to CPLR 7511(b)(1)(iii) due to an arbitrator's mistake of fact or law or disregard for the plain words of the parties' agreement. Rather, the court must find that the award is "totally irrational or violative of a strong public policy and thus in excess of the arbitrator's powers" (*Hackett v Milbank, Tweed, Hadley & McCloy*,

86 NY2d 146, 155 [1995] [internal quotation marks omitted]). While the arbitrator here may have erred in interpreting the insurance policy, such error did not rise to the very high level required to vacate an arbitration award.

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

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12738 The People of the State of New York, Dkt. 38370C/11
Respondent,

-against-

Pedro Sosa,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard L. Price, J.), rendered July 26, 2012, convicting defendant, after a nonjury trial, of attempted forcible touching, attempted assault in the third degree, attempted criminal contempt in the second degree, menacing in the third degree, and harassment in the second degree (two counts), and sentencing him to an aggregate term of 60 days, unanimously modified, on the law, to the extent of vacating the conviction of attempted criminal contempt in the second degree and dismissing that count of the information, and otherwise affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The accusatory instrument was jurisdictionally defective as to the attempted criminal contempt charge, because it failed to

allege that defendant had knowledge of the order of protection that he allegedly violated, an element of the crime (*see People v Inserra*, 4 NY3d 30 [2004]). However, we reject defendant's challenges to a harassment charge, because defendant's statement to the victim was clearly a threat of physical violence, when viewed in context.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

The court providently exercised its discretion in declining to unseal or review the sealed file of a case that was, at best, marginally related to the present case, with the exception of a statement that the People properly used to impeach a defense witness. The court also providently exercised its discretion in imposing reasonable limits on cross-examination. In any event, there was no reasonable possibility that any errors regarding these matters affected the court's verdict.

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12739 In re Ronald J. Gumbaz, Index 104527/12
Petitioner,

-against-

City of New York Department of
Finance Parking Violations Operations,
Respondent.

_____

Ronald J. Gumbaz, appellant pro se.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

_____

Determination of respondent, dated August 29, 2012, which found that petitioner violated New York City Traffic Rules [34 RCNY] § 4-08(c)(3), unanimously annulled, on the law, without costs, the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.] entered on or about May 1, 2013), granted, and respondent directed to remit to petitioner the $115.00 fine and $185.00 towing fee.

At a hearing held on the summons issued by respondent alleging that petitioner violated the traffic rules (34 RCNY § 4-08[c][3]) by parking in a bus stop, petitioner submitted a series of high-quality photographs of the street where he was parked and provided sworn testimony explaining the photographs' context and

relationship to one another, which established that he was lawfully parked at a distance of approximately half a block from the bus stop, thereby rebutting the prima facie case established by the summons (*see* Vehicle & Traffic Law § 238[1]; 19 RCNY § 39-08[f][4]). Respondent failed to call any witness or to produce "additional evidence" to refute petitioner's showing (*see Matter of Gruen v Parking Violations Bureau of City of N.Y.*, 58 AD2d 48, 50 [1st Dept 1977]; *Matter of Rosen v New York City Dept. of Fin. Adjudication Div.*, 2014 NY Slip Op 30137[U], at 5 [Sup Ct NY County 2014]).

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, JJ.

12740 Daniel Seller, et al., Index 652001/11
Plaintiffs-Appellants,

-against-

Citimortgage, Inc.,
Defendant-Respondent.

_____

Giskan Solotaroff Anderson & Stewart LLP, New York (Catherine E. Anderson of counsel), for appellants.

Mayer Brown, LLP, Chicago, IL (Stephen J. Kane of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 30, 2013, which, to the extent appealed from, granted defendant's motion to dismiss the cause of action alleging a violation of General Business Law § 349, unanimously affirmed, without costs.

The complaint fails to allege any of the elements of a General Business Law § 349 claim in connection with defendant's implementation of its private mortgage loan modification program (*see Lucker v Bayside Cemetery*, 114 AD3d 162, 174 [1st Dept 2013]). It alleges that defendant told plaintiffs that to qualify for a loan modification they had to be delinquent in their mortgage payments, and instructed them, since they were not

at that time delinquent, to make four mortgage payments at a reduced rate. In so advising plaintiffs, defendant was not engaging in the requisite "consumer-oriented conduct" (*id.*). The conduct was "specific to them" (*see Silverman v Household Fin. Realty Corp. of New York*, __ F Supp 2d __, 2013 WL 4039381, *3, 2013 US Dist LEXIS 111970, *7-9 [ED NY 2013]); it had no "broader impact on consumers at large" (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

As to the element of a materially misleading act or practice, plaintiffs allege that defendant told them that to qualify for a loan modification they had to be delinquent, but they do not allege that this representation was false, nor did they submit documentary evidence refuting it. Plaintiffs also allege that defendant said it would block negative credit reporting, but they do not allege that defendant reported their delinquency during the private loan modification application period.

While the adverse consequences of a negative credit report could constitute the requisite injury for a cause of action under General Business Law § 349, as indicated, plaintiffs do not allege that a negative credit report was issued.

The complaint also alleges that defendant violated General

Business Law § 349 in connection with its processing of plaintiffs' application for a permanent loan modification under the federal Home Affordable Modification Program (HAMP). Initially, we conclude, as the motion court found, that plaintiffs waived this claim by stating at the hearing on defendant's motion that the cause of action was based on the alleged misrepresentations discussed above (*see e.g. Ward v City of New York*, 89 AD3d 532 [1st Dept 2011]). We note in any event that a cause of action under General Business Law § 349 alleging violations of HAMP rules and directives would constitute an impermissible "end run" around the absence of a private right of action under HAMP (*see Legore v OneWest Bank, FSB*, 898 F Supp 2d 912, 918 [D Md 2012]; *Valtierra v Wells Fargo Bank, N.A.*, 2011 WL 590596, *4, 2011 US Dist LEXIS 18669, *13-14 (ED Cal 2011]). Moreover, plaintiffs' allegations that defendant engaged in misleading practices in connection with HAMP are conclusively refuted by the "Home Affordable Modification Trial Period Plan."

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12741 In re Nutenti A.,
Petitioner-respondent,

-against-

Lizbeth H.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Steven N. Feinman, White Plains, for respondent.

_____

Order, Supreme Court, New York County (Gloria Sosa-Lintner, J.), entered on or about August 6, 2013, which, after a hearing in a proceeding brought pursuant to article 8 of the Family Court Act, granted petitioner's application for an order of protection as against respondent which expires on August 6, 2014, unanimously affirmed, without costs.

The record amply supports Family Court's determination that an order of protection is warranted (*see* Family Ct. Act § 832). Testimony from petitioner and his relatives, including a brother who resides in the apartment next door to petitioner, establishes that respondent, petitioner's wife, who is more than twenty years his junior, committed acts constituting the family offenses of harassment in the second degree (*see* Family Ct. Act § 812[1];

Penal Law § 240.26 [3]), and disorderly conduct (Penal Law § 240.20). The court's credibility determinations are supported by the record, and there is no basis to disturb them (*see Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]).

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12742 Andrew Lombardi, Index 110684/11
Plaintiff-Respondent, 590270/12
590989/12

-against-

Structure Tone, Inc., et al.,
Defendants-Appellants.

– – – – –

[And a Third Party Action]

– – – – –

Structure Tone, Inc., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

Robert B. Samuels, Inc.,
Second Third-Party Defendant-Respondent.

_____

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for appellants.

Alexander J. Wulwick, New York, for Andrew Lombardi, respondent.

Safranek Cohen & Krolian, White Plains (Karen Maniscalco of counsel), for Robert B. Samuels, Inc., respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 23, 2014, which granted plaintiff's motion to sever the second third-party action, unanimously affirmed, without costs.

In this action arising out of personal injuries allegedly sustained by plaintiff when he tripped over debris at a

construction site, the main action is trial-ready, but there is outstanding discovery in the second third-party action, which includes the depositions of necessary witnesses. Plaintiff would be substantially prejudiced by a long delay if compelled to await completion of disclosure in the second third-party action. Accordingly, the motion court did not abuse its discretion in granting the motion (*see Blechman v Peiser's & Sons*, 186 AD2d 50, 51-52 [1st Dept 1992]; *see also Pena v City of New York*, 222 AD2d 233 [1st Dept 1995]).

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12744 Karen Christino Kraar, also known as Karen Anita Christino, Petitioner-Respondent, Index 104177/12

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Karen Christino Kraar, respondent pro se.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 19, 2012, which granted the petition seeking to direct respondents to create, file and issue a birth certificate for petitioner's deceased grandfather, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed. The Clerk is directed to enter judgment accordingly.

New York City Health Code (24 RCNY) § 201.11(c) prohibits, among other things, registering or issuing a delayed birth certificate for a deceased person. Although we understand why

petitioner wanted to obtain the certificate, and agree that petitioner submitted adequate proof, there is no legal authority to grant her the requested certificate.

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12745 The People of the State of New York, Ind. 6037N/11
Respondent,

-against-

Peter Briggs,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about June 26, 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 12, 2014

CLERK

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

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12747 Cherry Hill Market
Corporation, et al., Index 154292/12
Plaintiffs-Appellants,

-against-

Cozen O'Connor P.C., et al.,
Defendants-Respondents.

_____

Paul Batista, P.C., New York (Paul Batista of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Gerard E. Harper of counsel), for Cozen O'Connor P.C., respondent.

Law Offices Of Sarah Diane Mc Shea, New York (Sarah Diane Mc Shea of counsel), for Howard B. Hornstein, respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 25, 2013, which granted defendants' motion to dismiss the complaint to the extent it dismissed the complaint without prejudice to plaintiffs re-serving a further complaint, unanimously modified, on the law, to deny the motion as to the third cause of action, and otherwise affirmed, without costs.

The first two causes of action allege that defendants, as plaintiffs' retained counsel in a zoning matter and an unrelated litigation, provided inadequate and ineffective representation because plaintiffs' "objectives" in the zoning matter were not achieved, and because a summary-judgment motion was not filed by

the court-imposed deadline in the unrelated litigation. The court properly treated the causes of action as sounding in legal malpractice, as opposed to causes of action founded upon common-law negligence and breach of fiduciary duty, and properly dismissed them due to insufficient allegations as to proximate cause (*see generally Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]; *Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). Indeed, plaintiffs did not plead facts to indicate that "but for" defendants' alleged inadequate and ineffective representation of plaintiffs in the zoning and litigation matters, plaintiffs would have achieved the desired results sought (*Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]; *Lieblich v Pruzan*, 104 AD3d 462, 462-463 [1st Dept 2013]).

Plaintiffs' third cause of action, alleging that defendants breached their fiduciary duty because they either collected and/or billed plaintiffs for excessive and/or unearned fees, should not have been dismissed as duplicative of the malpractice causes of action (*see Loria v Cerniglia*, 69 AD3d 583, 583 [2d Dept 2010]). The third cause of action was not based upon the same facts underlying the malpractice claims (*cf. Cosmetics Plus*

Group, Ltd. v Traub, 105 AD3d 134, 143 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]). With respect to the instant complaint, a claim of breach of fiduciary duty can be premised on excessive legal fees charged by an attorney (*see Sobell v Ansonelli*, 98 AD3d 1020, 1022 [2nd Dept 2012] *see also Nason v Fisher*, 36 AD3d 486, 487 [1st Dept 2007]).

The court providently exercised its discretion in dismissing plaintiffs' fourth cause of action seeking declaratory relief regarding a dispute over legal fees, since an adequate remedy at law existed for the claim (namely, the third cause of action) (*see generally Apple Records v Capital Records*, 137 AD2d 50, 54 [1st Dept 1988]).

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12748 The People of the State of New York, Ind. 3137/11
Respondent,

-against-

Andre Holmes,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 15, 2012, convicting defendant, after a jury trial, of petit larceny, and sentencing him to a term of one year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations. The victim's testimony, which was generally corroborated by that of a police officer, established a wrongful taking of property.

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12749-
12750 In re Ni'Kia C., and Another,

Children Under Eighteen Years of Age, etc.,

Dominique J., etc.,
Respondent-Appellant.

The Commissioner of the Administration
for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jenna Krueger of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about April 19, 2013, which, to the extent appealed from as limited by the briefs, upon a fact-finding that respondent-appellant father had abused and neglected the subject son and derivatively neglected the subject daughter, ordered that respondent shall continue to have supervised visits with 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 (James E. d'Auguste, J.),

entered on or about October 17, 2012, unanimously dismissed, without costs, as superseded by the appeal taken from the order of disposition.

The finding of abuse was supported by a preponderance of the evidence (Family Ct Act § 1046[b][I]). Petitioner made a prima facie showing that a transverse fracture of the femur, such as the one sustained by the 16-month-old subject boy, would ordinarily not have been sustained except by reason of a caretaker's acts or omissions, and that respondent was the child's caretaker at the time the injury occurred (*see Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Amire B. [Selika B.]*, 95 AD3d 632 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]). The expert medical witness also testified that in addition to the femur fracture, the child also sustained a burn to the cheek, indicative of neglect, which in combination was indicative of child physical abuse. In response, respondent failed to present any evidence of a credible and reasonable explanation for how the child suffered the femur fracture (*Philip M.*, 82 NY2d at 244-246; *Amire B.*, 95 AD3d at 632). The court properly drew a negative inference from respondent's refusal to testify (*see Matter of Jonathan Kevin M. [Anthony K.]*, 110 AD3d 606, 607 [1st Dept 2013]), and properly declined to consider speculative

explanations unsupported by any evidence.

A preponderance of the evidence also supported the finding of neglect in connection with the burn, which is likely to result in permanent scarring. Respondent explained that the burn occurred after the child fell asleep on a frozen pack of meat given to him by respondent to treat a bruise. Respondent failed to exercise a minimum degree of care in allowing the burn to occur and then failing to seek medical treatment (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

The subject son's injuries arising out of respondent's abuse and neglect are sufficiently severe so as to support the finding that the subject daughter, who is approximately the same age as the son and was in respondent's care at the time of the son's injuries, was derivatively neglected by respondent (*see e.g. Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606, 607 [1st Dept 2011]).

The appeal from the part of the dispositional order directing that respondent shall continue to have supervised visitation with the children is moot, as the terms of the order have expired and subsequent dispositional orders have been entered (*see Matter of Pearl M.*, 44 AD3d 348, 348 [1st Dept 2007]). In any event, in light of the findings of abuse and

neglect, the imposition of supervised visitation was in the children's best interests (*see generally Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 556 [1st Dept 2014], *lv denied* 2014 NY Slip Op 71243 [2014]).

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12752 Hugh Wyatt, Index 102228/12
Plaintiff-Appellant,

-against-

Inner City Broadcasting Corporation,
Defendant-Respondent,

Pierre Sutton,
Defendant.

_____

Law Office of Ellery Asher Ireland, Brooklyn, (Ellery Asher Ireland of counsel), for appellant.

Meyer, Suozzi, English & Klein, P.C., Garden City (Robert N. Zausmer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered December 18, 2012, which granted the motion of defendant Inner City Broadcasting Corporation (ICBC) to dismiss the complaint as against it pursuant to CPLR 3211(a)(1) and (7) and 3016(b), and directed the Clerk of the Court to enter judgment in ICBC's favor, unanimously affirmed, without costs.

The motion court properly dismissed so much of the complaint as sought documents. Unlike fraud or breach of fiduciary duty, "seeking documents" is not a cause of action. To the extent plaintiff's pro se complaint, supplemented by his opposition to ICBC's motion to dismiss, can be read to allege fraud, breach of

fiduciary duty, and violation of Business Corporation Law § 713, those claims are derivative rather than direct. His argument that he adequately pled demand futility is unavailing. Demand is excused because of futility when a complaint alleges with particularity that "a majority of the board of directors is interested in the challenged transaction" (*Marx v Akers*, 88 NY2d 189, 200 [1996]), "the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances" (*id.)*, or "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*id.* at 200-201). A corporation's refusal to provide information to its shareholders is not on the above list of circumstances where demand is excused.

To the extent plaintiff seeks to bring claims for fraud or

breach of fiduciary duty against ICBC, the claims are dismissed because they are pled in a conclusory manner.

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12753- Index 101852/12
12753A In re Joseph Porcello,
Petitioner,

-against-

The New York City Housing Authority,
Respondent.

_____

Rutuin & Wolf, PLLC, Bronx (Jason M. Wolf of counsel),for petitioner.

Kelly D. MacNeal, New York (Jeffrey Niederhoffer of counsel), for respondent.

_____

Determinations of respondent New York City Housing Authority, dated October 26, 2011, each terminating petitioner's employment as an elevator mechanic on the grounds of incompetency and misconduct, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered April 2, 2013), dismissed, without costs.

The determinations are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]), and the penalty of termination of employment does not shock our sense of fairness

(*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). The record demonstrates that in addition to petitioner's misconduct in purchasing cocaine while on duty, petitioner, on two separate occasions, carried out his job responsibilities in a manner that involved health and safety risks, and resulted in actual physical injury to others. Each of these situations posed a safety risk and thus when considered separately warrant termination. Furthermore, the fact that petitioner had an otherwise unblemished work history, does not warrant a different determination.

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12754 Stilwell Value Partners, IV, L.P., etc., Plaintiff-Respondent, Index 653011/11

-against-

Diane B. Cavanaugh, et al., Defendants-Appellants,

Northeast Community Bancorp, Inc., Nominal Defendant-Appellant.

_____

Kilpatrick Townsend & Stockton LLP, New York (Jonathan E. Polonsky of counsel), for appellants.

Allegaert Berger & Vogel LLP, New York (Richard L. Crisona of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 23, 2013, which, in a derivative action, denied defendants' motion to dismiss, unanimously affirmed, with costs.

Plaintiff sufficiently alleged with the requisite detail that defendant directors, who sit on the boards of both the defendant parent company, Northeast Community Bancorp, MHC, and its subsidiary, nominal defendant Northeast Community Bancorp, Inc., have a conflict of interest regarding plaintiff's proposed transaction, based on, inter alia, their dual loyalties and self-interest (*see generally Bansbach v Zinn*, 1 NY3d 1, 11 [2003];

Marx v Akers, 88 NY2d 189, 200 [1996]). Contrary to defendants' contention, self-interest is not limited to a direct financial interest. Affording the pleading the benefit of every favorable inference (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]), it also sufficiently alleges that the directors breached their fiduciary duties of loyalty and due care and failed to act in good faith by either failing to adequately consider or to undertake plaintiff's demand to add disinterested directors to Northeast's board or engage in a two step conversion of its structure (*see Auerbach v Bennett*, 47 NY2d 619, 629-631 [1979]; *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]).

Plaintiff also sufficiently alleges that MHC, as Northeast's majority shareholder, breached its fiduciary duty to the minority (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 569 [1984]), and aided and abetted the directors' alleged breach by knowingly providing substantial assistance in refusing to act when under a duty to do so (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]).

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

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

ENTERED: JUNE 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12755 Randy Genet, et al., Index 102304/04
Plaintiffs-Appellants,

-against-

Gerald B. Appel, M.D.,
Defendant-Respondent.

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Thomas Torto, New York for appellants.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 1, 2013, upon a jury verdict, in favor of defendant, and bringing up for review an order, same court and Justice, entered April 19, 2013, which denied plaintiffs' motion pursuant to CPLR 4404(a) to set aside the jury verdict, unanimously affirmed, without costs.

Plaintiffs contend that the jury verdict in this medical malpractice action should be overturned on the basis that the trial court committed fundamental error by failing to charge Education Law § 6530(32), which requires a physician to maintain proper records of his treatment and oral instructions to his patients. However, plaintiff failed to request such charge or to object to the charge that was given at trial, and thus failed to

preserve the issue for appellate review (*Schaefer v New York City Tr. Auth.*, 96 AD3d 485 [1st Dept 2012]; *Kroupova v Hill*, 242 AD2d 218 [1st Dept 1997], *lv dismissed, lv denied* 92 NY2d 1013 [1998]; *see also* CPLR 4110-b). The trial court's omission of such a charge was not a "fundamental" error that might warrant review in the interests of justice (*cf. Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009]).

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 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12756 The People of the State of New York, Ind. 1297/12
Respondent,

-against-

Michael Lillo,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about September 11, 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 12, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12757N Frank Desario, Index 103530/10
Plaintiff-Respondent,

-against-

SL Green Management LLC, et al.,
Defendants-Appellants.

_____

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

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered December 23, 2013, which granted plaintiff's motion to quash subpoenas duces tecum served upon his former employers and for a protective order precluding defendants from using any of the information obtained by the subpoenas at trial, unanimously affirmed, without costs.

The motion court providently exercised its discretion in quashing defendants' post note of issue trial subpoenas seeking plaintiff's entire employment files from three employers.

Defendants failed to demonstrate "unusual or unanticipated" circumstances or "substantial prejudice" sufficient to warrant post-note of issue discovery. (*See, Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]; 22 NYCRR 202.21[d]).

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

ENTERED: JUNE 12, 2014

CLERK