SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 20, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

12337 Carolyn Le Bel, as Executrix of the Estate of Marya Lenn Yee,
Plaintiff-Appellant,

-against-

Mary A. Donovan, et al.,
Defendants-Respondents. Index 652200/10

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Gallet Dreyer & Berkey, LLP, New York (David S. Douglas of counsel), for appellant.

Amos Alter, New York, for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen Bransten, J.), entered October 1, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, granted defendants' cross motion for summary judgment dismissing the fourth and sixth cause of action, and declared that the subject partnership was not dissolved upon the decedent's death, unanimously modified, on the law, to deny defendants' cross motion as to the sixth cause of action and vacate the declaration, and otherwise affirmed,

without costs.

The motion court correctly reconciled apparently conflicting provisions of the partnership agreement, giving meaning to both (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371 [2006]). Contrary to plaintiff's contention, the provision that appears first does not automatically govern, as New York has not adopted the "first clause" doctrine of contract interpretation (*see Israel v Chabra*, 12 NY3d 158, 168 [2009]). Further, as plaintiff concedes, her interpretation of the contract renders section 6.8(b) superfluous, depriving it of all effect. Section 6.8(a) provides that "[a] voluntary dissolution (including any dissolution by law resulting from only one Partner remaining . . . following the death . . . of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI . . . ." Section 6.8(b) of the agreement provides that the partnership will survive the death of a partner if a new partner is admitted no more than 90 days after the death. When read together, these sections provide for dissolution upon the death of a partner unless a new partner is admitted within 90 days (*see Burger, Kurzman, Kaplan & Stuchin v Kurzman*, 139 AD2d 422, 423-424 [1st Dept 1988], *lv denied* 74 NY2d 606 [1989]).

An issue of fact exists, however, as to whether Andrea Calvaruso, the new partner, was actually an equity partner. While the new partnership agreement referred to her as an equity partner and purported to give her a 5% interest in the firm, Calvaruso made no capital contribution to the firm and received monthly guaranteed payments as a salary. Further, she only nominally shared in 5% of the firm's potential profits and losses (*see Shine & Co. LLP v Natoli*, 89 AD3d 523 [1st Dept 2011]). These facts preclude judgment for either side on this issue.

The motion court correctly dismissed the claim for an accounting, because the partnership agreement provided that the sole accounting to which partners would be entitled was a statement the firm's regular outside accountants prepared, and a statement was prepared and provided to plaintiff (*see* Partnership Law § 74).

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

ENTERED: MAY 20, 2014

CLERK

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

12509 The People of the State of New York, Ind. 2608/11
Respondent,

-against-

Mark Simmons,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 10, 2012, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant's challenges to the prosecutor's cross-examination and summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The challenged portions of the cross-examination of defendant constituted permissible impeachment, and the court's curative action was sufficient to prevent the prosecutor's misstatement of the record during summation from causing any prejudice.

Because the statements defendant challenged as involuntary were to be used solely to impeach defendant if he opted to testify, the court did not err in declining to conduct a pretrial hearing on the voluntariness of those statements (*see People v Whitney*, 167 AD2d 254, 255 [1st Dept 1990], *lv denied* 77 NY2d 912 [1991]). Defendant's rights would have adequately been protected by a midtrial hearing in the event that he chose to take the stand (*see id.*). However, when defendant ultimately chose to testify, his attorney made no request for a hearing, and thus abandoned the issue of voluntariness. In any event, there is nothing in the record to indicate any basis for challenging the admissibility, for impeachment purposes, of defendant's statements.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 20, 2014

CLERK

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

12510-
12511-
12512 Index 102336/96

Bank Leumi Trust Company
of New York,
Plaintiff,

-against-

Newby Toms,
Defendant-Appellant,

Emerald Investors Limited,
Nonparty Respondent.

_____

Newby Toms, appellant pro se.

Albert PLLC, New York (Craig J. Albert of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 21, 2013, which denied defendant's motion to vacate enforcement proceedings relating to the confessions of judgment filed by plaintiff and subsequently assigned to respondent judgment creditor, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 14, 2013, as amended July 29, 2013, which, to the extent appealable, denied defendant's motion to renew, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered June 14, 2013, which, to the extent appealed

from as limited by the briefs, granted respondent's cross motion to direct the Clerk to record the assignment of the judgments to respondent, unanimously affirmed, without costs.

Supreme Court correctly rejected defendant's argument that the general release executed by plaintiff, the original judgment creditor, served to extinguish the judgments by confession that the plaintiff had duly filed in 1996. Rather, the court properly read the general release in conjunction with the contemporaneously executed stipulation of settlement agreement between, inter alia, plaintiff and defendant (*see Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]; *Teletech Europe B.V. v Essar Servs. Mauritius*, 83 AD3d 511, 512 [1st Dept 2011]). Read as a whole, the agreements make clear that defendant was only released from direct liability to plaintiff, which assigned the judgments to respondent judgment creditor's predecessor. Not only does the stipulation of settlement agreement expressly provide that plaintiff assigned the judgments to respondent's predecessor, but defendant's affidavit in support of his original motion acknowledged this assignment, and that respondent's predecessor assigned all of its rights, claims and properties to respondent in December of 2010. Such formal judicial admissions are binding for the purposes of this litigation (*see Figueiredo v*

New Palace Painters Supply Co., Inc., 39 AD3d 363, 364 [1st Dept 2007]), and, in any event, they are supported by the documentation in the record.

Supreme Court also correctly found that defendant failed to meet his burden to establish that he had paid the judgments to respondent's predecessor or to respondent (*see Dowling v Hastings*, 211 NY 199, 201 [1914]). Defendant did not present a satisfaction of judgment, and his claims to have paid the judgments in 2002 to respondent were refuted by respondent's principal, and are inconsistent with the fact that respondent, although a beneficiary of the predecessor trust, did not own the judgments until the trust's property was assigned to it eight years later. Moreover, the sole trustee of the predecessor trust at the time of the alleged payment averred that he never entered into any agreement to accept payment of defendant's debt to the trust.

Supreme Court properly directed the Clerk of the Court to record the transfer of the judgments pursuant to CPLR 5019(c).

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

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

ENTERED: MAY 20, 2014

CLERK

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

12513 Alexander Komolov, et al., Index 651626/11
Plaintiffs-Appellants,

-against-

David Segal, et al.,
Defendants-Respondents.

_____

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

Frank Kurnit Klein & Selz, PC, New York (Beth I. Goldman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 19, 2013, which granted defendants' motion to dismiss the thirteenth cause of action, unanimously affirmed, with costs.

The thirteenth cause of action for unjust enrichment is precluded in this case because it seeks precisely the same relief that was barred by the statute of frauds.

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

ENTERED: MAY 20, 2014

CLERK

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

12514-
12515 The People of the State of New York,
Respondent,

Ind. 1790/12
2193/12

-against-

Gregory Potts,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered on or about June 27, 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: MAY 20, 2014

CLERK

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

12516 Skiboky Shaver Stora, Index 117071/08
Plaintiff-Respondent,

-against-

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

FJC Security Services, Inc.,
Defendant-Respondent,

Marcus Serrano,
Defendant.

_____

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge (Scott G. Christesen of counsel), for appellants.

Chukwuemeka Nwokoro, Brooklyn, for Skiboky Shaver Stora, respondent.

Jones Hirsch Connors & Bull P.C., New York (Peter Read of counsel), for FJC Security Services, Inc., respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about December 4, 2013, which, insofar as appealed from as limited by the briefs, granted defendant FJC Security Services, Inc.'s motion for summary judgment dismissing all claims and cross claims against it, and denied the City of New York, the New York City Department of Homeless Services (together, the City), and Volunteers of America-Greater New York, Inc.'s (VOA) motion for summary judgment dismissing the complaint

as against them, unanimously modified, on the law, to grant so much of the City and VOA's motion as sought to dismiss the complaint as against the City, and to deny so much of FJC's motion as sought to dismiss VOA's cross claim for contractual indemnification, and otherwise affirmed, without costs.

The provision of adequate security to prevent attacks by third parties at a homeless shelter is a governmental function, for the performance of which the governmental entity cannot be held liable unless it owes a special duty to the plaintiff (*Akinwande v City of New York*, 260 AD2d 586, 587 [2d Dept 1999], *lv dismissed in part, denied in part* 93 NY2d 1030 [1999]; *see also Marilyn S. v City of New York*, 134 AD2d 583, 585 [2d Dept 1987], *affd* 73 NY2d 910 [1989]). Since the record contains no evidence that the City owed a special duty to plaintiff, the City cannot be held liable for the injuries plaintiff sustained when defendant Serrano shot him on shelter premises.

However, an issue of fact whether VOA was negligent in its duty to provide minimum security in the shelter is presented by ample evidence that residents had previously smuggled deadly weapons onto shelter premises, inter alia, by jumping over the perimeter fence, and that the weakness of the perimeter fence had been reported to VOA (*see Maheshwari v City of New York*, 2 NY3d

288, 294 [2004]; *Osorio v City of New York*, 44 AD3d 553 [1st Dept 2007]; *Brewster v Prince Apts.*, 264 AD2d 611, 614-615 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000]).

Pursuant to the terms of the indemnification clause in the contract between FJC and VOA, VOA may assert a contractual indemnification claim against FJC to the extent plaintiff's injuries are found to have been "a result of an act or omission of FJC, including its employees." Issues of fact whether FJC was at least partly responsible for the failure of perimeter security that led to plaintiff's being shot on shelter premises are presented by the evidence that FJC had the "primary" responsibility for patrolling the perimeter fence, that an FJC security guard was aware of a fight, involving a knife, between plaintiff and Serrano earlier in the day of the shooting and

that, in sight of the guards, Serrano left the premises by jumping over the fence, and that when he returned later with a gun he entered by jumping over the fence.

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

ENTERED: MAY 20, 2014

CLERK

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

12517 Terrasure Development LLC, et al., Index 603533/07
Plaintiffs-Appellants,

-against-

Illinois Union Insurance Company,
Defendant-Respondent.

_____

Garrity, Graham, Murphy, Garofalo & Flinn, P.C., New York (Francis X. Garrity of counsel), for appellants.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Meryl R. Lieberman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered August 21, 2013, which denied plaintiffs' motion for summary judgment declaring that defendant Illinois Union Insurance Company was obligated to provide plaintiffs coverage under the Environmental Remediation Cost Containment Policy defendant issued to them, and granted defendant's cross motion for a declaration that it was not required to provide plaintiffs coverage, unanimously affirmed, without costs.

The motion court correctly determined that plaintiffs failed to comply with numerous conditions precedent to coverage under the policy, vitiating the contract as a matter of law (*see e.g. Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742

[2005]), including the requirement to provide timely notice of any pollution condition which might result in excess remediation costs.

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

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

ENTERED: MAY 20, 2014

CLERK

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

12518 The People of the State of New York, Ind. 1081/12
Respondent,

-against-

Miguel Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Emily L. Auletta of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 4, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and manslaughter in the first degree, and sentencing him to an aggregate term of 12 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful

offender determination. Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments.

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

ENTERED: MAY 20, 2014

CLERK

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

12519 Yesenia Vargas, Index 21465/11
Plaintiff-Appellant,

-against-

Moses Taxi, Inc., et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 20, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claim of serious injury to the left knee within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff raised an issue of fact in opposition to defendants' prima facie showing by submitting her treating orthopedic surgeon's affirmation that, while performing arthroscopic surgery, he observed and repaired tears to the medial and lateral meniscus, and that in his opinion those injuries were directly caused by the accident. The surgeon also found restricted and painful range of motion in the left knee

before and after surgery, when compared to a normal knee and to the uninjured right knee (*see Nelson v Tamara Taxi Inc.*, 112 AD3d 547 [1st Dept 2013]; *Calcano v Rodriguez*, 103 AD3d 490 [1st Dept 2013]; *Garner v Tong*, 27 AD3d 401 [1st Dept 2006]).

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

ENTERED: MAY 20, 2014

CLERK

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

12520 Laquana Conrad, Index 300270/10
Plaintiff-Appellant,

-against-

Apolonia Alicea, et al.,
Defendants-Respondents.

_____

Weiss & Rosenbloom, P.C., New York (Erik L. Gray of counsel), for appellant.

Montfort, Healy, McGuire & Salley, Garden City (Michael R. Adams of counsel), for Alicea respondents.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Five J's Automotive Ltd and Kevin S. Kiernan, respondents.

_____

Appeal from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 9, 2013, which, following a summary jury trial, denied plaintiff's motion to set aside the jury's verdict on the issue of damages and remand the action for a new trial, unanimously dismissed, without costs.

Plaintiff's motion seeking to set aside the jury verdict on the issue of damages as "inconsistent and in the interest of justice," pursuant to CPLR 4404(a), in substance seeks to set aside the verdict as inadequate and/or against the weight of the evidence (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597 [1st Dept 2008]), and is thus precluded by the summary jury trial

rules stipulated to by the parties. In consenting to the rules of this alternative dispute resolution forum, plaintiff specifically agreed to waive motions to set aside the verdict or judgment rendered by the jury, and waived any appeals, in order to quickly resolve the instant dispute. We therefore dismiss the appeal.

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

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

ENTERED: MAY 20, 2014

CLERK

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

12522 Ralph Cole Hardware, etc., Index 350054/10
Plaintiff, 84134/11

-against-

Ardowork Corporation, et al.,
Defendants.

- - - - -

Ardowork Corporation, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Lloyd Hardware,
Third-Party Defendant-Appellant.

_____

Segal McCambridge Singer & Mahoney, Ltd, New York (David S. Kostus of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Carmen A. Nicolaou of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 28, 2013, which denied third-party defendant's motion to dismiss for lack of jurisdiction, and granted defendants/third-party plaintiffs' cross motion to deem personal service sufficient and proper, unanimously affirmed, without costs.

Third-party plaintiffs have made a prima facie showing that third-party defendant, the father of the infant plaintiff, was "doing business" in New York, through a voluntary, continuous and

self-benefitting course of conduct, sufficient to render him subject to the general jurisdiction of this State's courts (CPLR 301; *see e.g. ABKCO Indus. v Lennon*, 52 AD2d 435, 440 [1st Dept 1976]; *see also Bryant v Finnish Natl. Airline*, 15 NY2d 426, 428 [1965]; *Lancaster v Colonial Motor Frgt. Line*, 177 AD2d 152, 156 [1st Dept 1992]). The evidence included, among other things, Mr. Hardware's testimony concerning his long-term employment as a scientist at an "undisclosed location" in New York, and documentary evidence presented by third-party plaintiffs showing that he also had a long-term business relationship with a New York company, for which he acted as designated agent, but which he failed to disclose. Under the circumstances of this case, the court properly discredited Mr. Hardware's self-serving affidavit, submitted in opposition to third-party plaintiffs' cross motion, which was tailored to avoid the consequences of his earlier, inconsistent deposition testimony and representations concerning his continued employment in New York (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

Personal jurisdiction over Mr. Hardware may not, however, be based on CPLR 302(a)(3) because, although he engaged in a persistent course of conduct within the State, the situs of the injury alleged in the third-party complaint is Connecticut, where

the infant plaintiff was allegedly exposed to lead-based paint at a property owned by Mr. Hardware, regardless of whether the child resided in New York at the time (*see Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 532 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]).

As Mr. Hardware was subject to personal jurisdiction pursuant to CLPR 301, personal service upon him in Connecticut was proper pursuant to CPLR 313.

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

ENTERED: MAY 20, 2014

CLERK

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

12523 Anthony Farmer, Index 301959/10
Plaintiff-Appellant,

-against-

Ventkate Inc.,
Defendant-Respondent,

"John Doe," etc.,
Defendant.

_____

Joshua E. Bardavid, New York, for appellant.

Majorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 27, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Ventkate Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was struck by defendant's taxi, resulting in injuries to his right knee that required surgery. Defendant established prima facie that plaintiff did not sustain a serious injury causally related to the accident, by submitting the affirmed reports of an orthopedist, who concluded that plaintiff had preexisting osteoarthritis for which he required arthroplasty, unrelated to the accident, and a radiologist, who

opined that the post-accident X rays showed severe osteoarthritis and no evidence of traumatic injury (*see Batista v Porro*, 110 AD3d 609 [1st Dept 2013]; *Paduani v Rodriguez*, 101 AD3d 470, 471 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact as to causation or aggravation of the preexisting arthritic condition of his right knee. His orthopedic surgeon concurred that the X rays showed advanced degenerative changes, including complete loss of joint space, and diagnosed him with right knee osteoarthritis before and after surgery. In light of these findings, he provided "no objective basis or reason, other than the history provided by plaintiff," in support of his belief that the accident "likely" exacerbated plaintiff's preexisting condition (*Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516 [1st Dept 2011]; *see Suarez v Abe*, 4 AD3d 288, 289 [1st Dept 2004]). Moreover, plaintiff offered no evidence of any injuries different from his undisputed preexisting arthritic condition, and his surgeon "failed to otherwise explain why those preexisting

conditions were ruled out as the cause of his current alleged limitations" (*Kamara v Ajlan*, 107 AD3d 575, 576 [1st Dept 2013]; *Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]).

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

ENTERED: MAY 20, 2014

CLERK

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

12524 Elizabeth Francis Kerrigan, Index 111775/03
Individually and as Executrix
of the Last Will and Testament of
Thomas W. Connelly, Deceased,
Plaintiff-Appellant,

-against-

Metropolitan Life Insurance
Company, et al.,
Defendants-Respondents.

_____

Eric Dinnocenzo, New York, for appellant.

d'Arcambal Ousley & Cuyler Burk LLP, New York (Michelle J. d'Arcambal of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered on or about May 14, 2013, which, inter alia, denied plaintiff's motions for leave to amend the complaint, to compel discovery and for summary judgment, and granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"Insurance Law § 3105 permits an insurer to rescind a policy where the application contains a material misrepresentation" (*East 115th St. Realty Corp. v Focus & Struga Bldg. Devs. LLC*, 85 AD3d 511, 511 [1st Dept 2011]). Although the EKG taken of the decedent in connection with the initial application revealed

"abnormalities," the decedent, who had a significant history of coronary artery disease, and had two prior heart attacks, stated, among other things, that he had never been treated for coronary disease, heart disorder, or high blood pressure. Thus, the underwriter's affidavit, along with the relevant underwriting guidelines establishing that the policy would not have been issued in this form had the true state of the decedent's condition been known, was sufficient to establish defendants' entitlement to judgment as a matter of law (*see Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115 [1st Dept 2007]).

Plaintiff's contention that the affirmations of the decedent's treating cardiologist, as well as the affirmation of another cardiology expert, put defendants on notice that the decedent had prior heart attacks, is unavailing, as plaintiff may not "shift the burden of truthfulness" to the insurer (*Friedman v Prudential Life Ins. Co. of Am.*, 589 F Supp 1017, 1025 [SD NY 1984] [internal quotation marks omitted]). There is no evidence to support the assertion that defendants had actual notice of anything other than "abnormalities" in the decedent's EKG. Defendants did not ignore the EKG or the test results, and made a decision based upon the physician's interpretation of the EKG, as well as the completed application, the paramedical examination

and the personal history interview.

Based on the absence of actual knowledge, plaintiff's estoppel/waiver argument fails (*compare United States Life Ins. Co. in the City of N.Y. v Blumenfeld*, 92 AD3d 487, 489-490 [1st Dept 2012]). Equally unavailing is plaintiff's assertion that defendants should be precluded from referring to the more specific facts referenced in the February 24, 2004 letter, which referenced additional treatment for myocardial infarction, uncontrolled hypertension, and noncompliance with medication, as the second letter provided additional facts supporting the same basis for claim denial, namely the decedent's medical history (*see Abreu v Huang*, 300 AD2d 420 [2d Dept 2002]).

Furthermore, inasmuch as the underwriting guidelines were properly followed, there were no issues of facts warranting additional discovery, and the motion for leave to amend to add bad faith causes of action was properly denied.

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

ENTERED: MAY 20, 2014

CLERK

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

12525 The People of the State of New York, SCI 964/12
Respondent,

-against-

Tony Shaw,
Defendant-Appellant.

_____

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

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

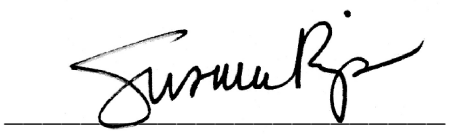
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about April 5, 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: MAY 20, 2014



CLERK

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

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

12526 In re Antonio J. Jenkins, Index 107700/08
Petitioner-Appellant, 113272/08

-against-

Daryle Young,
Respondent-Respondent.

- - - - -

In re Antonio J. Jenkins,
Petitioner-Appellant,

-against-

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

_____

Antonio J. Jenkins, appellant pro se.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Marta Ross of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 27, 2013, which dismissed the petition, unanimously affirmed, without costs.

Petitioner's arguments that the charges against him were false and maliciously motivated, and that his union-provided counsel notified DOE counsel of a hearing date, do not provide a basis to vacate the arbitration award against him pursuant to CPLR Article 75 (*Matter of Asch v New York City Bd./Dept. of*

Educ., 104 AD3d 415, 418 [1st Dept 2013]). Further, contrary to petitioner's arguments, to the extent his claims for defamation or libel could be said to survive the conversion of this action to a proceeding under Article 75, those claims are time barred since the action was commenced more than one year after the acts complained of (CPLR 215[3]).

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

ENTERED: MAY 20, 2014

CLERK

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

12528 In re Tracey Smith, Index 100664/13
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

_____

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

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

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Determination of respondents, dated February 4, 2013, which dismissed petitioner from her position as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alice Schlesinger, J.], entered August 7, 2013) dismissed, without costs.

Respondents' determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. Of Human Rights,* 45 NY2d 176, 181-182 [1978]), including petitioner's admissions that she lied to federal agents conducting a drug trafficking investigation.

The penalty of dismissal does not shock the conscience in that petitioner was found to have engaged in serious misconduct,

and admitted other less serious charges committed during her short career as a police officer.

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

ENTERED: MAY 20, 2014

CLERK

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

12529 The People of the State of New York, Ind. 1073/07
Respondent,

-against-

Ronald Godbold,
Defendant-Appellant.

_____

Pamela D. Hayes, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at pretrial motions; Lewis Bart Stone, J. at jury trial and sentencing), rendered July 30, 2009, convicting defendant of two counts of criminal possession of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to concurrent terms of 10 years, unanimously affirmed.

The court properly denied defendant's motion to preclude, on the ground of lack of CPL 710.30(1)(a) notice, audio recordings containing statements by defendant. The statements were outside the scope of the statute, both because they were made as part of a criminal transaction, and also because they were made to persons who were not public servants (*see People v Semidey*, 254 AD2d 57 [1st Dept 1998], *lv denied* 92 NY2d 985 [1998]).

After dismissing the indictment on the ground of legal insufficiency of the grand jury evidence, the motion court properly exercised its discretion in reinstating the indictment upon the People's submission of a portion of the grand jury minutes that had been inadvertently omitted from their original submission (*see People v Contreras*, 192 AD2d 417 [1st Dept 1993], *lv denied* 81 NY2d 1071 [1993]). The court had inherent authority to reinstate the indictment (*see People v Frederick*, 14 NY3d 913, 916-917 [2010]), and defendant's claim that the indictment was unlawfully amended is without merit, because the text of the indictment remained unchanged. Although defendant asserts that nothing in the CPLR is relevant to the court's action, he inconsistently asserts that the People exceeded the 30-day time limit for reargument motions set forth in CPLR 2221(d). In any event, that time limit would be inapplicable because the People's motion was essentially for renewal rather than reargument, and the court had discretion to entertain it (*see e.g. Framapac Delicatessen v Aetna Cas. & Sur. Co.*, 249 AD2d 36 [1998]). Finally, we note that defendant was not prejudiced by any mislabeling of the People's motion.

After conducting a suitable inquiry and determining that an absent juror would not appear within two hours after the time

that the trial was scheduled to resume, the court properly exercised its discretion in substituting an alternate juror (*see* CPL 270.35(2); *People v Jeanty*, 94 NY2d 507, 511 [2000]).

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that 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 record is unclear as to whether the court received or considered defendant's midtrial motion to receive in evidence portions of the grand jury testimony of an absent witness. In any event, there was no basis for receiving this hearsay evidence, and no violation of defendant's constitutional right to present a defense (*see People v Robinson*, 89 NY2d 648, 654 [1997]). Since there is no evidence that defendant took any actions, other than vaguely alluding to possible remedies, when the witness failed to respond to a subpoena, defendant did not establish that the witness was unavailable. Furthermore, despite ample opportunity to do so, defendant never established that the absent witness's testimony would have been material and not cumulative.

The court properly declined to give an accomplice corroboration charge regarding one of the People's witnesses. There was no evidence that she was involved in any of the facts or conduct constituting the offenses charged (*see People v Sweet*, 78 NY2d 263 [1991]), and no basis on which to submit to the jury the issue of whether she was an accomplice. The witness was only defendant's accomplice in the commission of separate criminal activity that preceded the crimes at issue (*see e.g. People v Cruz*, 291 AD2d 1 [1st Dept 2002], *lv denied* 97 NY2d 752 [2002]). We perceive no basis for reducing the sentence.

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

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

ENTERED: MAY 20, 2014

CLERK

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

12530N CIT Technology Financing Services I LLC, etc., Plaintiff-Appellant, Index 21583/06

-against-

Bronx Westchester Medical Group, P.C., etc., et al., Defendants-Respondents.

_____

Foster & Wolkind, P.C., New York (Peter B. Foster of counsel), for appellant.

David M. Samel, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 31, 2013, which, to the extent appealed from, denied plaintiff's motion to dismiss the affirmative defenses and for summary judgment on its breach of contract claims, unanimously modified, on the law, to grant the part of the motion seeking summary judgment as to liability under Lease I, and otherwise affirmed, without costs.

In opposition to plaintiff's prima facie showing of breach of contract, through the submission of the three equipment leases at issue, the assignment of the lease agreements to plaintiff from its predecessor in interest, and documents showing defendant's failure to make payments in accordance with the

agreements, defendant raised an issue of fact as to liability under Leases II and III by submitting an affidavit by one of its former shareholders acknowledging that he signed Lease I but denying that the signatures on Leases II and III were his, and copies of the three lease agreements showing three noticeably different signatures (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]). Neither repossession of the equipment under Lease I nor defendant's claim of overpayment is sufficient to raise an issue of fact as to that lease.

We reject plaintiff's argument that defendant ratified Leases II and III, since the record does not establish that defendant had full knowledge of all the material facts relating to the transaction (*see generally King v Fox*, 7 NY3d 181, 190 [2006]; *Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131 [1990]).

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11093 In re Nancy Fisher Kirschner, File 86A/11
Petitioner-Appellant, 86B/11

-against-

Charles A. Fisher,
Respondent-Respondent,

Barbara Snow,
Respondent.

_____

Greenburg Traurig LLP, New York (Leslie D. Corwin of counsel), for appellant.

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about January 30, 2013, which construed formula clauses in trust agreements relating to two grantor retained annuity trusts (GRATs) to require that the remaining assets in the GRATs pass in equal shares to grantor's three children, unanimously affirmed, without costs.

This appeal requires us to resolve two competing interpretations of two GRATs that grantor Janet Fisher (Janet), the mother of petitioner Nancy Fisher Kirschner (Nancy) and respondent Charles Fisher (Charles) established in 2009 and

2010.[1] The GRATs provided for annuity distributions to Janet during the two-year terms of the trusts, and alternatively contemplated the disposition of the assets remaining in them if she survived the terms, or did not, as follows:

> "(C) Upon the expiration of the Trust Term, the Trustees shall distribute all of the remaining principal and . . . all income of the trust accrued or on hand . . . as follows:
>
> (1) If the Grantor is then living, such property shall pass to the Grantor's children NANCY FISHER KIRSCHNER, CHARLES A. FISHER AND BARBARA SNOW, in equal shares if all of them are then living . . .
>
> (2) If the Grantor is not then living, the remaining trust property shall pass as follows:
>
> (a) A fractional share of the trust property, the numerator of which is equal to the *amount of said trust property which is includible in the Grantor's gross estate for Federal estate tax purposes*, and the denominator of which is equal to the value of the entire trust property, as finally determined in the Federal estate proceeding in the Grantor's estate, shall pass to the Grantor's estate.
>
> (b) The balance thereof shall pass to the Grantor's children NANCY FISHER KIRSCHNER, CHARLES A. FISHER AND BARBARA SNOW, in equal shares if all of them are then living . . ." (emphasis added).

Janet died on December 28, 2010, before the GRATs expired. Accordingly, we are concerned only with section (C)(2). That

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[1] A third child, Barbara Snow, is not a party to this appeal.

section is, on its face, quite straightforward. Because Janet died before the GRATs expired, whatever fraction of the assets in the GRATs is "includible in the Grantor's gross estate for Federal estate tax purposes" passes into the estate, and any remainder is distributed equally to the three children. However, the federal estate tax expired in 2010, the year of Janet's death. Although Congress reinstated the tax shortly before Janet's death, it permitted executors of estates of individuals who died in 2010 to elect to pay no estate tax. Nancy and Charles, Janet's executors, made that election. Nevertheless, they disagree on its impact on the operation of the GRATs.

Charles maintains that, because the estate paid no estate tax, the fraction of the assets in the GRATs "includible in the Grantor's gross estate for Federal estate tax purposes" pursuant to section (C)(2)(a) was zero, and that as a result the "balance" of the assets pursuant to section (C)(2)(b) is everything in the trust. Nancy, on the other hand, maintains that the fraction of the assets in the GRATs "includible in the Grantor's gross estate for Federal estate tax purposes" is what would have been paid in estate taxes had she and respondent not elected to forego paying the tax. For this she relies on EPTL 2-1.13(a)(1). That section, the title of which states that it applies only to

"[c]ertain formula clauses," provides:

> "If by reason of the death of a decedent property passes or is acquired under a beneficiary designation, a will or trust of a decedent who dies after December thirty-first, two thousand nine and before January first, two thousand eleven, that contains a bequest or other disposition based upon the amount of property that can be sheltered from federal estate tax by referring to the 'unified credit,' 'estate tax exemption,' 'applicable exclusion amount,' 'applicable exemption amount,' 'applicable credit amount,' 'marital deduction,' 'maximum marital deduction,' 'unlimited marital deduction,' 'charitable deduction,' 'maximum charitable deduction' or similar words or phrases relating to the federal estate tax, or that measures a share of an estate or trust based on the amount that can pass free of federal estate taxes, or that is otherwise based on a similar provision of federal estate tax then such beneficiary designation, will or trust shall be deemed to refer to the federal estate tax law as applied with respect to decedents dying in two thousand ten, regardless of whether an election is made not to have the federal estate tax apply to a particular estate."

EPTL 2-1.13 therefore requires that "[c]ertain formula clauses" be calculated "regardless of whether an election is made not to have the federal estate tax apply to a particular estate" (EPTL 2-1.13[a][1]). Thus, if the statute applied, it would calculate the amount "includible" as the entire estate.

It is not surprising that the parties take the positions they do. Nancy wants all of the GRAT assets to pass into the estate, because Janet's will bequeathed to her and her sister 45% of the assets in the estate, but only 10% to Charles. This was

to adjust for certain gifts Janet's husband had made to Charles during his lifetime. Charles, on the other hand, wants section (C)(2)(b) to control all of the GRAT assets because then he will get a share of them equal to those of his two sisters.

Charles has the better of the two arguments, because EPTL 2-1.13(a)(1) is inapplicable and section (C)(2) of the GRATs is unambiguous despite the 2010 expiration of the estate tax. In interpreting a statute, a court "should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of the City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976] [citations omitted]). "Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Sutka v Conners*, 73 NY2d 395, 403 [1989]).

A review of the legislative history of EPTL 2-1.13(a)(1) reveals that its purposes were quite narrow and that it was primarily a legislative fix enacted to prevent the thwarting of the well-intentioned estate plans of those who, in good faith reliance on the existence of an estate tax in 2010, bequeathed

significant portions of their estates to persons other than their spouses, so they could take full advantage of the spousal estate tax exemption. For people who died in 2010, the expiration of the estate tax not only nullified oft-utilized tax planning strategies, but threatened to leave their spouses with less money than they otherwise would have received, and with no concurrent benefit. The Legislature, by enacting EPTL 2-1.13(a)(1), saved these estate plans by permitting their creators to adopt the fiction that they paid an estate tax, even if they did not.

There is no evidence here that the GRATs at issue were created with the specific goal of taking advantage of spousal exemptions based on the federal estate tax, or were structured for similar purposes. Further, the Legislature did not contemplate that the repeal of the tax law would implicate the formula clause at issue here. The clause here references federal estate tax laws not to minimize tax liability, but to account for an uncertain value to include in the taxable estate upon death of the grantor, to be distributed in proportion to each of the beneficiaries' taxable share of the estate (*see* EPTL 2-1.8(a); *Matter of Gilligan*, 247 AD2d 383, 383-384 [2d Dept 1998]). Thus, contrary to petitioner's assertions, the GRATs' reference to the amount of trust property "includible in the Grantor's gross

estate for Federal estate tax purposes" is not analogous to the "amount that can pass free of federal estate taxes, or that is otherwise based on a similar provision of federal estate tax," as EPTL 2-1.13(a)(1) recites.

The plain language of the statute also militates against petitioner's argument. By its terms, EPTL 2-1.13(a)(1) applies only to property that passes "by reason of the death" of a decedent who dies in 2010. Here, the GRAT remainders did not pass when Janet died or as a result of her death. To the contrary, the GRAT remainders were going to pass to the beneficiaries regardless of whether Janet died during the terms of the GRATs, and her death affected only their proportionate shares. Moreover, the plain language of the trust agreement, which states that Janet expected her GRAT to be divided in equal shares if it was not subject to the estate tax, advances the stated purpose in the legislative history, "[t]o preserve the form in which most testators expected their estates to be divided prior to the unexpected repeal of the Federal estate tax," (Assembly Mem in Support, Bill Jacket, L 2010, ch 349 at 9, 2010 McKinney's Session Laws of NY at 1924). The trust agreement similarly provided that the entire balance should be divided equally if she had survived the two-year term.

Because EPTL 2-1.13(a)(1) is not applicable in light of the parties' election not to pay the estate tax, Surrogate's Court correctly held that the amount "includible" in grantor's gross estate for federal estate tax purposes is unambiguous and readily calculable as zero. "[W]here the language employed is so clear and unmistakable as to convey only one meaning even when read in its proper setting[,] . . . the intent evidenced by the language is given effect without reference to external circumstances or rules of construction" (*Matter of Fabbri*, 2 NY2d 236, 244 [1957]).

Accordingly, Surrogate's Court need not have considered any extrinsic evidence of any contrary intent, nor was there any such evidence, as the documents petitioner offered merely contain counsel's cautionary advice to grantor that if she died before expiration of the term of the trusts, the balance of the trusts would be included in her taxable estate for purposes of calculating any estate tax. Indeed, if grantor wanted the balance of the GRATs to pass in disproportionate shares to her children regardless of whether the estate tax applied, she could have drafted the relevant subparagraph to require such unequal, rather than equal, distribution. Instead, as Surrogate's Court

noted, she opted for an unambiguous distribution scheme under which her children would share equally in the remainder of her GRATs unless the trust property was subject to federal estate tax.

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

ENTERED: MAY 20, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12207 Board of Education of the City School District of the City of New York, Petitioner-Appellant, Index 405372/07

-against-

Alexis Grullon, Respondent-Respondent.

_____

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

Wolf & Wolf LLP, Bronx (Jason M. Wolf of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 5, 2012, denying petitioner's motion for leave to renew or reargue a prior order, same court and Justice, entered June 10, 2011, which sua sponte dismissed, as abandoned, the underlying proceeding to vacate or modify an arbitration award, unanimously dismissed, without costs, as taken from a nonappealable paper.

This proceeding arises out of an arbitration award rendered July 13, 2007 that imposed upon respondent a penalty of six months' unpaid suspension and mandatory counseling based on a finding that he had engaged in inappropriate contact with female students. The petition seeks judgment vacating the award (CPLR

7511[b][1]) or, in the alternative, modifying the award to impose a penalty terminating respondent's employment as a tenured teacher with the New York City School District (CPLR 7511[c]). Respondent interposed a motion to dismiss the petition for lack of personal jurisdiction (CPLR 404[a]), the denial of which was affirmed by this Court in September 2009 (65 AD3d 934 [1st Dept 2009]). Petitioner did not inquire as to the status of the matter until September 2010 and upon learning that the assigned Justice had retired, undertook to have the matter restored to the calendar. A status conference was ultimately held on March 3, 2011, at which time petitioner was directed to retrieve the court file and attempt to reach a settlement with respondent, with the condition that if petitioner's attorney was without authority to settle the matter, it would be dismissed as abandoned. At a second conference conducted later that month, petitioner informed the court that while counsel did have settlement authority, the parties were unable to reach an agreement. The matter was adjourned to May 25, 2011, at which time the court issued a sua sponte order dismissing the proceeding as abandoned in accordance with its March 3, 2011 order. Petitioner then brought the instant motion, designated as one to renew and/or reargue, contending that the court had "overlooked the entire procedural

history of this matter and misapplied the applicable law regarding when a proceeding may be deemed abandoned."

It is well settled that no appeal lies from an order issued sua sponte (CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]) or from an order denying reargument (*see Marine Midland Bank v Bowker*, 89 AD2d 194 [3d Dept 1982], *affirmed for reasons stated below* 59 NY2d 739 [1983]). Although petitioner failed to identify the nature of this application in contravention of statutory requirements (CPLR 2221[d][1], [e][1]), the motion specifies matters of fact and law asserted to have been misapprehended by the court and clearly seeks reargument (CPLR 2221[d][2]). Furthermore, this Court has repeatedly stated that the proper procedure to be followed to appeal from a sua sponte order is to apply to vacate the order and then appeal from the denial of that motion (CPLR 5701[a][3]; *see e.g. Diaz v New York Mercantile Exchange*, 1 AD3d 242, 243 [1st Dept 2003]) so that a suitable record may be made and counsel afforded the opportunity to be heard on the issues (*see Davidson v Regan Fund Mgt. Ltd.*, 15 AD3d 172 [1st Dept 2005]). Alternatively, the aggrieved party may seek permission to appeal (CPLR 5701[c]).

Nothing in the moving papers identifies the application as one seeking to vacate the motion court's order, nor does it

provide the requisite demonstration of the merit of the proceeding (*see Carroll v Nostra Realty Corp.*, 54 AD3d 623 [1st Dept 2008], *lv dismissed* 12 NY3d 792 [2009]; *cf. Mediavilla v Gurman*, 272 AD2d 146 [1st Dept 2000]). In particular, it does not demonstrate that a disagreement over the penalty assessed by the arbitrator constitutes a basis for vacating the award on a ground specified by statute (CPLR 7511[b][1]) or that there is any ground for modification of the award (CPLR 7511[c]). We note that petitioner has not sought leave to appeal (*see* CPLR 5701[c]) and, given the passage of seven years since the issuance of the arbitration award, we decline to nostra sponte grant such relief.

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

ENTERED: MAY 20, 2014

CLERK

Tom, J.P., Renwick, Richter, Feinman, Gische, JJ.

12290 In re Isaac A.,

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

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Michael A. Cardozo, Corporation Counsel, New York (Jenna Lynn Krueger of counsel), for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for respondent.

_____

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about July 31, 2013, which dismissed the juvenile delinquency petition on speedy trial grounds, unanimously affirmed, without costs.

The court properly dismissed the petition after concluding that the presentment agency failed to demonstrate good cause for adjourning the suppression and fact-finding hearings beyond the 60-day speedy trial limit (*see* Family Court Act § 340.1[2],[4][a]). We find no basis for disturbing the court's determination that the presentment agency's inability to complete

the suppression hearing within the time limit resulted from its inadequate preparation and lack of reasonable measures to insure its readiness to proceed on the required date (*Matter of Robert B.*, 187 AD2d 647 [1st Dept 1992]).

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

ENTERED: MAY 20, 2014

CLERK

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

12488N- 12488NA
Shamicka R., an infant by her mother and natural guardian Annette S., et al.,
Plaintiffs-Respondents,

-against-

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

Rainbow Transit, Inc.,
Defendant-Appellant.

Index 350312/08

_____

O'Connor Redd LLP, Port Chester (Joseph M. Cianflone of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 18, 2013, which, to the extent appealed from as limited by the briefs, denied defendant Rainbow Transit, Inc.'s motion to compel plaintiffs to provide authorizations for the infant plaintiff's medical records listed in an October 10, 2012 discovery demand, and granted plaintiffs' cross motion for a protective order, unanimously reversed, on the law and the facts, without costs, plaintiffs' cross motion denied, defendant's motion granted as to the health care providers for which insurance codes were provided, and, as to the remaining providers, the matter is remanded for further proceedings in

accordance herewith. Appeal from order, same court and Justice, entered July 10, 2013, which denied defendant's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

The infant plaintiff suffers from congenital defects, including cerebral palsy and spastic diplegia, which required that she walk with leg braces and be assisted by an assigned paraprofessional at all times while in school. Plaintiffs seek to recover damages for permanent injuries the infant allegedly sustained when she slipped and fell while attempting to walk into her middle school building by herself — that is, without the aid of an assigned paraprofessional, bus driver, or bus matron — after defendant Rainbow Transit, Inc., which operated the school bus that the infant plaintiff rode to school, had dropped her off. Plaintiffs assert that the subject accident has caused severe pain and permanent neurological and muscular-skeletal injuries to nearly every part of the infant's body, especially her lower extremities, impairing her gait and balance, and making it difficult for her to ambulate. They claim further that these physical conditions, and a host of other debilitating mental and emotional injuries, have caused the infant to be unable to perform usual daily functions, and have resulted in a "loss of

enjoyment of the quality of life."

Plaintiffs have provided many authorizations for medical records but have objected to the October 2012 discovery demand listing another 30 providers. For 21 of the listed providers, defendant provided the insurance codes that identified the specific conditions treated; the codes identify either the congenital defects from which the infant suffers or another condition relating to one of the physical, mental, or emotional injuries claimed in the bill of particulars. The infant's mother testified that the infant had been treating with an orthopedic surgeon from a very young age, and had undergone nine surgeries to address her balance, gait, and other ambulatory problems. Further, the doctor who performed a neurological and psychiatric evaluation of the infant on defendants' behalf noted this history, and opined that many of the injuries complained of are likely caused by, or associated with, the infant's congenital conditions.

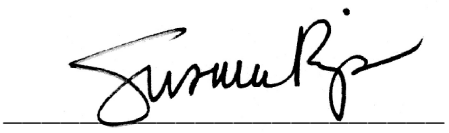
Under these circumstances, defendant demonstrated that the requested records are relevant to the mental and physical conditions that plaintiffs placed in controversy (*see Walters v Sallah*, 109 AD3d 401 [1st Dept 2013]; *Colwin v Katz*, 102 AD3d 449 [1st Dept 2013). Given the long-standing nature of the infant's

congenital conditions, defendant is entitled to authorizations for medical records unrestricted by date (*see Colwin*, 102 AD3d at 449; *McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479 [1st Dept 2011]).

We remand to Supreme Court for an in camera review of the records of the nine providers for which defendant could not obtain insurance codes, to determine the records' potential relevance (*see Carcana v New York City Hous. Auth.*, 47 AD3d 523 [1st Dept 2008]), and then to fix reasonable parameters as to time frame and relevance (*see Walters*, 109 AD3d at 402).

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

ENTERED: MAY 20, 2014



CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12533 In re 150 RFT Varick Corp., Index 100999/13
Petitioner-Appellant,

-against-

New York State Liquor Authority,
Respondent-Respondent.

_____

Gary E. Divis, New York, for appellant.

Mark D. Frering, Albany, for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 30, 2013, which denied the petition to vacate a penalty of a $10,000 fine and 10-day suspension of petitioner's liquor license, imposed by respondent pursuant to its determination, dated July 3, 2013, sustaining charges that petitioner had violated certain provisions of the Alcoholic Beverage Control Law and the Rules of the State Liquor Authority, unanimously affirmed, without costs.

The penalty imposed does not shock one's sense of fairness (*see generally 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]). We reject petitioner's argument that, in light of a prior summary

suspension order issued pursuant to State Administrative Procedure Act (SAPA) § 401(3) and in effect during the 13-day period between June 26 and July 9, 2012, the subject penalty of a 10-day suspension constitutes double jeopardy. The summary suspension order was not an adjudication of wrongdoing, but rather, an interim "emergency action" undertaken to protect the "public health, safety, or welfare" (SAPA 401[3]). Thus, a summary suspension order does "not constitute a final judgment" and lacks preclusive effect vis-a-vis subsequent licensee disciplinary proceedings (*see e.g. Matter of Couples at V.I.P. v New York State Liq. Auth.*, 272 AD2d 615, 616 [2d Dept 2000]). The summary suspension provisions of section 401(3) thus supplement, and do not conflict with, the agency's plenary licensee disciplinary framework (*see Matter of Netupsky v New York State Bd. of Regents*, 95 Misc 2d 763, 765-766 [Sup Ct, Albany County 1978]).

Accordingly, in assessing the propriety of the agency penalty, we are not required to consider the effect of the prior emergency suspension, although we acknowledge our discretion to consider the impact upon a licensee of prior penalties for the same misconduct (*see Matter of Miracle Pub v New York State Liq. Auth.*, 210 AD2d 229, 230 [2d Dept 1994], *lv denied* 86 NY2d 706

[1995]). Even if we were to exercise such discretion in this case to consider the impact of the prior emergency suspension, the resulting cumulative 23-day period of suspension would still not be disproportionate to the sustained charges of extensive misconduct (*see e.g. Matter of E.G. Pub v New York State Liq. Auth.*, 213 AD2d 156 [1st Dept 1995]; *Crismechy Rest. & Tavern v New York State Liq. Auth.*, 158 AD2d 295 [1st Dept 1990]).

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

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12534-
12535 The People of the State of New York,
Respondent,

SCI 5316/07
Ind. 2517/10

-against-

Gladys Moreno,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, New York County (Richard M. Weinberg, J.), rendered on or about December 5, 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: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12536 Victor R. Pantojas, Index 301865/10
Plaintiff-Appellant,

David Galindez,
Plaintiff,

-against-

Lajara Auto Corp., et al.,
Defendants-Respondents.

_____

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 29, 2012, which granted defendants' motion for summary judgment dismissing the complaint as to plaintiff Victor R. Pantojas (plaintiff) for failure to meet the serious injury threshold pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that he sustained serious injuries to his left knee, cervical spine, and lumbar spine as a result of a motor vehicle accident while he was a passenger in defendants' car. Defendants established prima facie that plaintiff did not sustain a significant or permanent consequential limitation in

any of the claimed parts of the body by submitting the affirmed report of their orthopedist finding normal range of motion and normal tests results (*see generally Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). The burden thus shifted to plaintiff to raise a triable issue of fact.

As to plaintiff's proof, although his chiropractor's report was not notarized (CPLR 2106; *Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]), it may be considered to the extent it did not constitute the sole basis for plaintiff's opposition (*see Pietropinto v Benjamin*, 104 AD3d 617, 618 [1st Dept 2013]), which also included the affirmed findings of plaintiff's orthopedist concerning the left knee and lumbar spine. The conclusions of plaintiff's experts insofar as they relied on the unaffirmed MRI reports showing injuries may be considered, given that defendants' own expert incorporated and relied on those unaffirmed reports in rendering his opinion (*see Amamedi v Archibala*, 70 AD3d 449 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]; *Bent v Jackson*, 15 AD3d 46, 47-48 [1st Dept 2005]).

Plaintiff failed to raise a triable issue of fact as to the knee, since his chiropractor did not set forth limitations in use of the knee in qualitative or quantitative terms (*see Toure*, 98 NY2d at 350), and his orthopedist's findings of range of motion

limitations were not significant or consequential (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584, 585 [1st Dept 2011]; *Arrowood v Lowinger*, 294 AD2d 315, 316 [1st Dept 2002]). Nor did plaintiff raise a triable issue of fact as to the cervical spine. His orthopedist did not evaluate or render any opinion concerning that part of the spine, and his chiropractor's finding concerning the cervical spine was inadmissible, as it was sole basis for plaintiff's opposition concerning that part of the body.

Plaintiff, however, raised a triable issue of fact as to existence of a significant and permanent consequential limitation in the lumbar spine. His chiropractor found range of motion limitations, spasms, and positive Kemp's and straight leg raising tests, and his orthopedist also observed range of motion limitations (*see Pietropinto*, 104 AD3d at 617-618; *Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]). Both doctors' findings of a causally related injury based on their examination and plaintiff's history raised a triable issue of fact as to causation (*see James v Perez*, 95 AD3d 788, 788-789 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Plaintiff's physical therapy records, submitted by defendants, showing that he began physical therapy five days after the accident, provides contemporaneous evidence of injuries

(*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Swift v New York Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]). The IAS court erred, however, in dismissing the complaint on gap-in-treatment grounds, as defendants did not raise that issue before the court (*see Sylla v Brickyard Inc.*, 104 AD3d 605 [1st Dept 2013]; *Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]).

Because plaintiff is entitled to present his claims based on the lumbar injuries, he is also entitled to seek damages for injuries to his cervical spine and left knee caused by the accident, even if those injuries did not meet the threshold on the record now before the court (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12537- Index 651762/12
12538-
12539-
12540 Getty Properties Corp., et al.,
Plaintiffs-Respondents,

-against-

Getty Petroleum Marketing Inc.,
Defendant,

1314 Sedgwick Ave. LLC, et al.,
Defendants-Appellants.

_____

White & Wolnerman, PLLC, New York (Randolph E. White of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered on or about December 10, 2013, which, inter alia, granted plaintiffs' motion to hold defendants in civil and criminal contempt; order, same court and Justice, entered December 17, 2013, which dismissed defendants' November 26, 2013 motion; and order, same court and Justice, entered on or about January 14, 2014, which dismissed defendants' October 21, 2013 motion, unanimously affirmed, with costs.

We see no reason to disturb the court's findings of contempt and its dismissal of defendants' motions, which violated a prior

injunction requiring court approval for the making of any motion in this action. Defendants' challenges to the propriety of the injunction were disposed of in a prior appeal (115 AD3d 616 [1st Dept 2014]).

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12541 In re Dwayne F.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 13, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute attempted robbery in the second degree, attempted grand larceny in the fourth degree, and attempted assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification

and credibility. The victim had a sufficient opportunity to observe appellant and made a reliable identification. We have considered and rejected appellant's remaining arguments.

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

ENTERED: MAY 20, 2014

CLERK

CORRECTED ORDER - MAY 22, 2014

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12542 **Alan** Podel, Index 306312/09
Plaintiff-Respondent- 83780/10
Appellant,

-against-

Glimmer Five, LLC,
Defendant-Appellant-
Respondent,

Warren A. Whyte, et al.,
Defendants.

- - - - -

Glimmer Five, LLC,
Third Party Plaintiff-Appellant-
Respondent,

-against-

Lilipanka 13 LLC, doing business
as The Mojo Lounge,
Third Party Defendant-Respondent.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant-respondent.

Reibman & Weiner, Brooklyn (Marc Reibman of counsel), for respondent-appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Dennis J. Monaco of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 10, 2013, which denied defendant landlord's motion for summary judgment seeking dismissal of the complaint and the third-party defendant tenant's cross claim, and contractual indemnification against third-party defendant tenant, and denied

plaintiff's cross motion for summary judgment on the issue of constructive notice, unanimously modified, on the law, defendant landlord's motion for summary judgment granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff, an employee of third-party defendant tenant's restaurant, alleges that, while carrying, with both hands, a heavy pot containing hot liquid, he fell and was injured as he was descending a dangerous spiral staircase located between the restaurant's basement prep kitchen and its ground floor main kitchen. Liability does not lie against defendant out-of-possession landlord because the claimed riser, tread and handrail violations were not significant structural defects (*see Quing Sui Li v 37-65 LLC*, 114 AD3d 538 [1st Dept 2014]; *Drotar v Sweet Thing, Inc.*, 106 AD3d 426, 427 [1st Dept 2013]; *Kittay v Moskowitz*, 95 AD3d 451, 452 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). The staircase was not an "interior stair" as defined in § 27-132 of the NYC Administrative Code (*see Quing Sui Li*, 114 AD3d 538; *Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531 [1st Dept 2013]). Nor were the claimed violations of former §§ 27-127 and 27-128 specific statutory safety provisions that may serve as predicates for defendant landlord's liability (*see Centeno*, 11 AD3d 531). It is therefore immaterial whether landlord had notice of the allegedly dangerous condition

or retained a right to reenter (*see Nielsen v 300 E. 76th St. Partners, LLC*, 111 AD3d 414, 415 [1st Dept 2013]; *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497, 498 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]).

We note that nothing in the record supports the possibility that the landlord built the allegedly offending staircase.

The lease's indemnification clause does not violate General Obligations Law § 5-321. Although it purports to indemnify the landlord for its own negligence, the parties permissibly allocated the risk to insurance, regardless of whether indemnification was limited to its proceeds (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 415 [1st Dept 2009][*citing Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 (2006)]). Moreover, the clause is valid as applied, as there is no view of

the evidence that the landlord was negligent (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]; *Guzman v 170 West End Ave. Assoc.*, __ AD3d __, 2014 Slip Op 01537 [1st Dept 2014]). The third party defendant is therefore liable for the costs of defendant's defense.

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12544 Nicola Newark, Index 252256/08
Plaintiff-Respondent,

-against-

Hector R. Pimentel,
Defendant-Respondent,

Bobby Wong,
Defendant-Appellant.

_____

Brand Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for appellant.

Votto & Albee, PLLC, Staten Island (Christopher J. Albee of counsel), for Hector R. Pimentel, respondent.

The Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for Nicola Newark, respondent.

_____

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 1, 2013, after separate jury trials on liability and damages, awarding plaintiff damages as against defendant Bobby Wong in the amount of $63,000 for past pain and suffering, $200,000 for future pain and suffering for 20 years, and $63,000 for past medical expenses, unanimously affirmed, without costs.

On August 14, 2007, defendants Hector Pimentel and Bobby Wong were involved in a motor vehicle accident at an intersection controlled by a traffic light. After the collision, Wong's vehicle continued across the intersection, jumped the curb and

entered the store where plaintiff Nicola Newark was shopping, causing debris to fall on top of her. Pimentel commenced a separate personal injury action against Wong and his action was jointly tried with that of plaintiff.

The trial court did not abuse its discretion in allowing Pimentel's interests as a plaintiff in his own action and as a defendant in this action to be represented by separate attorneys (*see* CPLR 4011; *Chemprene, Inc. v X-Tyal Intl. Corp.*, 55 NY2d 900 [1982]). The court promised to and did exert control over the nature of the dual representation, as necessary, and Pimentel's defense counsel, whose opening statement, summation, and questioning of witnesses were brief, played a limited role. In any event, in the absence of any evidence of an unfair advantage or prejudice, any error would be harmless.

The challenged evidentiary rulings were proper exercises of the court's discretion and broad authority to control the courtroom (*see Campbell v Rogers & Wells*, 218 AD2d 576 [1st Dept 1995]). Pimentel testified that he observed Wong's vehicle a few seconds before the accident, during which time Pimentel was able to take evasive maneuvers and fully stop his vehicle, which had been traveling 20 to 25 miles per hour. This testimony, which was subject to cross-examination, provided a nonconclusory basis

for Pimentel's estimation of Wong's speed (*cf. Batts v Page*, 51 AD3d 833 [2d Dept 2008]).

The court did not commit reversible error in allowing Pimentel's defense counsel to read under four pages of Wong's deposition testimony into the record (*see* CPLR 3117[a][2]; *Gonzalez v Medina*, 69 AD2d 14 [1st Dept 1979]). Wong was free to read any other part of the deposition testimony which he thought, in fairness, should have been considered (CPLR 3117[b]).

The court did not improvidently exercise its discretion in precluding Wong's two proposed expert witnesses in the absence of any "good cause" shown for the failure to disclose these witnesses until the second day of the damages trial (*see* CPLR 3101[d]; *Hudson v Manhattan & Bronx Surface Tr. Operating Auth.*, 188 AD2d 355 [1st Dept 1992]). Plaintiff's counsel's response of "No, not really," in response to the court's question as to whether she had any objection did not unequivocally relate to the proposed testimony and thus, does not constitute an express waiver of an objection thereto (*cf. Picon v Moore*, 15 AD3d 188 [1st Dept 2005]). Indeed, in refusing to interpret counsel's response as a waiver, the court conceded that the phrasing of its question was unclear. The fact that, as a result of the preclusion of the defense experts, no additional doctors

testified, contrary to the court's earlier statement to the jury, did not warrant a mistrial. The absence of these doctors, who were not identified as defense witnesses, was explained as the court's error.

The two challenged statements made during summation, which were met with sustained objections, were not unduly prejudicial and did not warrant a mistrial (*see Pareja v City of New York*, 49 AD3d 470 [1st Dept 2008]; *cf. Valenzuela v City of New York*, 59 AD3d 40 [1st Dept 2008]).

The jury's finding that Pimental was negligent was not inconsistent with the finding that his negligence was not a substantial cause of the accident and could have been reached logically from the evidence (*see Giraldo v Rossberg*, 297 AD2d 534 [1st Dept 2002]). While the jury clearly credited Pimentel's testimony as to the color of the traffic light, it could have found that he was nonetheless negligent in failing to observe Wong's vehicle earlier and/or taking further measures to avoid the accident. Such a finding does not render Pimentel a substantial cause of the accident. This is especially so when considering testimony that, in addition to running a red light, Wong was also speeding through the intersection. The liability verdict was also not against the weight of the evidence (*see*

Cohen v Hallmark Cards, Inc., 45 NY2d 493, 499 [1978]).

Plaintiff established a causal connection between the accident and her injuries via her testimony as to the nature of her symptoms, the denial of prior symptomology, the fact that she immediately reported injury to the neck and back to health care providers, and the testimony of her treating physician (*see Matott v Ward*, 48 NY2d 455 [1979]; *Henry v New York City Tr. Auth.*, 92 AD3d 460 [1st Dept 2012]).

The 28-year-old plaintiff sustained various soft tissue injuries in the subject accident, including two cervical herniations, a lumbar disc bulge, and severe headaches. At the time of trial, five and a half years later, plaintiff's condition, found by the jury to be permanent and significant, had improved, but she was still treating with a physician, receiving physical therapy, and taking prescription pain medication, and

could not return to her former occupation. We find that the award did not deviate materially from what would be reasonable compensation.

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12545 John Pickering-George, also known as John Robert Daley, Petitioner, Index 402477/12

-against-

Mathew M. Wambua, et al., Respondents.

_____

John Pickering-George, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

_____

Determination of respondent Department of Housing Preservation and Development (HPD), dated August 22, 2012, which, after a hearing, terminated petitioner's Section 8 rent subsidy, 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 [Eileen A. Rakower, J.], entered April 9, 2013), dismissed, without costs.

The determination is supported by substantial evidence, including petitioner's own testimony (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Such evidence shows that petitioner failed to pay his portion of the rent for the subject apartment for an extended period of time (*see* 24 CFR 982.552); that he vacated the premises

without notifying or obtaining the approval of HPD; and that he was absent from the premises for more than 180 days (*see* 24 CFR 982.312).

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

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12547 Reem Contracting, et al., Index 104202/11
Plaintiffs-Respondents,

-against-

Altschul & Altschul, et al.,
Defendants-Appellants.

_____

Altschul & Altschul, New York (Barbara S. Friedman of counsel), for appellants.

Mandelbaum, Salsburg, Lazris & Discenza, P.C., New York (Dennis Alessi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 31, 2012, which, inter alia, denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The court correctly found that plaintiffs' counsel met the requirement of Judiciary Law § 470 to maintain a New York office (*see Kinder Morgan Energy Partners, LP v Ace Am. Ins. Co.*, 51 AD3d 580 [1st Dept 2008]). Counsel's affirmation avers that the firm leases a New York office with a telephone, that partners of the firm use the office periodically, and that many of the firm's attorneys are admitted to practice in New York.

Contrary to defendants' contention, plaintiffs' counsel, a New Jersey firm, need not obtain authorization to do business in

New York pursuant to § 1301(a), § 1528 or other provisions of the Business Corporation Law to commence an action in New York courts. While any purported noncompliance with those provisions might have other consequences, it does not affect the ability of the firm's attorneys to practice in New York and thus to commence these proceedings representatively. Similarly, we reject defendant's contention that plaintiffs' counsel, in seeking attorneys' fees, impermissibly maintained the action on its own behalf, rather than in a representative capacity (*see* Business Corporation Law § 1312). The action was brought in plaintiffs' name only, and any award of attorneys' fees depends on the resolution of the underlying legal malpractice cause of action brought in plaintiffs' name.

Plaintiffs' affidavits of service on all defendants constitute prima facie evidence of proper service (*Chinese Consol. Benevolent Assn. v Tsang*, 254 AD2d 222, 223 [1st Dept 1998]). Defendant Mark Altschul's conclusory denial that he was served as alleged in the affidavit of service does not suffice to raise an issue of fact to be resolved at a traverse hearing (*see e.g. id.*; *Public Adm'r of County of N.Y. v Markowitz*, 163 AD2d 100 [1st Dept 1990]).

To the extent defendants argue that service was incomplete due to the belated filing of proof of service, the argument is unavailing, since failure to file proof of service within the 20-day time period for answering the complaint is not a jurisdictional defect, but a "mere irregularity," and, as plaintiffs acknowledge, service is deemed complete only 10 days after the late filing (*see Weininger v Sassower*, 204 AD2d 715, 716 [2d Dept 1994]; *see also Nardi v Hirsh*, 245 AD2d 205 [1st Dept 1997]). Any purported defects in the form of the affidavit of service, including the sufficiency of the signature, are mere irregularities, not jurisdictional defects that would warrant dismissal of the complaint (*see Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 443 [1st Dept 1998]).

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12548 The People of the State of New York, Ind. 639/01
Respondent,

-against-

Lerun Nightingale,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 18, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 20 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12549 Kelly Coffey, Index 114073/09
Plaintiff-Respondent,

-against-

CRP/Extell Parcel I, L.P., et al.,
Defendants-Appellants,

Stroock & Stroock & Lavan LLP,
Defendant.

_____

Boies, Schiller & Flexner LLP, Armonk (Jason S. Cyrulnik of counsel), for appellants.

Held & Hines, LLP, New York (James K. Hargrove of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered April 2, 2013, inter alia, declaring the option agreement rescinded, and ordering defendants to release and return the escrowed down payments, unanimously affirmed, with costs.

The court correctly found that defendants are barred by the doctrine of collateral estoppel from relitigating the issues raised here, since those issues were fully and fairly litigated in the administrative proceeding that culminated in the hybrid CPLR article 78 proceeding/reformation action, which affirmed a determination by the Office of the Attorney General allowing

certain purchasers similarly situated to plaintiff to rescind their option agreements (*see Matter of CRP/Extell Parcel I, L.P. v Cuomo*, 101 AD3d 473 [1st Dept 2012]).

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

ENTERED: MAY 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12550 In re Fanny Chu, Index 100795/13
Petitioner,

-against-

Barbara J. Fiala, etc., et al.,
Respondents.

_____

Martin A. Kron and Associates, LLP, New York (Daniel L. Kron of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondents.

_____

Determination of respondent Department of Motor Vehicles Appeals Board, which after a hearing, suspended petitioner's driver's license for 31 days based on a violation of Vehicle and Traffic Law § 1146, 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 [Carol E. Huff, J.], entered September 27, 2013), dismissed, without costs.

Substantial evidence supports the determination (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Such evidence, including eyewitness testimony, shows that petitioner failed to exercise due care, and struck the pedestrian as she crossed the street,

ultimately resulting in the pedestrian's death (*see e.g. Matter of Montagnino v Fiala*, 106 AD3d 1090 [2d Dept 2013]).

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

ENTERED: MAY 20, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11722 SPRE Realty, Ltd., doing business as Susan Penzner Real Estate,
Plaintiff-Respondent,

-against-

Daniel Dienst, et al.,
Defendants-Appellants.

Index 651671/13

_____

Jacob, Medinger & Finnegan, LLP, New York (Wendy Michael of counsel), for appellants.

Frydman LLC, New York (Glen Lenihan of counsel), for respondent.

_____

Order of Supreme Court, New York County (Charles E. Ramos, J.), entered October 1, 2013, affirmed, with costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Richard T. Andrias
David B. Saxe
Helen E. Freedman
Paul G. Feinman, JJ.

11722
Index 651671/13

_____x

SPRE Realty, Ltd., doing business
as Susan Penzner Real Estate,
Plaintiff-Respondent,

-against-

Daniel Dienst, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of Supreme Court, New York County (Charles E. Ramos, J.), entered October 1, 2013, which denied their motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

Jacob, Medinger & Finnegan, LLP, New York (Wendy Michael and Keelin Kavanagh of counsel), for appellants.

Frydman LLC, New York (Glen Lenihan and David S. Frydman of counsel), for respondent.

ACOSTA, J.

In this appeal, we must determine whether plaintiff broker has alleged facts sufficient to establish its entitlement to a commission on the sale of real estate, where it expended significant effort locating an apartment for buyers who abandoned the transaction and purchased another apartment in the same building 18 months later. In addition, we take this opportunity to clarify the standard by which a broker may be found to have been the "procuring cause" of a real estate transaction. We find that the complaint sufficiently alleges that plaintiff was a direct and proximate link between the introduction of defendant buyers and the seller and the consummation of the transaction to withstand defendants' motion to dismiss.

The following facts are taken from the complaint. As we are called upon to decide a motion to dismiss, we accept the allegations in the complaint as true and draw all reasonable inferences in plaintiff's favor (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). Plaintiff, SPRE Realty, Ltd. (SPRE), is a licensed New York State real estate broker that does business under the name Susan Penzner Real Estate. In early 2006, defendants, Daniel and Jill Dienst, retained SPRE as their real estate broker to help them purchase a luxury residence in Manhattan. Although their agreement was not reduced to writing,

the parties had an understanding that SPRE would receive a commission after securing a residence that met defendants' expectations. Susan Penzner, the founder and principal of SPRE, spearheaded SPRE's efforts to locate a suitable property.

SPRE showed defendants several residences in Manhattan over the first 18 months of the parties' relationship. In or around October 2007, Penzner introduced defendants to a condominium development at 397 West 12th Street (397 West), which was under construction. After defendants expressed an interest in 397 West, Penzner brought them to the office of the developer (Far West Village Partners) to view the "layout and renderings" of the building, and to the private home of a principal of the developer to view an example of the developer's work. Defendants "fell in love with the [p]roperty" and thought the developer's principal "seem[ed] like a great guy."

SPRE negotiated with the developer on defendants' behalf concerning the total cost of a duplex condominium at 397 West, a post-purchase discount in the event of a subsequent sale of a similar unit at 397 West for a lower price, and specific design elements that defendants requested. Based on these negotiations, SPRE sent a deal sheet to the developer around July 1, 2008, anticipating defendants' purchase of two units at 397 West for $11.5 million. About a week later, attorneys for defendants and

the developer exchanged and reviewed a contract of sale for the two units. According to SPRE, the contract contained the same material terms as the deal sheet that SPRE prepared.

Meanwhile, Penzner searched for architects who would be capable of executing defendants' specific design plans. She reached out to several prospects and ultimately recommended and introduced John Pawson, an internationally renowned architect, to defendants. In late July 2008, Penzner arranged for and attended a meeting with one of the developer's principals at defendants' summer home in Sag Harbor, New York. SPRE characterized that meeting as "successful."

Despite SPRE's efforts, in late August 2008 defendants "pulled out of the deal, stating that they had changed their mind[s] and were no longer in the market for a new home." Penzner emailed Mr. Dienst a few months later to inquire whether defendants had any renewed interest in purchasing a home, but she received no response. During that time, Penzner continued "in good faith" to assist Mrs. Dienst in a search for a commercial property for her art and antiques store. Mrs. Dienst repeatedly confirmed that she and her husband were no longer seeking to purchase a residence and that they had no lingering interest in 397 West.

Nonetheless, in February 2010, defendants purchased a duplex

condominium at 397 West comprised of a different pair of units than the ones they had previously sought to purchase. SPRE alleges that defendants deliberately concealed their intention to purchase property at 397 West in order to avoid paying SPRE a broker's commission.

SPRE commenced this action in May 2013, alleging breach of implied contract and unjust enrichment. Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), arguing that SPRE could not prove that it was the procuring cause of the real estate transaction or that it was entitled to a commission for services rendered. In an affidavit supporting the motion, Mr. Dienst stated, inter alia, that he and his wife never signed the deal sheet or contract of sale for the first duplex, that they ultimately purchased a different duplex at 397 West for $6.5 million, and that SPRE was not involved in the purchase of the second duplex.

The motion court denied the motion to dismiss, noting that defendants might have returned to 397 West on a "periodic basis" during the 18-month period between the abandonment of the first transaction and defendants' ultimate purchase, which would evince a bad-faith termination of the original transaction. This appeal followed, and we now affirm.

Discussion

"[I]n the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller" (*Lane--Real Estate Dept. Store, Inc. v Lawlet Corp.*, 28 NY2d 36, 42 [1971]). A broker does not earn a commission merely by calling the property to the attention of the buyer (*Greene v Hellman*, 51 NY2d 197, 205 [1980]). But this does not mean that the broker "must have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale" (*id.* at 206). Rather, the broker must be the "procuring cause" of the transaction, meaning that "there must be a direct and proximate link, as distinguished from one that is indirect and remote," between the introduction by the broker and the consummation of the transaction (*id.*).

The Departments of the Appellate Division, this Court being no exception, have applied varying language in elaborating on that standard. For example, the three other Departments have stated that "if a broker 'does not participate in the negotiations, he must at least show that he created an amicable atmosphere in which negotiations went forward or that he generated a chain of circumstances which proximately led to the sale" (*Cappuccilli v Krupp Equity Ltd. Partnership*, 269 AD2d 822,

823 [4th Dept 2000], quoting *Briggs v Rector*, 88 AD2d 778, 779 [4th Dept 1982]; *Talk of the Town Realty v Geneve,* 109 AD3d 981, 982 [2d Dept 2013]; *Spalt v Lager Assoc.*, 177 AD2d 879, 882 [3d Dept 1991]).[1]

Although this Department has cited, and even quoted from, cases that have used the phrase "amicable atmosphere," we have not gone so far as to adopt that specific standard. However, this Court has suggested that a broker can be the procuring cause if he or she "brought 'the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand which permits their working out the terms of their agreement'" (*Aegis Prop. Servs. Corp. v Hotel Empire Corp.*, 106 AD2d 66 [1st Dept 1985], quoting *Salzano v Pellillo*, 4 AD2d 789, 790 [2d Dept 1957]).[2] The use of the language in *Aegis* appears to be an aberration in this Department, though, because we have more frequently and recently applied the "direct and proximate link" test (*see e.g. Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 154 [1st Dept 2003]).

The Court of Appeals has not sanctioned the "amicable

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[1] It appears that the "amicable atmosphere" language originated in the Fourth Department (*see Briggs*, 88 AD2d at 779).

[2] The "amicable frame of mind" language appears to have originated in Supreme Court, New York County (*see Baird v Krancer*, 138 Misc 360, 362 [Sup Ct NY County 1930]).

atmosphere" or "amicable frame of mind" language. It has, however, affirmed without opinion a finding that a broker was the procuring cause where it "generated a chain of circumstances which proximately led to" a lease transaction (*Eugene J. Busher Co. v Galbreath-Ruffin Realty Co.*, 22 AD2d 879 [1st Dept 1964], *affd* 15 NY2d 992 [1965]). In any event, the Court has stated that "however variable the judicial terminology employed to express the requirement that the broker must be the procuring cause, it has long been recognized that there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" (*Greene*, 51 NY2d at 206 [footnote omitted]).

We regard the "amicable atmosphere" and "amicable frame of mind" standards as somewhat broader and more amorphous than the requirement of a "direct and proximate link," or even a requirement that the broker "generated a chain of circumstances which proximately led" to a transaction's consummation. Although courts have attempted to harmonize the continued use of the "amicable" phrases discussed above with Court of Appeals precedent articulating the "direct and proximate link" standard, the former phrases are not precise enough terms by which to determine whether a broker is the procuring cause of a

transaction.[3] Reliance on the creation of an "amicable atmosphere in which negotiations went forward" seems to ignore the proximity element of the "direct and proximate link" test. Furthermore, we think that this continued deviation from the standard set forth by the Court of Appeals in *Greene* has led to some confusion. Yet litigants, and the bar, deserve a greater level of certainty.

Therefore, in order to reduce the confusion that has arisen from the more nebulous terminology heretofore employed by the Departments of the Appellate Division, we reiterate that the "direct and proximate link" standard articulated in *Greene* governs determinations of circumstances under which a broker constitutes a procuring cause within the First Department. This standard requires something beyond a broker's mere creation of an "amicable atmosphere" or an "amicable frame of mind" that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction's final terms or be present at the closing (*Sholom & Zuckerbrot Realty Corp. v Citibank*, 205 AD2d 336, 338-339 [1st Dept 1994]).

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[3] The phrase "direct and proximate," as used in the context of a real estate broker's action to recover commissions, was apparently first employed by this Department in 1911 (*see Greene*, 51 NY2d at 206 citing *Lord v United States Transp. Co.*, 143 App Div 437, 454-455 [1st Dept 1911]).

In the present case, even under the more exacting "direct and proximate link" standard, we find that the allegations in the complaint sufficiently state that SPRE was the procuring cause of defendants' purchase of the second duplex at 397 West. SPRE brought defendants to the building on several occasions; introduced defendants to the developer and attended several meetings between the developer and defendants; reviewed floor plans with defendants; negotiated favorable terms for defendants on the original units; prepared a deal sheet with defendants' preliminary offer terms on the first duplex for the developer's consideration; drafted a contract of sale; and connected defendants with a reputable architect whom SPRE specially selected to implement defendants' design plans. Affording these allegations a liberal construction, we find that they establish that SPRE's actions and efforts may have been a direct and proximate link between the introduction of defendants to the developer and defendants' purchase of the second duplex at 397 West. Whether SPRE was the procuring cause "is a question of fact to be decided on the evidence" (*Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 [1st Dept 2006]).

Even if SPRE is unable to prove that it was the procuring cause of defendants' purchase, it may be able to prove that defendants terminated its activities "'in bad faith and as a mere

device to escape the payment of the commission'" (*see Di Stefano v Rosetti-Falvey Real Estate*, 270 AD2d 631, 632 [3d Dept 2000]; *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 384 [1881]; *Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [1st Dept 2008]; *Williams Real Estate Co. v Viking Penguin*, 228 AD2d 233, 233 [1st Dept 1996]). Although 18 months passed between the abandonment of the first transaction and the conclusion of the second transaction, whether defendants withdrew from the first transaction in good faith is a question of fact to be decided on the evidence. The answer will depend on when defendants renewed their interest in 397 West and recommenced negotiations with the developer of the property. As the motion court noted, it is possible that defendants never lost interest in 397 West but returned to it on a "periodic basis," which would evince an intent to terminate the first transaction and exclude SPRE from the second transaction to avoid paying a commission. Clearly, at this early juncture in the litigation, we cannot definitively conclude whether defendants abandoned the first duplex negotiation in good faith.

Nor can we conclude that the completed transaction was fundamentally different from the abandoned transaction (*see Garrick-Aug Assoc. Store Leasing v Hirschfeld Realty Club Corp.*, 3 AD3d 406 [1st Dept 2004]). While the price that defendants

ultimately paid – according to Mr. Dienst's affidavit – was less than half the price that they would have paid for the first duplex, plaintiff alleges that the two units they ultimately purchased were "substantially identical" to the units that SPRE had procured for them. Additionally, as SPRE points out, it was during the 18-month interval between the abandoned transaction and the consummated transaction that the economic downturn occurred, so the price of the allegedly similar units may have dropped precipitously during that time or defendants may have been able to negotiate a lower price.

Whether SPRE can be deemed to have earned a commission on the abandoned transaction is also a question of fact to be decided on the evidence. A broker may be entitled to a commission where the buyer authorizes the broker to submit an offer to the seller but subsequently fails to execute or arbitrarily refuses to enter into a contract of sale (*Duross Co. v Evans*, 22 AD2d 573 [1st Dept 1965]; *Pease & Elliman, Inc. v Gladwin Realty Co.*, 216 App Div 421 [1st Dept 1926]; *Westhill Exports v Pope*, 12 NY2d 491 [1963]). Moreover, a signed contract of sale is unnecessary to hold defendants liable for the commission on the abandoned transaction, if SPRE can prove that it had an implied contract with defendants, that a contract of sale was prepared on terms that SPRE was authorized by defendants

to offer, and that defendants' refusal to sign the contract of sale was arbitrary (*see Duross Co.*, 22 AD2d at 573-574; *Westhill Exports*, 12 NY2d at 497). Defendants argue that SPRE failed to allege that it was authorized by them to submit an offer to the seller, but if it has or obtains evidence of such authorization, SPRE may amend the complaint to conform to the proof (CPLR 3025[c]). Defendants' contention that SPRE was not so authorized is also a question of fact that should await discovery.

Finally, inasmuch as the allegations in the complaint state a cause of action not for unjust enrichment but for quantum meruit (*see Edward S. Gordon Co. v Peninsula N.Y. Partnership*, 245 AD2d 189, 190 [1st Dept 1997]), we note that a motion to dismiss "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks omitted]).

Accordingly, the order of Supreme Court, New York County (Charles E. Ramos, J.), entered October 1, 2013, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), should be affirmed, with costs.

All concur.

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

ENTERED: MAY 20, 2014

CLERK