SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 26, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6193 Hong-Bao Ren, Index 157230/14
Plaintiff-Appellant-Respondent,

-against-

Gioia St. Marks, LLC, et al.,
Defendants-Respondents-Appellants,

ACO Bakery Incorporation doing business as Spot Dessert Bar initially sued herein as Sun Dessert Bar,
Defendant.

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Gioia St. Marks, LLC, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Eight Oranges Inc.,
Third-Party Defendant-Respondent-Appellant.

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[And a Second Third-Party Action]

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The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for appellant-respondent.

Rubin, Fiorella & Friedman LLP, New York (Stewart B. Greenspan of counsel), for Gioia St. Marks, LLC, Gioia Equities Inc. and Anthony Gioia, respondents-appellants/appellants-respondents.

Law Office of Theresa B. Marangas, PLLC, Loudonville (Theresa B. Marangas of counsel), for Eight Orange Inc., respondent-appellant/respondent-appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 24, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment against defendants Gioia St. Marks, LLC and defendant Eight Oranges Incorporation on the Labor Law § 240(1) claim, denied Gioia's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it and for conditional summary judgment on its claim for contractual indemnification against Eight Oranges, and denied Eight Oranges's motion for summary judgment dismissing the complaint and cross claims for indemnification as against it, unanimously modified, to the extent of granting plaintiff's motion for partial summary judgment against defendants Gioia and Eight Oranges on the Labor Law § 240(1) claim, and granting conditional summary judgment to Gioia on its claim for contractual indemnification against Eight Oranges, and otherwise affirmed, without costs.

Labor Law § 240(1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related

risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). “The ‘purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves’” (*Saint v Syracuse Supply Co.*, 25 NY3d at 124).

On the date of plaintiff’s accident, he was working on a kitchen renovation project at a restaurant owned by defendant Eight Oranges, which leased the space from defendant landlord Gioia. Plaintiff was crouching on top of a ventilator, which he had secured to a ceiling beam, and was in the process of attempting to remove the ventilator by attaching to it a 60 pound derrick rig when the ventilator tilted and became detached from the wall, causing plaintiff to fall to the ground.

Contrary to plaintiff’s contention, the ventilator he was standing on and disassembling when he fell was not a safety device; it was the object of the demolition project on which he was employed, and was not intended to protect him from elevation-related risks (*cf. Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [plaintiff entitled to protection under Labor Law § 240(1) where component of structure he was working on that would become second floor of building “flipped,” causing him to fall]).

Plaintiff also indicated during his deposition testimony that while standing on the eight-foot A-frame ladder that was provided he was unable to reach the area to secure the 60 pound derrick rig, which was required to remove the ventilator. Indeed, plaintiff testified that it was "impossible to perform this job if I stood on the ladder." In response, defendants failed to raise an issue of fact. Thus, plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim because he was not provided with a proper safety device during the demolition project.

The motion court properly found that Eight Oranges, the tenant engaged in renovations of the premises at the time of plaintiff's fall, failed to establish prima facie that the Labor Law §§ 241(6) and 200 and common law negligence claims should be dismissed as against it.

The motion court should have granted conditional summary judgment in favor of Gioia on its cross claim for contractual indemnification. "Summary relief is appropriate on a claim for contractual indemnification where, as here, the [lease] is unambiguous and clearly sets forth the parties' intention that a [tenant] indemnify the [landlord] for the injuries sustained" (*Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007]). The indemnification provision in the parties'

lease here provides,

> "The Tenant agrees to indemnify and hold Landlord free and harmless from any claim of damage or injury occurring or arising to any person or persons or property on, in or about the demised premises or the sidewalk in front of same caused by the Tenant."

Despite Eight Oranges' argument to the contrary, this indemnification provision does not require a finding of negligence on the part of the tenant before it is triggered. Nor does it violate General Obligations Law § 5-321, "since a finding of liability under Labor Law § 240 is not the equivalent of a finding of negligence and does not give rise to an inference of negligence" (*Eccleston v Berakha*, 233 AD2d 417 [2d Dept 1996]; *see also Masciotta v Morse Diesel Intl.,* 303 AD2d 309, 311-312 [1st Dept 2003] [addressing General Obligations Law § 5-322.1 which pertains to contractors and subcontractors]). It is clear from the contractual language at issue that the landlord, Gioia, intended to be indemnified by the tenant, Eight Oranges, for any "damage or injury occurring or arising to any person" on the property, that is caused by the tenant.

Moreover, conditional summary judgment is appropriate here even when judgment has yet to be rendered or paid in the main action, "since it serves the interest of justice and judicial

economy in affording the indemnitee ‘the earliest possible determination as to the extent to which he may expect to be reimbursed’” (*Roddy v Nederlander*, 44 AD3d at 556-557, quoting *McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 [1968]).

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

ENTERED: JULY 26, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Kahn, Gesmer, JJ.

6281-
6282-
6283 Lesly Jean, Plaintiff-Appellant, Index 25953/16E

-against-

Michael Chinitz, et al.,
Defendants-Respondents.

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

Lewis Brisbois Bisgaard & Smith LLP, New York (Gregory Radwan of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 16, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for violation of Judiciary Law § 487 and punitive damages, unanimously affirmed, without costs. Order, same court and Justice, entered July 17, 2017, which granted defendants' motion to dismiss the amended verified complaint, unanimously affirmed, without costs. Order, same court and Justice, entered August 31, 2017, which denied plaintiff's motion to reargue defendants' motion to dismiss the amended verified complaint, and denied plaintiff's motion in the alternative for leave to amend the complaint, unanimously affirmed, without costs.

In its February 16, 2017 order, the motion court correctly dismissed the first cause of action in the original verified complaint to the extent that it alleged a violation of Judiciary Law § 487, because plaintiff failed to plead the essential elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit (*see* Judiciary Law § 487; *Doscher v Manatt, Phelps & Phillips, LLP*, 148 AD3d 523, 524 [1st Dept 2017]). Accordingly, the portion of the first cause of action in the original verified complaint that alleges a section 487 violation fails to state a cause of action under the statute (see CPLR 3211[a][7]). Additionally, plaintiff's section 487 cause of action lacks the requisite particularity (*see* CPLR 3016[b]; *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]).

By the same order, the motion court also correctly dismissed plaintiff's separate cause of action for punitive damages as pleaded in the original verified complaint. A separate cause of action for punitive damages is not legally cognizable (*see* *Steinberg v Monasch*, 85 AD2d 403, 406 [1st Dept 1982]). Rather, punitive damages "are merely an element of the total claim for damages on . . . underlying causes of action," and a separate cause of action based solely upon them must be dismissed

(*Greenview Trading Co. v Hershman & Leicher*, 108 AD2d 468, 470 [1st Dept 1985]). In any event, the original verified complaint does not allege intentional and malicious treatment of plaintiff or wanton dishonesty suggestive of criminal indifference to civil obligations sufficient to support an award of punitive damages (*see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 73 [1st Dept 2015]). Indeed, the pleading merely alleges that defendants were trying to conceal their negligence in having allowed plaintiff's medical malpractice action to be dismissed for noncompliance with discovery orders.

By its July 17, 2017 order, the motion court also correctly dismissed plaintiff's amended verified complaint, albeit not on the proper grounds. Contrary to the motion court's determination, the amended verified complaint was not procedurally barred. Defendant's answer was served and filed on March 7, 2017, and plaintiff's amended verified complaint was filed on March 16, 2017, well within the 20-day period within which plaintiff could timely file an amended pleading without leave of court (*see* CPLR 3025[a]). Furthermore, in an amended pleading, a plaintiff "may add any cause of action at all, related or not to what the original pleading contained" (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025 at 87, citing *Mendoza v Mendoza*, 4 Misc

2d 1060, 1061 [Sup Ct, NY County 1947], *affd* 273 App Div 877 [1st Dept 1948]). Thus, it is of no moment that the amended verified complaint included a section 487 cause of action, whereas defendant's answer served and filed subsequent to the February 17 order dismissing the section 487 claim included no response to plaintiff's section 487 allegations.

Plaintiff argues that the amended verified complaint added allegations of intentional deceit on the part of defendants, as manifested in the form of email communications from defendants to plaintiff falsely assuring him that his medical malpractice case was still active when, in fact, it had been dismissed due to defendants' failure to comply with three discovery orders of the motion court. Plaintiff further alleges that defendants' deceit injured him by depriving him of the opportunity to take steps to remedy or vacate the dismissal. Plaintiff's theory presumes that the trial court justice presiding in the medical malpractice action would have vacated the dismissal and reinstated the action had plaintiff moved for such relief. Given the circumstances under which the medical malpractice action was dismissed, however, involving three separate discovery orders for provision of medical authorizations and physician reports, each of which was disregarded by plaintiff's attorney, it is, at best, purely speculative that the medical malpractice court would have granted

such relief. Thus, plaintiff's claim of injury lacks sufficient support to sustain his claim that defendants' false email communications were the proximate cause of any injury to him (*see Pellegrino v File*, 291 AD2d 60, 64 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002] [dismissing legal malpractice claim where plaintiffs' allegations did not, on their face, establish that but for their medical malpractice attorney's conduct in failing to inform them of the dismissal of their medical malpractice action, they would not have sustained the actual ascertainable harm]).

Moreover, "[t]reble damages awarded under Judiciary Law [section] 487 are not designed to compensate a plaintiff for injury to property or pecuniary interests" (*Specialized Indus. Svcs. Corp. v Carter*, 99 AD3d 692, 693 [2d Dept 2012] [internal quotations marks omitted]). Rather, "they are designed to punish attorneys who violate the statute and to deter them from betraying their 'special obligation to protect the integrity of the courts and foster their truth-seeking function'" (*id.*, quoting *Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Thus, plaintiff's advancement of a section 487 cause of action in this case is inconsistent with the purpose of the statute, and dismissal of that cause of action was warranted for that additional reason.

The August 31, 2017 order, which denied plaintiff’s motion to reargue defendants’ motion to dismiss the amended complaint, is appealable, because the court entertained the merits of plaintiff’s motion, thereby effectively granting reargument (*see Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 484 [1st Dept 2015]). Upon reargument, however, dismissal of the section 487 cause of action was appropriate, as plaintiff proffered nothing on his reargument motion that would alter the motion court’s original conclusion that plaintiff’s section 487 cause of action was insufficiently pled in his amended verified complaint.

Additionally, by its August 31, 2017 order, the motion court properly denied plaintiff’s alternative motion to amend the complaint, as the proposed pleading did nothing more than add detailed factual allegations as to the times and contents of the email communications in question. As already noted, it failed, however, to correct the fundamental flaw in plaintiff’s section 487 cause of action as previously pleaded, namely, that the injury that plaintiff alleged to have suffered as the result of defendants’ deceit is speculative, rendering that cause of action

invalid (*see* CPLR 3211[a][7]).

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

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

ENTERED: JULY 26, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6312 Anita Hersh, Index 157593/14
Plaintiff-Appellant,

-against-

One Fifth Avenue Apartment Corp., et al.,
Defendants,

Constance Ellis, et al.,
Defendants-Respondents.

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Wagner Berkow, LLP, New York (Ian J. Brandt of counsel), for appellant.

Holland & Knight LLP, New York (Patrick J. Sweeney of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 25, 2017, which, inter alia, granted the motion of defendants-respondents to dismiss the fourth cause of action of the complaint as against them, and denied plaintiff's motion to amend the complaint except with respect to the ad damnum clause, unanimously affirmed, without costs.

In this case, plaintiff alleges that her apartment sustained extensive water infiltration due, in large part, to the condition of the greenhouse on the roof terrace located on the floor above her. According to plaintiff, the individual owners of the offending greenhouse (defendants Alan Belzer and Susan Martin), the cooperative (defendant One Fifth Avenue Corp.), and the

individual board members failed to adequately address and remedy the situation, and their failure to act resulted in catastrophic water damage to plaintiff's apartment. Plaintiff alleged six causes of action, including one for breach of fiduciary duty against the individual board members, the only claim at issue on this appeal.

It is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of "individual wrongdoing by the members . . . separate and apart from their collective actions taken on behalf of the" cooperative (*20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]; *Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]). Here, the complaint does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively. Thus, the breach of fiduciary duty claim is not viable. Because the proposed amended complaint fails to cure this deficiency, plaintiff's motion seeking to amend the complaint was properly denied.

Contrary to plaintiff's contention, this result is entirely consistent with *Fletcher v Dakota, Inc.* (99 AD3d 43 [1st Dept 2012]). In *Fletcher*, we concluded that "although participation in a breach of contract will typically not give rise to

individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability" (*id.* at 47). Thus, we declined to dismiss claims against a cooperative board director who was alleged to have participated in the cooperative's violation of the State and City Human Rights Laws.

Here, in contrast, there is no viable corporate tort alleging breach of fiduciary duty, because a corporation owes no fiduciary duty to its shareholders (*Fletcher,* 99 AD3d at 54; *Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]). Thus, in the absence of a corporate tort in which the individual board members could have participated, the breach of fiduciary duty claim as against them was properly dismissed. Indeed, *Fletcher* made this very point by dismissing the breach of fiduciary duty cause of action against an individual board director, while at the same time sustaining Human Rights Law claims against him.

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

ENTERED: JULY 26, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6315 Theresa Maddicks, et al., Index 656345/16
Plaintiffs-Appellants,

-against-

Big City Properties, LLC,
et al.,
Defendants,

Big City Realty Management,
LLC, et al.,
Defendants-Respondents.

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Newman Ferrara LLP, New York (Roger A. Sachar, Jr. of the bar of the State of Missouri, admitted pro hac vice, of counsel), for appellants.

Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for respondents.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered November 16, 2017, which, upon defendants' motion, dismissed the amended complaint pursuant to CPLR 3211 without prejudice, modified, on the law, to deny the motion as to the claims, except those involving General Business Law § 349, against defendants Big City Realty Management, LLC, Big City Acquisitions, LLC, 408-412 Pineapple LLC, 510-512 Yellow Apple, LLC, 535-539 West 155 BCR, LLC, 545 Edgecombe BCR, LLC, 106-108 Convent BCR, LLC, 110 Convent BCR, LLC, 3750 Broadway BCR, LLC, 3660 Broadway BCR, LLC, and 605 West 151 BCR, LLC, and to deny the motion as to the class action allegations against these

defendants, except those supporting the General Business Law § 349 claim, and otherwise affirmed, without costs.

Defendants moved to dismiss the claims against 145 Pineapple LLC, 2363 ACP Pineapple LLC, 513 Yellow Apple LLC, 603-607 West 139th BCR LLC, 3660 Broadway BCR LLC, 559 West 156 BCR LLC, 605-607 West 141 BCR LLC, and 580 St. Nicholas BCR LLC on the ground that plaintiffs had made no allegations of wrongdoing against those defendants. The court sua sponte dismissed the claims against Big City Realty Management and the other defendants named in the decretal paragraph above based on an argument not raised by defendants. Since plaintiffs are prejudiced by their inability to respond to the court's reasoning in support of the dismissal (*see Matter of Dental Socy. of State of N.Y. v Carey*, 92 AD2d 263, 264 [3d Dept 1983], *affd on other grounds* 61 NY2d 330 [1984]), we reinstate the claims only against the defendants named in the decretal paragraph, except for those involving General Business Law § 349. We do not, in any way, prejudge arguments that have not been fully briefed on this appeal, e.g., that 545 Edgecombe BCR does not own 545 Edgecombe Avenue, or that plaintiffs have not actually pleaded conspiracy or aiding and abetting. Moreover, it appears from the record that defendant 3660 Broadway BCR, LLC owns one of the buildings named in plaintiffs' complaint. 3660 Broadway's reinstatement is without

prejudice to any claims it may raise, later in this litigation, about this ownership issue.

We affirm the dismissal of the class action allegations addressed to the General Business Law § 349 claim and the General Business Law § 349 claim as against the landlord defendants since plaintiffs make no arguments on appeal as to that claim. As to the remaining class allegations, the dismissal, at this early stage, before an answer was filed and before any discovery occurred, was premature (*Bernstein v Kelso & Co.*, 231 AD2d 314 [1st Dept 1997]). As this Court noted in *Bernstein*, "Pursuant to CPLR 902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired" (*id.* at 323). Because the time to make such a motion had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met (*see Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 796 [2d Dept 2015]).

It does not appear conclusively from the complaint that, as a matter of law, there is no basis for class action relief (*see Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]). For example, plaintiffs allege that some

defendants receive J-51 tax benefits and are therefore required to provide tenants with rent-stabilized leases but failed to do so. This claim was also made in *Borden* (*see* 24 NY3d at 390), and the Court of Appeals found that the plaintiffs satisfied the class action requirements of numerosity, predominance of common issues of law or fact, typicality of the named plaintiffs' claims, adequate representation, and superiority of class action versus other methods (*see id.* at 399-400).

Although the instant action involves 11 buildings and 8 owners, all the buildings are allegedly managed by Big City Realty Management, and all the owners are allegedly part of one holding company, Big City Acquisitions. Moreover, *Downing* – another putative class action about J-51 (*see* 107 AD3d at 88) – involved "a residential complex owned by defendants" (*id.*).

The dissent argues that the claims at issue are fact intensive, and can be determined only by examining the evidence concerning each individual unit. As noted above, this cannot be determined, as a matter of law, merely from reading the complaint. The dissent fails to consider plaintiffs' allegation that the setting of the improper rents in these apartments was part of a systematic effort by Big City Acquisitions to avoid compliance with the rent stabilization laws. Plaintiffs identify several different ways this alleged scheme was accomplished, and

offer examples of each. We disagree with the dissent's statement that it is "irrelevant" whether Big City was engaged in a systematic effort to destabilize these units. If discovery were to show that, for example, Big City charged all the tenants the same fraudulent and inflated amounts for claimed improvements, this would support a class action and make one tenant's proof relevant to that of other tenants. It simply is premature, before discovery and before a class certification motion has been made, to rule out the class claims in their entirety.

Although there may be some differences in the documents to be examined for each apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it. We note, however, that the possibility that the damages might be different for individual plaintiffs is not a reason to deny class certification (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 23 [1st Dept 1991]). At this stage when defendants have not answered, we do not know what documents they have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments. If their defenses are the same for many of the units, then the scheme alleged by plaintiffs may have relevance, and the potential members of the class should not, as a matter of law, be

precluded from raising these claims as a group. Moreover, class actions may be appropriate where the members of the class include former tenants, who may be unaware of their rights (*see generally Borden*, 24 NY3d at 399).

Although the dissent criticizes the majority for not citing any cases in which class allegations like these have been sustained, as noted above, generally a detailed analysis of class certification status is inappropriate at the pleading stage. Thus, it is not surprising that there is not extensive case law analyzing class pleadings at this stage. It is worth noting that the dissent, which takes the majority to task for its holding, only cites one case, from another Department, in which class claims have been dismissed at the pre-answer stage. That case, *Wojciechowski v Republic Steel Corp.* (67 AD2d 830 [4th Dept 1979], *lv dismissed* 47 NY2d 802 [1979]), does not contain a lot of facts, but the decision contains no reference to the type of common scheme alleged in the complaint here.

Finally, the dissent acknowledges that the J-51 claims might be appropriate for class relief. We see no reason, at this pre-answer stage, to distinguish between those claims and the other aspects of the purported scheme asserted by plaintiffs. The J-51 claims will involve the review of individual documents, and the assessment of individual rent histories. If those claims are

potentially appropriate for class action relief, the others should be too, at least for pleading purposes.

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

FRIEDMAN, J.P. (dissenting in part)

At issue in this putative class action are claims by current and former tenants of several different buildings, allegedly owned by entities under common control, for rent overcharges in violation of the Rent Stabilization Law. Although the complaint alleges that the overcharges fall into four broadly similar categories, and that the overcharges were systematically planned, the complaint does not identify any question of law or fact common to the entire proposed class (or to the proposed subclass of current tenants). Stated otherwise, in the end, regardless of any plan by defendants or any overcharges of other tenants, each class member either was or was not overcharged — a question that can be determined only by looking at the evidence concerning that tenant's individual unit. In nonetheless modifying the order of Supreme Court to reinstate plaintiffs' class allegations, the majority writes a new roadmap for the litigation of these types of disputes, turning every overcharge claim into a potential class action. This certainly has not been the approach taken with these cases until now — the majority cites no case in which a similar class has been certified or even held certifiable — and I see no reason for the change effected by today's decision.

Plaintiffs seek to prosecute their claims for alleged rent overcharges on behalf of a putative class of current and former

rent-stabilized tenants of 21 different buildings.[1] The 21 buildings, although owned by various different entities, allegedly comprise a single "Big City Portfolio" (as dubbed by plaintiffs) under the common control of defendant Big City Realty Management LLC (Management LLC), as property manager, and defendant Big City Acquisitions, LLC (Acquisitions LLC), as holding company. The overcharges allegedly have resulted from four different unlawful practices, each allegedly orchestrated on a portfolio-wide basis: (1) inflating rent increases based on individual apartment improvements (IAIs); (2) failing to register accurate and complete rental information; (3) misrepresenting negotiated initial fair market rents (FMRs) for units moving from rent control to rent stabilization; and (4) failing to offer stabilized leases for units in buildings for which the owner received J-51 tax benefits.

On this appeal by plaintiffs from an order that, among other things, struck their class allegations on a pleading motion, the main issue is whether "it appears conclusively from the complaint and from the affidavits that there [is] as a matter of law no

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[1]As more fully discussed below, the named plaintiffs in this action are current or former tenants of only 11 of these 21 buildings. In addition, plaintiffs propose a subclass of current rent-stabilized tenants of the 21 buildings for purposes of the prospective relief they seek.

basis for class action relief" (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013] [internal quotation marks omitted], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014], quoting *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 831 [4th Dept 1979], *lv dismissed* 47 NY2d 802 [1979]).[2] Unlike the majority, I would answer this question in the affirmative. As more fully explained below, I reach this conclusion because it is apparent from the first amended complaint (the complaint) itself that one of the essential prerequisites for the maintenance of a class action is absent from this case: the overcharge claims of the members of the putative class involve no common questions of law or fact, as required by CPLR 901(a)(2). To be clear, the point I am making

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[2]The majority, in asserting that class allegations should never be dismissed upon a motion to dismiss, ignores this Court's contrary holding in *Downing* while relying on dicta in the much older case of *Bernstein v Kelso & Co.* (231 AD2d 314 [1st Dept 1997]). *Bernstein* is in any event distinguishable because, after making the statements relied on by the majority, this Court went on to observe that "the 'prerequisites' for declaring a class action are, at least, arguably present under the circumstances" (*id.* at 323). *Ackerman v New York Hosp. Med. Ctr. of Queens* (127 AD3d 794 [2d Dept 2015]), the other decision cited by the majority on this point, does not support the majority's position, because *Ackerman* held that the class allegations in that case were legally sufficient and pleaded with factual particularity (*see id.* at 796). Further, the majority itself appears to be unconvinced of the merit of its own objection to considering the sufficiency of the class allegations at this juncture, since it also argues that "[i]t does not appear conclusively from the complaint that . . . there is no basis for class action relief."

is not that the common questions will not predominate; it is that questions common to the class, predominant or otherwise, simply do not exist. Indeed, the majority itself does not identify any such common question.

Under plaintiffs' first three overcharge theories (inflation of IAI increases, failing to register rents, and misrepresentation of initial FMRs), whether any particular tenant has actually been overcharged can be determined only by examining the evidence pertaining to that tenant's individual apartment. Proof that defendants engaged in these practices with respect to other apartments in the portfolio — even proof that such overcharges were part of a conscious scheme — will not establish any element of an overcharge claim with respect to any particular unit as to which evidence is not presented. Under plaintiffs' fourth overcharge theory (deregulation of units in J-51 buildings), because landlords receive J-51 benefits with respect to buildings or complexes as a whole, class relief may potentially be appropriate on a *building-wide* or *complex-wide* basis (*see Downing*, 107 AD3d at 88 [reinstating class allegations in an action alleging unlawful deregulation of units in a residential complex receiving J-51 benefits]). The complaint, however, does not propose classes defined by tenancy in particular buildings or complexes but one overall class for the

entire Big City Portfolio, of which only 4 buildings (out of 21) are alleged to have received J-51 benefits. Here, proof that defendants deregulated units in certain buildings for which they received J-51 benefits will not be probative of whether another building in the portfolio was or was not part of the J-51 program.

In view of the foregoing, it simply cannot be said that, in this action, "questions of law or fact *common to the class* . . . [will] predominate over any questions affecting only individual members" (CPLR 901[a][2] [emphasis added]). Indeed, to reiterate, I cannot see that this action will involve *any* question of law or fact common to the class (or subclass) proposed in the complaint — because each question raised by the action pertains, not to the entire real estate portfolio plaintiffs use to define the proposed class and subclass, but to a particular unit or (in the case of the J-51 issue) a particular building within the portfolio. Accordingly, I respectfully dissent from the majority's reinstatement of plaintiff's class allegations, and would affirm the dismissal of those class allegations, without prejudice to an amendment of the complaint to propose the certification of classes defined as current and former tenants of any buildings for which the owners allegedly

have received J-51 tax benefits.[3]

At this point, I turn to a more detailed examination of the allegations of the complaint and the action's procedural history. Plaintiffs are current or former tenants of 24 different apartments in 11 different Manhattan residential buildings, 9 of which are allegedly owned by 7 different defendants (collectively, the landlord defendants).[4] As previously noted,

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[3]The majority states that it "see[s] no reason" to distinguish between the J-51 claims and the other overcharge claims asserted in the complaint. The reason for the distinction is that J-51 claims arising from the same building or complex, unlike the other categories of claims in this action, do raise a common issue of law or fact — whether the building or complex participates in the J-51 program — even though the J-51 claims will also inevitably involve individual issues. The determination of whether the common question in a J-51 case predominates over individual questions is appropriately deferred to the certification motion.

[4]Specifically, as alleged in the complaint, 26 plaintiffs are current tenants of 22 different apartments, and the two remaining plaintiffs are former tenants of two other apartments. The relevant buildings, their respective alleged owners (if any), and the number of apartments currently or previously leased to the named plaintiffs in each, are as follows: (1) 106 Convent Avenue, owned by defendant 106-108 Convent BCR, LLC (two apartments); (2) 110 Convent Avenue, owned by defendant 110 Convent BCR, LLC (two apartments); (3) 408 West 129th Street, owned by defendant 408-412 Pineapple LLC (five apartments); (4) 412 West 129th Street, owned by defendant 408-412 Pineapple LLC (five apartments); (5) 510 West 134th Street, owned by defendant 510-512 Yellow Apple, LLC (two apartments); (6) 512 West 134th Street, owned by defendant 510-512 Yellow Apple, LLC (two apartments); (7) 535 West 155th Street, owned by defendant 535-539 West 155 BCR, LLC (one apartment); (8) 3750 Broadway, owned by defendant 3750 Broadway BCR, LLC (one apartment); (9) 555 West 151st Street (two apartments); (10) 605 West 151st Street, owned

these 11 buildings — along with 10 other buildings in which no plaintiff has ever resided — are alleged to comprise what plaintiffs denominate the "Big City Portfolio" of real properties under the common control of defendants Management LLC and Acquisitions LLC, although the complaint does not allege how the various defendant entities are related.[5] Based on allegations that their respective landlords have overcharged them for rent through the four methods previously described, plaintiffs seek monetary damages, declaratory relief and reformation of their respective leases. The complaint proposes the certification of a class of "current and former tenants of Big City Portfolio

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by defendant 605 West 151 BCR, LLC (one apartment); (11) 545 Edgecombe Avenue (one apartment). The complaint fails to allege which entities own the buildings at 555 West 151st Street and 545 Edgecombe Avenue. In their papers supporting the motion to dismiss, defendants advised the court that defendant 3660 Broadway BCR, LLC owns 555 West 151st Street, and that defendant 545 Edgecombe BCR, LLC (which is named in the caption but not mentioned in the body of the complaint) holds the ground lease for 545 Edgecombe Avenue.

[5]As noted, plaintiffs allege that, in addition to the 11 buildings of which they are current or former tenants, the so-called "Big City Portfolio" includes 10 other buildings. Although the eight entities that allegedly hold title to these ten other buildings are also named as defendants, the complaint contains no allegations of wrongdoing against them. I concur with the majority to the extent it affirms the dismissal of the complaint as against these defendants. I also concur with the majority's reinstatement of the complaint as against 3660 Broadway BCR, LLC, which, as noted, defendants admit to be the owner of 555 West 151st Street, as to which two plaintiffs allege rental overcharges.

buildings . . . who paid rent in excess of the legal limit" and a subclass of "all current tenants of Big City Portfolio building[s], who currently reside in a rent-stabilized apartment or [an] unlawfully deregulated apartment."

In lieu of answering, defendants moved to dismiss the complaint pursuant to CPLR 3211. In addition to arguing that the complaint was legally insufficient on substantive grounds (specifically, the statute of limitations and failure to exhaust administrative remedies), defendants argued in support of their motion that plaintiffs' class allegations should be dismissed as legally insufficient. Without reaching defendants' substantive arguments, the court granted the motion to dismiss the complaint in its entirety, apparently on a theory of misjoinder. In its decision, the court also set forth its view that the action "fails as a class action because the questions of law or fact common to the class do not predominate over questions affecting only individual members, the claims or defenses may not be typical of the class and a class is not superior to other available methods of adjudication."

In opposing the present appeal, defendants have not pressed, as grounds for affirming the dismissal of the complaint in its entirety, either the substantive arguments they raised before

Supreme Court or Supreme Court's misjoinder theory.[6] Since defendants present us with no justification for Supreme Court's dismissal of the complaint as against the seven landlord defendants and 545 Edgecombe BCR, LLC (defendants having admitted, as noted, that the latter holds the ground lease for 545 Edgecombe Avenue), I concur in the reinstatement of the complaint as against these defendants. As to Management LLC and Acquisitions LLC (which are not alleged to have owned any of the subject buildings directly), although defendants argue on appeal that the complaint does not sufficiently allege a basis for imposing liability on these two entities, this argument was not raised before Supreme Court in support of the motion to dismiss. Accordingly, I also concur in the reinstatement of the complaint as against Management LLC and Acquisitions LLC.

To reiterate, it is plain from the allegations of the complaint itself that whether defendants have illegally overcharged rent can be determined only by examining the evidence concerning each individual unit (or, in the case of the J-51 claim, each individual building). In deciding whether there has

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[6]Apart from the question of whether this action may properly be maintained as a class action, it is questionable (as Supreme Court correctly recognized) whether the claims of all of the 28 named plaintiffs are properly joined in one action (*see* CPLR 1002[a]). However, "[m]isjoinder of parties is not a ground for dismissal of an action" (CPLR 1003).

been a rental overcharge with respect to any particular unit, evidence of overcharges with respect to other units in the alleged 21-building "Big City Portfolio," or even of a systemic plan to engage in such overcharging, will be immaterial.[7] And, again, in determining liability, there are no apparent "questions of law or fact common to the [proposed] class" (CPLR 901[a][2]). Raising the same question about hundreds of different apartments, or 21 different buildings, does not give rise to a common question simply because all of the properties are alleged to be under common control.[8]

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[7]Again, as to the claim that defendants entered into free market leases for units in buildings participating in the J-51 program, proof that defendants engaged in this practice with respect to one building in the J-51 program is not probative of whether any other particular building in the portfolio was part of the J-51 program or, if it was, of whether defendants entered into free market leases for units in that building.

[8]For example, proof that defendants overstated the cost of IAIs made to certain of the named plaintiffs' units will prove nothing about whether the cost of IAIs made to the unit of any other given class member was similarly overstated. By the same token, proof of the complaint's allegation that "[d]efendants and/or their predecessors in interest failed to register the apartment [leased to plaintiff Johanna Karlin] in 2001, from 2004 to 2005, from 2007 to 2010, and from 2012 to 2015," will do nothing to establish a failure to comply with registration requirement for any other unit in the entire portfolio. Nor will proof that "the first rent-stabilized lease [of the apartment leased to plaintiff Theresa Maddicks] had a legal regulated rent of $1,675.60, but Maddicks was given a preferential rent of $1,100," do anything to establish that the initial FMR of any other class member's apartment was misrepresented.

As previously noted, in *Downing*, on which the majority mistakenly relies, this Court recognized that the legal sufficiency of class allegations may be determined on a CPLR 3211 motion to dismiss where "it appears conclusively from the complaint and affidavits that there [is] as a matter of law no basis for class action relief" (107 AD3d at 91). Here, it is apparent from plaintiffs' own pleadings that there can be no basis for class relief based on the class and subclass they propose. Thus, there is no reason to defer the resolution of this issue to a motion for class certification under CPLR 902. Contrary to the majority's view that it would be "premature" to determine the sufficiency of the complaint's class allegations on a pre-discovery motion to dismiss, the statutory direction that a motion for class certification be made "[w]ithin sixty days after the time to serve a responsive pleading has expired" (CPLR 902) demonstrates that the CPLR does not contemplate that substantial discovery is necessary to determine whether an action may be maintained on a class basis.

Further, in *Downing*, we merely declined to dismiss class allegations that defined the proposed class by tenancy in a single residential complex for which the owner had received J-51 tax benefits. Nothing in *Downing* supports the majority's view that it may be proper to certify a class defined by tenancy in

any of 21 buildings, only four of which are alleged to have participated in the J-51 program, in an action involving three theories of rental overcharge that have nothing to do with the J-51 claim. Tellingly, the majority does not cite any case in which a putative class of rent-stabilized tenants possessing separate and distinct overcharge claims against a common landlord (or different landlords under common control) was certified (or held potentially certifiable), other than in the J-51 situation presented in *Downing*.[9] While the majority rejects my position that the sufficiency of the class allegations may be determined on a motion to dismiss, the majority itself is evidently unable to locate any case in which a class similar to the amorphously broad one proposed here was approved even on a motion for class certification.

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[9]The other case relied on by the majority is also distinguishable. *Pruitt v Rockefeller Ctr. Props.* (167 AD2d 14 [1st Dept 1991]) was an action alleging that a prospectus issued in connection with a public securities offering was false and misleading, which raised classwide common questions of law and fact as to "the truth or falsity of the prospectus'[s] statements" (*id.* at 21). Plaintiffs in this case do not allege that all members of the proposed class or subclass were misled by identical written statements. While I agree with *Pruitt*'s uncontroversial holding that the need for individual determinations of damages does not necessarily bar class certification (*see id.* at 23), in this case the question of liability itself is entirely individual (either as to each unit or, on the J-51 claim, each building) and can be resolved only on an individual basis.

The foregoing notwithstanding, the majority asserts that we somehow cannot know, "merely from reading the complaint," that the merit of each class member's overcharge claim will be determined from the evidence concerning his or her individual unit. It seems to me that this is an attempt to distract attention from the failure, by plaintiffs and the majority alike, to identify any question of law or fact common to the class. We certainly do know from the complaint what the elements of each class member's overcharge claim will be and, as previously discussed, proof of those elements will involve evidence concerning the individual unit (or, on the J-51 claim, the individual building), not the portfolio as a whole. The possibility that the alleged overcharges resulted from a portfolio-wide "systematic effort . . . to avoid compliance with the rent-stabilization laws," while troubling (and perhaps of interest to the housing authorities), is irrelevant to the merits of any individual class member's overcharge claim: the class member either was or was not overcharged, regardless of any overcharges (or lack thereof) to other units, and regardless of the existence (or nonexistence) of any portfolio-wide scheme. That similar claims and defenses may be raised with regard to different units does not create a common question, either of law

or fact, with respect to the different units.[10]

For the foregoing reasons, I dissent from the majority's decision to the extent it reinstates plaintiffs' class allegations. In my view, we should affirm the dismissal of plaintiffs' class allegations, without prejudice to an amendment of the complaint to replead the class allegations solely on the J-51 claim, as previously discussed. In all other respects, I concur with the majority's disposition of the appeal.

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

ENTERED: JULY 26, 2018

CLERK

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[10] The hypothetical situation posited by the majority as a possible basis for class relief — that defendants "charged all the tenants the same fraudulent and inflated amounts for claimed improvements — is not alleged in the complaint. While the complaint alleges that the costs of IAIs to some — but not all — plaintiffs' were overstated, there is no allegation that the costs were overstated in the same amounts.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rosalyn H. Richter
Richard T. Andrias
Judith J. Gische
Peter H. Moulton, JJ.

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Commissioner of the Department of
Social Services of the City of New York,
Plaintiff-Appellant,

-against-

New York-Presbyterian Hospital,
Defendant-Respondent,

C.Y.L., et al.,
Defendants.
____x

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 8, 2016, which granted defendant New York-Presbyterian Hospital’s (NYPH) motion to dismiss the complaint, and denied plaintiff’s cross motion for summary judgment on its causes of action for breach of contact and unjust enrichment.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee and Scott Shorr of counsel), for appellant.

Stuart Perry, PC, New York (Stuart S. Perry of counsel) and Solomon Law Firm, Cherry Hill, NJ (Franklin P. Solomon of the bar of the State of New Jersey and the State of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

FRIEDMAN, J.P.

At issue on this appeal is an agreement settling a prior medical malpractice action against a hospital, in which the hospital agreed to "assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with" the injured patient's lengthy hospitalization. We hold, as a matter of law, that this provision may be enforced against the hospital in this action by plaintiff Commissioner of the New York City Department of Social Services (DSS), the relevant Medicaid administrator, as an intended third-party beneficiary of this aspect of the settlement agreement. We also hold that DSS's claim against the hospital is not barred by the doctrine of res judicata.

Defendant C.Y.L.'s then-18-month-old son, M.L., was being treated for a congenital condition at defendant New York-Presbyterian Hospital (NYPH) in November 2003 when he was injured, allegedly by malpractice attributable to NYPH. As a result of this incident, M.L. remained an inpatient at NYPH until his death in 2010. C.Y.L., as M.L.'s guardian and on his own behalf, commenced a malpractice action against NYPH in 2004. While M.L. was still alive, the malpractice action was settled, with court approval, pursuant to a settlement agreement, dated April 28, 2008, which provides, in pertinent part:

> "NYPH agrees and stipulates that, if and when Medicaid asserts a lien or claim for return of any monies paid by Medicaid for care and treatment rendered to [M.L.] during his hospitalization that commenced on or about November 8, 2003, NYPH will assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with the aforementioned hospitalization."

The settlement documentation also includes a "hold harmless" agreement, dated April 25, 2008, containing a provision substantially identical to the above-quoted provision of the settlement agreement, and further providing that C.Y.L. would "hold [NYPH] harmless from any and all claims or liens of any nature whatsoever," except for "the potential Medicaid lien or claim referenced above."

Pursuant to the settlement agreement and the infant's compromise order entered by the court, NYPH's $6 million settlement payment was used to fund a supplemental needs trust for M.L.'s future care after his then-anticipated discharge from NYPH.[1] After M.L. died in March 2010, having never been discharged from NYPH, DSS (as the agency responsible for recoupment of Medicaid expenditures in New York City) received notice of the winding up of the trust, but, other than submitting

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[1]At the time of the settlement, it had been expected that M.L. would be discharged from NYPH and that his family would continue to care for him at home. As noted, this expectation was not realized.

a claim for reimbursement of $7,133 in payments made to providers other than NYPH, it did not participate in the winding-up proceedings.[2] By order entered July 14, 2010, the court approved the final accounting for the trust, the plan for payment of the trust's outstanding expenses (including DSS's claim for $7,133) and for the distribution of its residual assets, and the discharge of the trustees upon filing of proof of compliance with the order.

On or about November 17, 2010, about four months after entry of the order approving the plan for the winding up of the trust, NYPH billed the New York State Department of Health (DOH) — the agency responsible for the processing and payment of claims against Medicaid for compensation for services covered by the program — for the costs it had incurred in caring for M.L. from November 2003 until his death in March 2010. After substantial downward adjustment of the invoiced sums, DOH paid NYPH an amount in excess of $4.8 million in 2012. When the payment was brought to the attention of DSS — which, again, is the agency responsible for the recoupment of Medicaid expenditures — DSS sought

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[2]At that point, NYPH had not billed Medicaid for the cost of any of M.L.'s hospitalization since November 8, 2003. It is undisputed that the practice with respect to hospitalized patients covered by Medicaid is for the hospital not to bill the program until the patient has been discharged or has died.

reimbursement of this amount from defendant C.Y.L., and defendant BNY Mellon, N.A., the co-trustees of the supplemental needs trust and co-administrators of M.L.'s estate.[3] Ultimately, DSS commenced this action to recoup the funds against C.Y.L., BNY and NYPH. Against NYPH, DSS asserted causes of action for unjust enrichment and breach of contract, the latter based on the theory that DSS was an intended third-party beneficiary of the settlement agreement's provision that NYPH would "assume full responsibility for any monies which are ultimately found to be due to Medicaid[.]"

By orders entered in November 2014 and March 2015, Supreme Court dismissed the complaint in this action as against C.Y.L., and BNY based on res judicata, a determination from which DSS did not appeal.[4] Subsequently, by order entered in September 2016, Supreme Court granted the motion by NYPH, the sole remaining defendant, to dismiss the complaint as against it, and denied

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[3] It appears that the unusual situation presented by this case — in which DSS, on behalf of Medicaid, seeks to recover from NYPH the payment that Medicaid just made to that same institution — results from Medicaid's assignment of payment-making authority to one agency (DOH) and recoupment authority to a different agency (DSS).

[4] DSS also moved, in the malpractice action (over which a different justice presided), to reopen the winding up of the trust pursuant to CPLR 5015. The CPLR 5015 motion was denied, and DSS has not taken an appeal from that determination.

DSS's cross motion for summary judgment on its causes of action against NYPH. Supreme Court, taking the view that DSS should have raised its claims against NYPH in the proceedings to wind up the trust, granted NYPH's motion to dismiss on the ground of res judicata.

Now before us is DSS's appeal from the order granting NYPH's motion to dismiss the complaint and denying DSS's cross motion for summary judgment. Initially, we hold that Supreme Court erred in dismissing the complaint on the ground of res judicata. At the time of the winding up of the trust in 2010, Medicaid had not been billed for, and had not paid, any of NYPH's charges for the hospitalization of M.L. that DSS now seeks to recoup in this action.[5] Thus, the claims that DSS asserts in this action did not exist when the trust was wound up. Logically, the order approving the final accounting of the trust — the basis for NYPH's assertion of the defense of res judicata — could not preclude DSS from asserting a claim that had not yet come into being at the time the order was entered (*see X-Act Contr. Corp. v*

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[5] DSS admits, however, that, at the time of M.L.'s death, Medicaid had paid $354,079.89 for his care to various providers, and that a claim for recoupment of this amount could have been presented in the winding-up proceedings. According to DSS, the amount of the lien it asserted in the winding-up proceedings was only $7,133, due to an employee's misunderstanding of the notice of the winding up of the trust.

Flanders, 148 AD3d 518, 518 [1st Dept 2017] [a prior action did not constitute res judicata barring suit on a claim based on wrongdoing that allegedly occurred after the prior action had been settled]).

Turning to the merits of the cause of action for breach of contract (which Supreme Court did not address), the question presented is whether DSS was an intended third-party beneficiary of the settlement agreement's provision that NYPH "will assume full responsibility for any monies . . . ultimately found to be due to Medicaid." We find that this question can be answered as a matter of law. This is also the view of both parties to this appeal, each of which urges that the terms of the settlement agreement unambiguously support the party's own position on the issue of DSS's status as a third-party beneficiary. Further, neither party, in arguing for its position, places significant reliance on parol evidence. NYPH, in particular, in its appellate argument on the third-party beneficiary issue, makes no reference at all to anything in the record other than the settlement agreement, the hold harmless agreement, and the infant's compromise order.[6]

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[6] Although more than a year passed between the date of NYPH's answer and the service of its motion to dismiss, there is no indication that significant discovery has been conducted in this action, and neither party claims that additional discovery

As most recently articulated by the Court of Appeals, an intention of the parties to a contract to benefit a third party, thereby conferring on the third party the right to enforce the contract, will be found (apart from situations where the third party is the only party that could recover for the breach) only "when it is . . . clear from the language of the contract that there was 'an intent to permit enforcement by the third party'" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018], quoting *Fourth Ocean Putnam Corp. v*

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is needed. The record contains some parol evidence relevant to the interpretation of the settlement agreement, but that evidence casts little light. NYPH's moving papers include an affirmation by Brian Noonan, Esq., an attorney in NYPH's employ who was involved in negotiating the settlement of the malpractice action, but Noonan simply asserts, as a conclusion, that NYPH and C.Y.L. "did [not] . . . agree or otherwise undertake to benefit [DSS] by entering into the settlement." Again, the portion of NYPH's appellate brief addressing the third-party beneficiary issue does not refer to Noonan's affirmation. The record also includes the affidavit by C.Y.L. and the affirmation by his counsel that were filed in the malpractice action in support of the application for approval of the settlement, but NYPH does not claim that these documents provide any support for its position. Nor does NYPH claim to find support for its position in an August 2007 letter to DSS from C.Y.L. malpractice attorney, which asked DSS to "confirm that there is no Medicaid lien . . . at this time for services rendered by [NYPH] and therefore we can proceed to a settlement without a significant lien needing to be addressed." In the absence of any illuminating extracontractual documentary evidence or witness testimony, it seems inevitable that a trial on the issue of DSS's status as an intended third-party beneficiary would be nothing more than a repetition to a factfinder of the same legal arguments concerning the meaning of the settlement agreement that the parties make to us on this appeal.

Interstate Wrecking Co., 66 NY2d 28, 45 [1985]). Thus, it is well established that a third party cannot be deemed an intended beneficiary of a contract unless "the parties' intent to benefit the third party . . . [is] apparent from the face of the contract" (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001]; *accord Perfetto v CEA Engrs., P.C.*, 114 AD3d 835, 836 [2d Dept 2014]; *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 105 AD3d 639, 640 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *East Coast Athletic Club, Inc. v Chicago Tit. Ins. Co.*, 39 AD3d 461, 463 [2d Dept 2007]; *Zelber v Lewoc*, 6 AD3d 1043, 1045 [3d Dept 2004]).

The provision of the settlement agreement under which NYPH agreed to "assume full responsibility" for any Medicaid claim in the settlement agreement makes it "apparent from the face of the contract" (*LaSalle*, 285 AD2d at 108) that the parties intended to confer a direct benefit on DSS. NYPH's "assum[ption] [of] full responsibility" for any Medicaid claim is more than a promise merely to indemnify C.Y.L. against such a claim, which would not, by itself, confer third-party beneficiary status on DSS (*see e.g. Siegel Consultants, Ltd. v Nokia, Inc.*, 85 AD3d 654, 657 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152-153 [1st Dept 2003]). Rather, the settlement agreement, by requiring NYPH to "assume full

responsibility for any monies which are ultimately found to be due to Medicaid," plainly contemplates that "performance is to be rendered *directly* to [the] third party," a reliable indication that "the third party is deemed an *intended* beneficiary of the covenant and is entitled to sue for its breach" (*Goodman-Marks Assoc., Inc. v Westbury Post Assoc.*, 70 AD2d 145, 148 [2d Dept 1979]; *accord Tarrant Apparel Group v Camuto Consulting Group, Inc.*, 40 AD3d 556, 557 [1st Dept 2007]; *Internationale Nederlanden [U.S.] Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]).[7]

The dissent's attempt to distinguish *Goodman-Marks*, *Tarrant Apparel* and *International Nederlanden* is not persuasive. The observation that the particular facts of those cases are dissimilar from the facts presented here does not undercut the purposes for which we cite those cases, namely, that an agreement

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[7] While we do not disagree with NYPH's contention that C.Y.L. was seeking to protect himself in negotiating this term of the settlement agreement, granting DSS a direct right of action against NYPH for recoupment of Medicaid expenditures served C.Y.L.'s personal interests by affording him an additional layer of protection, beyond that provided by a bare right of indemnity, against possible liability to DSS. In this regard, the infant's compromise order's indemnity provision (requiring NYPH to provide C.Y.L. with "indemnification against any and all Medicaid liens"), while not sufficient by itself to establish DSS's third-party beneficiary status, does not negate the intent to confer a direct benefit on DSS manifest from the settlement agreement's "assum[ption] [of] full responsibility" provision.

under which a benefit is to be provided directly to a third party generally establishes an intended third-party beneficiary status.[8] Indeed, what essentially occurred in this case, as evidenced by the plain terms of the settlement agreement, is that NYPH agreed to act as a surety for any liability that C.Y.L. might conceivably have to reimburse Medicaid. Thus, this case presents one of the paradigmatic situations in which the intention of the parties to the contract to confer a benefit on the third party, thereby allowing a direct action by the third party against the promisor, is generally recognized (*see* Restatement [Second] of Contracts § 302[1][a] [a beneficiary is intended "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary"]; *id.*, Comment *b* [in a surety situation, "a direct action by beneficiary against promisor is normally appropriate to carry out the intention of promisor and promisee"]; *see also Daniel-Morris*

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[8] Although the dissent asserts that *Tarrant Apparel* actually supports its position that a triable issue as to DSS's third-party beneficiary status exists in this case, that case, as the dissent acknowledges, was decided on a motion to dismiss pursuant to CPLR 3211, not on a motion for summary judgment.

Co. v Glens Falls Indem. Co., 308 NY 464, 468-469 [1955]).[9]

NYPH argues that any direct obligation to DSS imposed on it by the settlement agreement is triggered only when "monies . . . are ultimately found to be due to Medicaid," a condition that has not occurred, and (according to NYPH) now can never occur, since DSS's claims against C.Y.L. and BNY have been dismissed on res judicata grounds. We see no merit in this argument, as a matter of law. Under the relevant paragraph of the settlement agreement, the trigger for NYPH's obligation to "assume full responsibility for any monies . . . ultimately found to be due to Medicaid" is *not* the ultimate liability finding (which would render the provision a mere indemnity clause). Rather, the settlement agreement provides that NYPH's obligation to "assume full responsibility" for any liability to DSS arises "*if and when Medicaid asserts a lien or claim for return of any monies paid by Medicaid* for care and treatment rendered to [M.L.] during his hospitalization that commenced on or about November 8, 2003" (emphasis added). Stated otherwise, the obligation to assume liability on the claim is triggered upon DSS's assertion of the claim; it does not await the ultimate liquidation of the claim.

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[9] In addition, the relevant provision of the settlement agreement speaks of "a lien or claim for return of any monies paid by Medicaid[.]" It is undisputed that DSS is the agency charged with the duty to assert any such lien or claim.

As events transpired, DSS asserted the claim "for return of [the] monies paid by Medicaid" against C.Y.L. and BNY when it commenced this action against them (as representatives of M.L.'s estate and the trust), as well as against NYPH, in 2014. Therefore, it was the commencement of this action that triggered NYPH's obligation under the settlement agreement to assume the liability to reimburse DSS for its expenditures on the subject hospitalization, with the amount of the liability to be determined in the course of the action. While the action has been dismissed as against C.Y.L. and BNY on res judicata grounds (a determination that is not before us for review on this appeal), nothing in the settlement agreement suggests that the dismissal of the action as against C.Y.L and BNY somehow retroactively negates the assumption by NYPH of liability to DSS that went into effect upon the commencement of the action.

The dissent would have us deny DSS summary judgment on the ground that the settlement agreement is somehow ambiguous as to whether the parties thereto intended to benefit DSS. However, the dissent identifies nothing in the settlement agreement or the other settlement documents that negates the parties' otherwise apparent intention to allow DSS to enforce the "full responsibility" for Medicaid reimbursement that NYPH expressly assumed. That NYPH's obligation is triggered only "if and when

Medicaid asserts a lien or claim for any monies paid by Medicaid" does not change the fact that NYPH agreed to "assume full responsibility" for any liability to DSS upon the assertion of such a lien or claim. While the dissent may be correct that it would have made more sense for the settlement agreement to include an express agreement by NYPH not to seek Medicaid reimbursement for its care of M.L. after the alleged malpractice (and it seems clear that C.Y.L. expected NYPH to forgo seeking such reimbursement), this does not negate the intent to allow a direct claim by DSS against NYPH that is apparent from the contract that the parties actually signed.[10] Further, as the dissent itself acknowledges, the use of the term "indemnification" in the infant's compromise order to describe NYPH's obligation to C.Y.L. does not defeat a claim of third-party beneficiary status otherwise established by the terms of

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[10] We disagree with the dissent's characterization of the settlement agreement as "contemplat[ing] that NYPH could bill [Medicaid] for M.L.'s care." While the settlement agreement does not contain an express covenant by NYPH not to bill Medicaid, NYPH's agreement to "assume full responsibility for any monies which are ultimately found to be due to Medicaid" is inconsistent with any contemplation by the parties that NYPH would bill Medicaid for the cost of M.L.'s hospitalization. Such a step would have been expected to result in a claim by DSS for reimbursement against C.Y.L. and, perforce, a claim by C.Y.L. for indemnification in the same amount against NYPH. At the time the settlement agreement was signed, the parties could not logically have contemplated that NYPH would embark on such a pointless course of conduct.

the settlement agreement.

Finally, given our conclusion that DSS is entitled to prevail on its breach of contract claim, it follows that the dismissal of the cause of action for unjust enrichment — a claim that cannot be maintained with regard to subject matter governed by contract — should be affirmed.

Accordingly, the order of Supreme Court, New York County (Charles E. Ramos, J.), entered September 8, 2016, which granted defendant NYPH’s motion to dismiss the complaint, and denied plaintiff DSS’s cross motion for summary judgment on its causes of action for breach of contract and unjust enrichment, should be modified, on the law, to deny the motion to dismiss and to grant the cross motion insofar as it seeks summary judgment on the cause of action for breach of contract, and otherwise affirmed, with costs to DSS against NYPH.

All concur except Moulton, J. who dissents in part in an Opinion.

MOULTON, J. (dissenting in part)

I respectfully dissent from the majority's finding that plaintiff (DSS) is a third-party beneficiary of a settlement agreement as a matter of law.[1] In my view, this case presents the rare situation in which we cannot determine third-party beneficiary status as a matter of law. I agree, however, with the majority's res judicata analysis.

This appeal concerns the efforts of DSS to recoup $4,887,243.99 in Medicaid funds paid to New York-Presbyterian Hospital (NYPH) in 2012 in connection with the hospitalization of the infant M.L., who passed away on March 20, 2010.

In 2004, M.L.'s father sued NYPH for medical malpractice, and he settled the action in 2008. In the settlement agreement, NYPH agreed and stipulated that

> "if and when Medicaid asserts a lien or claim for return of any monies paid by Medicaid for care and treatment rendered to [M.L.] during his hospitalization that commenced on or about November 8, 2003, NYPH will assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with the aforementioned hospitalization."

The same language appeared in an April 2008 hold harmless

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[1] Because I do not believe that DSS established its entitlement to summary judgment on its breach of contract claim based on its status as a third-party beneficiary, I do not agree with the majority that we should affirm Supreme Court's dismissal of DSS's unjust enrichment cause of action.

agreement, which also contained language stating that M.L.'s father agreed to "defend, indemnify and hold harmless" NYPH, other defendants, and defense counsel for claims unrelated to NYPH's aforementioned assumption of responsibility.

In June 2008, Supreme Court (Abdus-Salaam, J.), approved the settlement and the form of a supplemental needs trust in an infant's compromise order. In the order, Justice Abdus-Salaam ordered NYPH, in "full settlement of the claim herein," to 1) pay $6 million in cash and future periodic payments to the trust, M.L.'s parents, and several attorneys; 2) waive any and all hospital liens; and 3) "indemnif[y] against any and all Medicaid liens from the date of [M.L.'s] hospitalization to discharge." Although the settlement agreement contemplated that M.L. would likely end his hospital stay in 2008 because his family wanted to take him home, he remained at NYPH until his death in March 2010.

A third party may sue as a beneficiary on a contract made for its benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contract (*see Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018]). A third party's right to enforce a contract also arises when the third party is the only one who could recover for the breach of contract (*see Fourth*

Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 45 [1985]).[2] Although the beneficiary's name need not be mentioned in the contract, the parties' intent to benefit the third party must be apparent from the face of the contract (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001]; *Strauss v Belle Realty Co.*, 98 AD2d 424, 426-427 [2d Dept 1983], *affd* 65 NY2d 399 [1985]). "Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent" (*LaSalle Natl. Bank*, 285 AD2d at 108-109).

NYPH and DSS offer divergent interpretations of the settlement agreement and its conferral, *vel non*, of third-party

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[2] The Restatement (Second) of Contracts § 302 (which defines intended and incidental beneficiaries) was adopted by the Court of Appeals in *Fourth Ocean Putnam Corp.* (66 NY2d at 44). It provides:

> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
> "(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary."

beneficiary rights.

NYPH asserts that the overall purpose of the settlement agreement was to permit settlement of the medical malpractice action and that DSS has failed to demonstrate that the parties intended to confer to it any benefit (*see e.g. Combined Resources Constr. v Velez Constr.*, 250 AD2d 378, 379 [1st Dept 1998] [provision in settlement agreement requiring defendant to make conditional settlement offers to subcontractors was "independent of the gist" of the agreement and did not confer a right on subcontractors to receive payments] [brackets and internal quotation marks omitted]). NYPH argues that the settlement agreement, read in conjunction with the hold harmless agreement and the infant compromise order, embodies an indemnification agreement between it and M.L.[3] Indemnity requires that there be a viable claim against the indemnified party. Because DSS failed to timely pursue its claim against the trust or M.L.'s estate, NYPH contends that any viable claim has expired. NYPH further asserts that it never agreed to return monies upon DSS's mere assertion of a claim for monies paid by Medicaid. Rather, the

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[3] NYPH points to the indemnity language in M.L.'s infant compromise order, which orders payment of the settlement amount of $6 million "plus waiver of any and all hospital liens and indemnification against any and all Medicaid liens from the date of subject hospitalization to discharge."

operative language in the settlement agreement is that NYPH's obligation arises when monies are "ultimately found to be due." No monies can be found due, NYPH maintains, as a result of DSS's failure to pursue its claims against the trust or M.L.'s estate.

DSS maintains that the broad language of the settlement agreement demonstrates that it is a third-party beneficiary. It seizes on the settlement agreement's provision that "if and when Medicaid asserts a . . . claim for return of any monies paid by Medicaid . . . NYPH will *assume full responsibility* for any monies which are ultimately found to be due to Medicaid" (emphasis added). DSS argues that this language is broader than an indemnification provision.[4] Since NYPH was paid by Medicaid, it follows that a claim for the return of such monies from NYPH would inure to DSS's benefit. The settlement agreement also does not explicitly require DSS to sue the trust or M.L.'s estate before NYPH's duty to take "full responsibility" for any monies owed Medicaid is triggered. Rather, DSS contends that once the State has determined the costs of M.L.'s hospitalization, the amount "found to be due" will have matured.

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[4] In any event, DSS correctly notes that even if the settlement agreement is one of indemnity, that alone does not negate the possibility of a third-party beneficiary claim (*see Polat v Fifty CPW Tenants Corp.*, 249 AD2d 163, 164 [1st Dept 1998]).

DSS's and NYPH's contrary views of DSS's rights under the settlement agreement both find some support in the language of the agreement. It is true that NYPH's agreement to assume "full responsibility" is not explicitly tied to a claim asserted against the trust or M.L.'s estate. However, NYPH agreed to assume "full responsibility" only "if and when Medicaid asserts a lien or claim for return of any monies paid by Medicaid." If the parties' intent was to benefit DSS, the settlement agreement could have accomplished that goal far more directly by simply providing that NYPH would not bill DSS in the first instance. That the settlement agreement anticipates that DSS might seek reimbursement or that DSS would benefit from a recoupment does not establish the parties' intent to confer a benefit to DSS.

Because the settlement agreement is ambiguous concerning DSS's status as a third-party beneficiary, the issue cannot be decided as a matter of law. Although the issue of third-party beneficiary status is most often determined as a matter of law, we have denied summary judgment where issues of fact were raised as to the parties' intent (see *Edward J. Minskoff Equities, Inc. v Crystal Window & Door Sys., Ltd.*, 92 AD3d 469, 469-470 [1st Dept 2012]; *Paul, Weiss, Rifkind, Wharton & Garrison v Skelgas Group*, 188 AD2d 398, 398-399 [1st Dept 1992]; *MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992]; *R. H. Sanbar*

Projects v Gruzen Partnership, 148 AD2d 316, 320 [1st Dept 1989]).[5]

Thus, it is my view that this appeal presents the rare situation in which we cannot decide the issue as a matter of law. Determination of the issue should await further development of

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[5] The majority cites three inapposite cases to bolster the argument that the issue can be decided in DSS's favor as a matter of law (*Goodman-Marks Assoc., Inc. v Westbury Post Assoc.*, 70 AD2d 145 [2d Dept 1979]; *Tarrant Apparel Group v Camuto Consulting Group, Inc.*, 40 AD3d 556 [1st Dept 2007]; *Internationale Nederlanden U.S. Capital Corp. v Bankers Trust Co.*, 261 AD2d 117 [1st Dept 1999]). In *Goodman-Marks Assoc., Inc.*, the Second Department held that the plaintiff mortgage broker was the intended third-party beneficiary of a "unique direct-payment provision" contained in an agreement used to facilitate financing (70 AD2d at 148). Here, it cannot be said that the settlement agreement contained such an unambiguous "unique direct-payment provision." In *Tarrant Apparel Group,* we affirmed Supreme Court's denial of a motion to dismiss under CPLR 3211(a)(7), because the language in a license agreement "arguably" reflected that performance was to be rendered directly to the plaintiff (40 AD3d at 557). In *Internationale Nederlanden (U.S.) Capital Corp.*, we found that the plaintiffs, as creditors, were entitled to amend the complaint to assert that they were third-party beneficiaries of a contract between a debtor in bankruptcy and the debtor's balloting agent (261 AD2d at 117, 123). We found that "the sole purpose of the [d]ebtors in retaining [the balloting agent] was to effectuate the creditors' wishes in the reorganization" (*id.* at 123). By contrast, in this appeal, an issue of fact exists regarding whether the specific purpose of the settlement agreement was to benefit DSS or, instead, to facilitate the settlement of the medical malpractice action and protect M.L. and his estate from a Medicaid lien (*id.* ["Courts should look at the overall purpose of the transaction"]).

the record.[6] The parties' legal arguments presuppose that all of the issues raised in this appeal can be decided as a matter of law. I disagree.

Moreover, the majority agrees with my view that it would have made more sense for the settlement agreement to include an express agreement by NYPH not to seek Medicaid reimbursement for M.L.'s care. Yet, this argument does not sway the majority. The fact that the agreement contemplates that NYPH could bill DSS for M.L.'s care (as opposed to contemplating a waiver of NYPH's current and future hospital bills) raises a question as to whether the parties intended to benefit DSS or benefit only themselves.

DSS's cause of action based on unjust enrichment also cannot be decided on this record. To establish a claim for unjust enrichment, also known as quasi contract, a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,

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[6] I cannot assume that further discovery would be fruitless. The Supreme Court Records On-Line Library reflects that a preliminary conference was never held. Instead, the preliminary conference was adjourned in favor of motion practice until the conference was "DISPOSED/RESULT OF MOTION."

182 [2011] [internal quotation marks and citation omitted]). Although "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), that rule does not obtain where, as here, there is a bona fide dispute about the meaning of a contract and its application to the dispute at issue (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]; *Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 227-228 [1st Dept 1993]). On the record before us, triable issues of fact exist as to whether it is

“against equity and good conscience” to permit NYPH to retain the $4.83 million it received from Medicaid for M.L.’s hospitalization.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 8, 2016, modified, on the law, to deny the motion to dismiss and to grant the cross motion insofar as it seeks summary judgment on the cause of action for breach of contract, and otherwise affirmed, with costs to DSS against NYPH.

Opinion by Friedman, J.P. All concur except Moulton, J. who dissents in part in an Opinion.

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

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

ENTERED: JULY 26, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Sallie Manzanet-Daniels, J.P.
Peter Tom
Richard T. Andrias
Troy K. Webber, JJ.

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Index 150660/14

_______________________________________x

Georgia Malone & Company, Inc.,
Plaintiff-Appellant,

against,

E&M Associates, et al.,
Defendants-Respondents.
_______________________________________x

Plaintiff appeals from the order of the Supreme Court, New York County (Kelly O'Neill Levy, J.), entered June 27, 2017, which denied plaintiff's motion for partial summary judgment on the causes of action for breach of contract and attorneys' fees, and granted defendants' motion for summary judgment dismissing the causes of action for breach of contract, breach of implied contract, quantum meruit, unjust enrichment, and attorneys' fees.

Davidoff Hutcher & Citron LLP, New York (Frank L. Perrone, Jr. of counsel), and Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Sadis & Goldberg, LLP, New York (Douglas R. Hirsch and Jennifer Rossan of counsel), for respondents.

TOM, J.

In this action for recovery of a brokerage commission, plaintiff broker argues that it is entitled to the agreed-upon commission because defendants E&M Associates, Michael Langer, Irving Langer, Leibel Lederman, Aryeh Ginzberg, Scott Katz, and the LLC defendants were bound by the commission agreement and breached the agreement when they purchased the properties (using newly formed entities) and failed to pay the commission. We find that the language in the agreement is ambiguous, and thus that there is a triable issue of fact as to whether the parties intended to bind all the defendants to the agreement. Accordingly, defendants are not entitled to summary judgment dismissing the causes of action for breach of contract and attorneys' fees as against any of them.

The properties at issue consist of 85 multifamily homes containing 90 buildings and 1.4 million square feet in upper Manhattan (the properties), which were ultimately purchased by limited liability companies formed for that purpose.

Plaintiff is a real estate brokerage firm, run by its president, Georgia Malone, a broker and attorney. Defendant E&M Associates LLC (E&M) is a real estate acquisition and management firm whose members consist of defendant Irving Langer and his wife Miriam Langer. Irving Langer, along with defendants Aryeh

Ginzberg and Leibel Lederman, are partners in the firm. Defendant Michael Langer, Irving's son, is an E&M employee. Defendant Scott Katz is employed by nonparty Galil Management LLC, a successor to E&M, but was previously listed on E&M's website as E&M's CFO.

Separately, Ginzberg and Lederman are in the real estate syndication business and have bought and sold real estate by themselves and through entities they wholly own, and have negotiated and concluded deals with other individuals and entities.

According to Ginzberg and Lederman, in November 2011, they met with nonparty Baruch Singer, owner of the properties, to discuss the purchase of the properties, but they could not agree on a value for the properties, and the discussions ended.

In fact, plaintiff had performed substantial due diligence and review of the properties in connection with an earlier "Unwind Transaction" in which Singer negotiated to modify his lender's right to purchase. This included a review of all rent rolls, condition of apartments, status of rent regulation of each apartment, air rights, J-51 issues, potential upside of the rent rolls, and numerous other analyses of the properties. Notably, the work plaintiff performed was confidential and for use only by the owner for the Unwind Transaction, and for the potential sale

of the properties.

In the summer of 2012, plaintiff received the listing of the properties from Singer. In August 2012, nonparty Oren Richland, a principal of a real estate investment firm, contacted Malone and explained that he was working with investors from E&M who were interested in purchasing a multifamily portfolio. Malone advised that she was involved with the properties, and that she had prepared and was in possession of substantial confidential documentation about the properties. She said that she could arrange for an inspection of the properties, if E&M, as buyer, would first sign a "Confidentiality/Noncircumvent/Commission Agreement" (the agreement) confirming that all marketing and valuation analyses would be kept confidential and that the buyer would be obligated to pay a brokerage fee upon the purchase of the properties.

On August 29, 2012, Richland emailed Malone to ask her to send Michael Langer a copy of the agreement; the email copied Langer and provided Langer's contact details at E&M. Langer was forwarded the agreement on August 30, 2012. Within two hours, he forwarded the email, with confidential attachments, to Leibel Lederman. On August 30, 2012, the agreement was executed.

The agreement provides that it is made and agreed between plaintiff as broker and Michael Langer of E&M as "Buyer." The

agreement was signed by Malone on behalf of plaintiff and by Langer on behalf of "E&M Associates," and notably contains a footnote providing that [s]ignatories each have apparent and actual authority to bind all employees, officers, successors, assigns and agents of all their related entities and affiliates to this letter agreement."

The agreement's preamble provides that plaintiff has certain information in its possession regarding the properties that will be disclosed to the buyer upon execution of the agreement, and that the buyer is considering purchasing the properties. The preamble stresses that the buyer will be permitted to review certain confidential information and that the buyer and its representatives are required to treat such information as confidential and must not reveal or disclose the information. "Representatives" is defined to mean "the Buyer's directors, officers, employees, managers, members, partners, affiliates, potential joint venturers, representatives and advisors, including, without limitation, attorneys, accountants, but excluding all brokers, agents, and consultants."

The agreement provides that plaintiff's "Marketing and Valuation Analyses" for the properties is to be kept confidential, and can be viewed only by the parties bound to the agreement and by the parties' representatives "who agree

in writing to be bound by the terms" of the agreement. The agreement further provides that the buyer agrees to take strict precautions to safeguard and protect the confidentiality of the Marketing and Valuation Analyses provided thereunder. Under the agreement, plaintiff would exclusively handle all communication with the seller of the properties until the buyer had "entered into a fully accepted and executed letter of intent to acquire the [Properties]."

Pursuant to the agreement, the buyer acknowledged that it was introduced to the seller and the properties and agreed to pay the broker a commission upon contract closing. The Brokerage Agreement clause also provided that if the buyer were found to have breached the clause or any other provision, it would reimburse plaintiff for damages and expenses, including attorneys' fees.

In addition, the agreement provided that the confidentiality restrictions would remain in effect for one year and that all other provisions, including the payment of commission, would last for five years after execution of the agreement.

On September 12, 2012, Malone conducted a tour of the Properties with Irving Langer and Michael Langer. According to Malone, in addition to sending Michael Langer the due diligence materials beforehand, she personally handed the due diligence

material to the Langers immediately before the inspection, and reminded the Langers that plaintiff would be entitled to a commission if E&M "or any of its affiliates" purchased the properties. Malone further stated that, based on a market analysis that took several months and hundreds of hours of research, she advised the Langers that the purchase price for the properties should be approximately $200,000 per unit.

Malone claimed that she informed the Langers that the properties were subject to a 10-year option (the Unwind Transaction), starting November 11, 2006, held by one of the seller's lenders, which would allow the lender to purchase the properties at the 2006 market price. Malone further claimed that it was through her extensive work in analyzing and reviewing the properties that the Unwind Transaction was completed so that the sale of the properties could take place.

On September 13 and October 18, 2012, Richland followed up with Michael Langer, by email, stating: "Thanks again for coming out on the tour and joining the meeting with Elie. When you have a chance, please take a look at the updated model and we can discuss." Richland followed up with Michael Langer again on October 18, 2012, stating: "I am still waiting to hear back regarding both deals, Singer is doing his thing and the bank is still working on the numbers." Langer claimed that after

September 12, 2012, he had no further contact with Malone, and that neither he nor E&M purchased the properties.

Meanwhile, plaintiff was marketing the properties to other entities. Specifically, on June 18, 2013, plaintiff marketed the properties to FBE Limited LLC (FBE), a privately held real estate and capital management company owned and managed by the Fruchthandler family. Malone claimed that she met with Mr. Fruchthandler and his team, arranged for a tour of the properties, provided updated due diligence materials, and provided analyses of potential condominium conversion of certain properties and air rights for possible floor additions.

In July 2013, Ginzberg was again contacted by Singer, the owner of the properties. Ginzberg claimed that Singer was anxious to sell the properties and that the two met and Ginzberg made an offer. Singer advised Ginzberg that he had already been in negotiations with FBE and that he was going to advise FBE that if it wanted to move ahead on the deal immediately, he would make the deal with it. Otherwise, he would make the deal for the properties with Ginzberg.

FBE agreed to complete the deal immediately, and on July 18, 2013, entered into a Purchase and Sale Agreement (PSA) with Singer for the properties pursuant to which it agreed to purchase the properties for more than $300 million dollars. However, FBE

had difficulty raising sufficient funds for the deal. Ginzberg let Singer know that he was still interested if the deal fell through.

Ginzberg claimed that, in late September or early October 2013, at Singer’s suggestion, he contacted FBE and asked if “we” could help close the deal by purchasing half the properties, but the parties were unable to agree on terms. Then, in October 2013, Ginzberg ran into Singer at a wedding and told him that he thought the FBE deal would collapse, and as a result, Singer asked him if he was still interested. Ginzberg brought Lederman into discussions with Singer and the Fruchthandlers, and the parties commenced negotiations for the properties.

On October 27, 2013, an agreement was reached whereby FBE agreed to assign the PSA to Manhattanville Holdings LLC, an entity formed by FBE when it thought it would be able to close the transaction. By agreement dated November 12, 2013, the PSA was assigned to Manhattanville Holdings, and on November 14, 2013, Manhattanville Holdings closed the deal. Lederman signed on behalf of Manhattanville Holdings; Lederman, Ginzberg, and Irving Langer all signed in connection with section 1(c) (indemnification of assignor), and section 5 (assignor and assignee represent that they have not dealt with any broker in this transaction other than Meridian Capital, LLC, and that the

assignee and the "Principals," together with the assignor and Fruchthandler, agreed to indemnify each other for claims arising out of any representations and warranties set forth in section 5). The term "Principals" was defined in the agreement to mean Lederman, Ginzberg, and Irving Langer.

According to Ginzberg, Lederman, and Irving Langer, the managing member of Manhattanville Holdings was LIA MM LLC, and its members were Zaidys Manhattanville LLC, AZG II Manhattanville LLC, and LL Manhattanville LLC. The members of LIA MM LIC were Lederman, Ginzberg, and Irving Langer. In addition, Irving Langer was the managing member of Zaidys Manhattanville LLC, Ginzberg was the managing member of AZG II Manhattanville LLC, and Lederman was the managing member of LL Manhattanville LLC. The individually named defendants also averred that neither Michael Langer nor E&M were members of Manhattanville Holdings and that neither owned an equity interest in the properties.

Significantly, Lederman, Ginzberg, and Irving Langer were principals in the transaction and principals in the successor/ affiliate entity that entered into the assignment of contract, and created the 52 additional related successor and/or affiliated entities, also defendants in this action, that purchased and took title to the properties. A chart attached to the PSA confirms that Manhattanville Holdings is the owner of 75% of the equity in

all of the properties and that AZG II Manhattanville is to be the ultimate owner of 25% of the equity in all of the properties. Plaintiff contended that Lederman, Ginzberg, and Irving Langer control all of the purchasing entities, in addition to the fact that they are partners in E&M. Plaintiff also pointed to a second list of limited liability companies, which are described on the above chart as the list of property owner entities and are ultimately owned by Manhattanville Holdings. Further, each of the defendant limited liability companies admitted, in response to plaintiff's notice to admit, that they purchased the properties.

Plaintiff commenced this action, asserting that it performed its services as set forth in the agreement, that on or about November 14, 2013, defendants closed on the purchase of the properties, and that defendants failed and refused to pay the agreed-upon commission of $3.5 million. Plaintiff also alleged that pursuant to the agreement defendants agreed to reimburse it for legal fees incurred, with interest.

The complaint asserts six causes of action: (1) breach of contract for defendants' refusal to pay the sum of $3.5 million, the commission due on this transaction; (2) breach of an implied brokerage agreement; (3) quantum meruit; (4) unjust enrichment; (5) breach of confidentiality; and (6) attorneys' fees.

Plaintiff moved for partial summary judgment on the causes of action for breach of contract and attorneys' fees. In support, plaintiff submitted an affidavit by Malone asserting that under the clear terms of the agreement, plaintiff earned its commission because it introduced defendants to the seller, and that the entity defendants' admission in response to plaintiff's notice to admit warranted judgment in its favor on those claims. Plaintiff noted that defendants received the benefit of an introduction to the properties by plaintiff, as well as the benefit of plaintiff's confidential and due diligence materials. Plaintiff further argued that defendants are all related and affiliated with one another as business partners, and joint venturers, within the meaning of the agreement.

In particular, plaintiff noted that the agreement bound not only E&M but also all its employees, officers, successors, assigns and agents, and all their related entities and affiliates. Plaintiff added that Irving Langer, Leibel Lederman, Aryeh Ginzberg, and Scott Katz were either employees, partners and/or affiliates of E&M.

Plaintiff stressed that in circumvention of the agreement, defendants used the confidential information plaintiff prepared and, acting through an entity they created, purchased the properties. In that regard, plaintiff noted that the address for

each of the purchasing entities was the same, and was also the address of E&M. Regardless of which entities purchased the properties, plaintiff pointed out that all the purchasing entities were interrelated and owned and operated by the individual defendants who were bound by the agreement and who were introduced to the properties by plaintiff.

Defendants cross-moved for summary judgment dismissing all but the fifth cause of action (breach of confidentiality). In opposition to plaintiff's motion and in support of their cross motion, defendants submitted affirmations by Irving Langer, Michael Langer, Lederman, and Ginzberg, reiterating the above facts, and stating that neither Michael Langer nor E&M Associates purchased or had any equity interest in the properties. Defendants maintained that the definition of buyer in the agreement did not include the people and entities that actually bought the properties. Defendants also argued that plaintiff was not entitled to a commission, because it was not the procuring cause of the sale.

In reply, plaintiff asserted that all the defendant entities were related to, or in a partnership or joint venture with, E&M. Plaintiff added that Galil Management was a successor to E&M. Plaintiff argued that it did not need to show that it was the procuring cause of the sale, as under the terms of the agreement,

upon introduction, the agreement called for the buyer to pay plaintiff a commission if and when it closed on the properties. Plaintiff also implored the court not to allow defendants to benefit from plaintiff's substantial work on the properties and then avoid paying a brokerage commission because they "cut" plaintiff "out of the deal."

Supreme Court denied plaintiff's motion for partial summary judgment, and granted defendants' cross motion for partial summary judgment to the extent of dismissing all causes of action save the one for breach of confidentiality. We now modify to the extent of reinstating the causes of action for breach of contract and attorneys' fees.

The parties' main disagreement is about whether the agreement was intended to bind the employees, officers, affiliates and successors of E&M. Plaintiff contends that the language following the signatures - "[s]ignatories each have apparent and actual authority to bind all employees, officers, successors, assigns and agents of all their related entities and affiliates to this letter agreement" - binds all defendants in this case.

In contrast, defendants point to the fact that the agreement defines the "Buyer" as "Michael Langer of E&M Associates." Defendants also note that the preamble specifically defines the

the “Buyer’s Representatives” as “directors, officers, employees, managers, members, partners, affiliates, potential joint venturers, representatives and advisors, including, without limitation, attorneys, accountants, but excluding all brokers, agents, and consultants,” and that Section 2 of the agreement specifically refers to the confidentiality obligations of the Buyer’s Representatives, but that Section 5 (the commission and attorneys’ fees obligations) does not refer to the Buyer’s Representatives.

Supreme Court found that the agreement was clear and unambiguous. In this regard, the court noted that the agreement defined the buyer as E&M and that Section 5 of the agreement only referred to the buyer’s obligation to pay the commission upon purchase of the properties. The court found that the separate confidentiality obligation in Section 2, and the definition of Buyer’s Representatives in the preamble, only bound officers, employees, and affiliates with regard to the confidentiality obligations of the agreement.

The court remarked that it could not “rewrite the definition of ‘Buyer’ to include these ‘Representatives,’” and maintained that the parties could have included such Representatives in the definition of “Buyer” but did not do so. The court therefore found this omission to be intentional.

The court further discounted the broad language appearing after the signatures, stating that such language "[did] not alter or expand the definition of 'Buyer,'" but rather indicated that for parts of the agreement, such as the confidentiality provisions, Michael Langer had the authority to bind officers, employees, managers, members, agents, affiliates, and successors. Supreme Court's reading of the agreement was thus that only Michael Langer and E&M were bound by the commission clause.

"Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; *see also Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

Crucially, an agreement can be deemed unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Greenfield*, 98 NY2d at 569, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

However, a contract is ambiguous when "read as a whole, [it] fails to disclose its purpose and the parties' intent"

(*see Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]), or when specific language is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). Moreover, the agreement must be read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]).

Stated differently, the existence of ambiguity is determined by examining "'the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,'" with the wording viewed "'in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]). And, importantly, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

We find that the agreement here is ambiguous with regard to which parties are bound to its terms. First, although the term "Buyer" is defined as "Michael Langer of E&M Associates," the agreement expressly provides, after the signatures, that Michael Langer has the authority to bind "all employees, officers,

successors, assigns, and agents of all their related entities and affiliates to this letter agreement" (emphasis added). A literal reading of this sentence would bind the employees, successors, assigns etc. to all the terms of the agreement. Further, Malone averred in her affidavit that she had previously dealt with defendants in other transactions and knew that they often used LLCs to purchase properties, which might reflect why this language was added. Thus, while the definition of "Buyer" was initially narrow, this later clause is extremely broad, and the two are inconsistent.

Supreme Court's reading of the agreement renders the language following the signatures meaningless. Indeed, while the court fairly noted that the parties could have expanded the definition of "Buyer" from the outset, the extremely expansive clause regarding who was bound to the entire letter agreement cannot be ignored. Nor can it be said that such expansive language, which explicitly applies to the entirety of the agreement, is somehow limited to the confidentiality provisions of the agreement. The language clearly binds the other parties "to this letter agreement," with no limitation.

Further, while the agreement separately defined "Buyer's Representatives" in a broad manner, and then bound those representatives to the confidentiality provisions of the

agreement, this does not mean that the parties did not also intend a broad reading of the parties bound to the commission clause, particularly given the language following the signatures.

The language following the signatures also indicates an intent to bind all future entities related to E&M, its employees and officers, as well as successors. Indeed, unlike the language in *Ellington* (24 NY3d at 246), which only used the term "any other affiliate," the language at issue includes the terms "successors," which demonstrates an intention to bind future affiliates of the contracting parties.

It is also necessary to consider the context and circumstances and the relations between the parties at the time the agreement was executed. Plaintiff had been conducting significant work on the properties for Singer since 2011. Indeed, plaintiff's work on the "Unwind Transaction" was crucial to making it possible for Singer to sell the properties. Plaintiff was also given the listing for the properties by Singer and made efforts to market the properties to interested parties.

In addition, plaintiff was familiar with Ginzberg and Irving Langer, and had worked on numerous deals with them. According to plaintiff, Ginzberg and Irving Langer were aware that plaintiff's policy was that its commission was paid by the buyer. Having previously dealt with Irving Langer and his partners at E&M,

plaintiff also knew that they often formed new entities for the purpose of taking title on deals like this one. Further, plaintiff had also met with Irving Langer in 2011 to discuss acquiring a portfolio of properties in upper Manhattan, such as the properties.

Ginzberg and Lederman, employees and members of E&M, were interested in purchasing the properties since late 2011, and in 2012 E&M approached plaintiff about purchasing the properties. Michael Langer, an E&M employee, entered into the agreement on E&M's behalf, and he and his father, Irving Langer, the managing member of E&M, were given access to confidential material related to the properties and given a tour of the properties by plaintiff.

It should be noted that the confidential material received from plaintiff was vital to and necessary for the buyer to assess and determine a fair valuation of the properties. It would be impossible to negotiate the purchase of the properties without the substantial due diligence analyses and review of the properties, including marketing and valuation analyses, prepared by plaintiff. Within two hours of receiving this material, Langer forwarded the confidential attachments to Lederman, one of the principals who subsequently purchased the properties. Significantly, the agreement provided that plaintiff had

introduced the seller to the buyer, and that the obligation to pay a commission upon contract closing would last for five years from the execution of the agreement, and it appears that the signatories were given broad authority to bind all employees, members, affiliates, agents, and successors, as previously described.

In sum, given the history between the parties, the language contained in the agreement, and the other relevant circumstances surrounding the execution of the agreement, it is certainly plausible that the parties intended to bind not only E&M to the agreement, but also all of its individual members and employees, as well as its affiliates and successors. Regardless, the conflicting language in the agreement makes it reasonably susceptible of more than one interpretation, and a trial is required to determine the parties' intent. Accordingly, the causes of action for breach of contract and attorneys' fees should not have been dismissed.

The causes of action for breach of implied contract, quantum meruit, and unjust enrichment were correctly dismissed because there is a valid and enforceable agreement covering the subject matter (*see MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]). The breach of implied contract claim fails because there is no evidence that defendants

prevented plaintiff from closing and thereby receiving a commission (*see Eastern Consol. Props. v Adelaide Realty Corp.*, 261 AD2d 225, 230 [1st Dept 1999], *affd* 95 NY2d 785 [2000]).

Accordingly, the order of Supreme Court, New York County (Kelly O'Neill Levy, J.), entered June 27, 2017, which denied plaintiff's motion for partial summary judgment on the causes of action for breach of contract and attorneys' fees, and granted defendants' motion for summary judgment dismissing the causes of action for breach of contract, breach of implied contract, quantum meruit, unjust enrichment, and attorneys' fees, should be

modified, on the law, to deny defendants' motion as to the causes of action for breach of contract and attorneys' fees, and otherwise affirmed, without costs.

All concur.

Order Supreme Court, New York County (Kelly O'Neill Levy, J.), entered June 27, 2017, modified, on the law, to deny defendants' motion as to the causes of action for breach of contract and attorneys' fees, and otherwise affirmed, without costs.

Opinion by Tom, J. All concur.

Manzanet-Daniels, J.P., Tom, Andrias, Webber, JJ.

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

ENTERED: JULY 26, 2018

CLERK