SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 31, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6730 In re Michael Baranowski, Index 102144/09
Petitioner-Respondent,

-against-

Raymond W. Kelly, as the Police Commissioner of the City of New York, etc., et al.
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Ilyse Sisolak of counsel), for appellants.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered November 24, 2010, which granted the petition pursuant to CPLR article 78 seeking to annul respondents' determination denying petitioner accidental disability retirement benefits and direct respondents to award petitioner said benefits, unanimously affirmed, without costs.

The Medical Board found that petitioner suffered from a disabling congenital condition that prevented him from performing his duties as a police officer, and recommended ordinary

disability retirement based on the fact that the condition typically manifests itself when an individual is in his or her 20s or 30s. Petitioner contends that he is entitled to an accidental disability retirement pension based on an incident in July 2003, when he carried a victim from a burning building, which permanently aggravated the congenital condition.

Where, as here, the Medical Board finds an employee disabled for performance of duty and the Board of Trustees becomes deadlocked on the issue of whether the condition is causally related to the service-related injuries, accidental disability retirement is denied as long as there is any credible evidence of lack of causation before the Board of Trustees (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund,* 90 NY2d 139, 144-145 [1997]). Here, the court remanded to the Medical Board on two occasions to cite evidence supporting its conclusion that petitioner's disability was not service-related. We agree that the Medical Board's finding that petitioner's congenital condition was only temporarily exacerbated by the incident was based solely on conjecture, since the Board failed to cite anything in the record indicating that the condition improved before becoming permanently disabling (*see*

Matter of Cusick v Kerik, 305 AD2d 247, 253 [2003], *lv denied* 100 NY2d 511 [2003]; *Matter of Liston v City of New York*, 161 AD2d 491, 492 [1990], *lv denied* 76 NY2d 709 [1990]).

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

ENTERED: MAY 31, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6751-
6752 In re Weeks Woodlands Association, Inc., et al.,
Petitioners-Appellants,

-against-

Dormitory Authority of the State of New York, et al.,
Respondents-Respondents.

Index 110502/10

Albert K. Butzel, New York, for appellants.

Wachtel & Masyr, LLP, New York (Karen Binder of counsel), for Dormitory Authority of the State of New York, St. Mary's Hospital for Children, Inc. and St. Mary's Healthcare System for Children, Inc., respondents.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for New York State Department of Health, respondent.

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

Appeals from order, Supreme Court, New York County (Emily Jane Goodman, J.), entered January 18, 2011, which, to the extent appealed from as limited by the briefs, denied petitioners' motion for a preliminary injunction and granted the cross motion of respondent New York State Department of Health to dismiss the petition as against it, and from order and judgment (one paper), same court and Justice, entered August 9, 2011, which to the extent appealed from as limited by the briefs, granted the motion

of respondent Dormitory Authority of the State of New York for summary judgment declaring that it had the authority to provide financing for the subject construction project, denied petitioners' motion to renew, granted the cross motion of respondent New York City Department of Buildings for summary judgment dismissing the proceeding as against it, and denied petitioners' motion for summary judgment with respect to the applicability of section 24-111(a) of the Zoning Resolution of the City of New York, dismissed, without costs, as moot.

Petitioners seek to enjoin a construction project to modernize a hospital for disabled children operated by a not-for-profit corporation, based primarily on alleged noncompliance with zoning requirements. Petitioners concede that they did not seek injunctive relief against the project going forward upon their appeal to this Court from Supreme Court's denial of their motion for a preliminary injunction. It now appears that the excavation, foundation walls, steel superstructure, concrete slabs, metal stud frames and duct work are complete. We see no evidence that the work was performed in bad faith, and the work completed could not be readily undone without undue hardship. While we would adopt the dissent's cogent analysis of the zoning issue if we were to reach the merits, in view of petitioners'

failure to seek injunctive relief from this Court and the advanced stage of work on the project, we find that the appeal has become moot and therefore must be dismissed (*see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727 [2004]; *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165 [2002]; *Sutherland v New York City Hous. Dev. Corp.*, 61 AD3d 479, 479-480 [2009], *lv denied* 13 NY3d 703 [2009]; *William Israel's Farm Coop. v Board of Stds. & Appeals of City of N.Y.*, 25 AD3d 517 [2006]).

The dissent is mistaken in asserting that the Court of Appeals' decisions in *Citineighbors* and *Dreikausen* support the position that this appeal is not moot. At the same time that it recognized that "a race to completion cannot be determinative [of mootness]" (*Dreikausen*, 98 NY2d at 172), the Court of Appeals identified as the "[c]hief" factor in the mootness inquiry "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*id.* at 173). In this case, to reiterate, after Supreme Court denied their motion for a preliminary injunction, petitioners sought no injunctive relief from this Court upon the instant

appeal.

Indeed, over a year's time, petitioners repeatedly chose not to apply to this Court for injunctive relief to preserve the status quo pending further proceedings.[1] Hence, by August 2011 (five months before this appeal was argued), bonds in the amount of $102,200,000 had been issued to finance the project, approximately $30 million of the bond proceeds had been drawn down, and, according to the main respondents' initial brief, "excavation and foundations [were] complete, the erection of the steel superstructure [was] 70% complete, the installation of the concrete slabs on the basement floor [was] complete and the concrete slabs on the ground floor [were] 50% complete." In light of this history, the dissent would turn the law on its head by penalizing a not-for-profit institution, and the public

[1]After Supreme Court denied their initial application for a temporary restraining order (TRO) in August 2010, petitioners did not immediately come to this Court to seek interim relief. Petitioners again failed to seek such relief from this Court in January 2011, when Supreme Court denied their first motion for a preliminary injunction. Petitioners again failed to seek such relief from this Court in March 2011, when they moved this Court for other relief in connection with their appeal from the first order under review. Petitioners again failed to seek such relief from this Court in April 2011, when Supreme Court denied their application for a TRO in connection with the renewal of their motion for a preliminary injunction. Finally, petitioners once again failed to seek such relief from this Court in August 2011, when Supreme Court denied their renewed motion.

agencies cooperating with it, for having gone forward with this project in reliance on (1) the issuance of all necessary governmental permits, (2) Supreme Court's denial of all applications for injunctive relief, and (3) petitioners' failure even to seek injunctive relief from this Court. Stated otherwise, it is the position of the dissent that respondents should have imposed an injunction against proceeding with the project on themselves. We disagree.

Petitioners and the dissent fail to come to grips with the fact that petitioners, by failing to seek injunctive relief from this Court upon any of the occasions when they were denied relief by Supreme Court, are themselves complicit in the project's having reached its present advanced stage. Instead, the dissent makes an emotional appeal, essentially accusing us of coming to the aid of those having "the power and the money to proceed with dispatch" (internal quotation marks omitted), as if this matter concerned a for-profit project aimed at enriching private developers at the expense of local homeowners. Putting aside that the status of the proponents of this project has no particular bearing on petitioners' rights, the dissent seems to have lost sight of the fact that the intended beneficiaries of the project are the sick and disabled children served by

respondent hospital, a not-for-profit institution. Although the identity of those to be served by the project is also essentially irrelevant to the issues raised on this appeal, we do not think it accurate to characterize these children as persons well-endowed with "power" and "money."[2] We add that the dissent is simply wrong in saying that respondents have acted "with a blatant disregard for [petitioners'] rights." Respondents have at all times acted under color of law, and their construction of the zoning provision in question, while erroneous, certainly falls within the bounds of reason (especially given that the question is apparently one of first impression), and, after all, was accepted by Supreme Court.

The dissent argues that, to avoid mootness, it sufficed for petitioners to seek injunctive relief in Supreme Court, even if they subsequently failed to apply for such relief upon their appeal to this Court. *Dreikausen* indicates otherwise. In

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[2]The dissenter protests too much in asserting that we "stoop[]" to characterizing as an emotional appeal his reference to respondents' alleged "power" and "money." Since the resources available to respondents are not legally relevant, the dissent's reference thereto serves no evident purpose other than emotional manipulation. However, if the dissent finds the temptation to make such a reference irresistible, far from being "meanspirited[]," it is only fair to take note of the children for whose benefit the project is intended.

Dreikausen, the Court of Appeals cited with approval *Matter of Fallati v Town of Colonie* (222 AD2d 811 [1995]), in which the appeal was found moot because (as summarized by the Court of Appeals) "no injunction [was] sought before [the] Appellate Division" (98 NY2d at 173). The petition in *Fallati* sought, inter alia, "to enjoin [the respondent] from improving or developing [certain] property pending the determination" of the proceeding challenging the compliance of the intended use with zoning rules (222 AD2d at 812-813). The Third Department dismissed the appeal from the dismissal of the petition on the following ground*:* "Since petitioner did not seek injunctive relief *during the pendency of this appeal*, we find the controversy herein to be rendered moot" (*id.* at 813 [emphasis added]). Similarly, in *Gabriel v Prime* (30 AD3d 955 [2006]), the Third Department dismissed as moot an appeal from a judgment declaring that a contract for the sale of real property had been effectively terminated, where the owner (who sought to avoid the contract) sold the property to a third party after entry of the judgment and "no lis pendens was filed nor a stay issued *following Supreme Court's judgment* in [the owner's] favor" (*id.* at 956 [emphasis added]; *see also Matter of G.Z.T. Indus. v Planning Bd. of Town of Fallsburg*, 245 AD2d 741, 742 [1997]

[appeal was dismissed as moot because "*(d)uring the pendency of this appeal*, petitioner took no steps to safeguard its interests by, e.g., seeking to temporarily enjoin the planned construction"] [emphasis added]; *Matter of Bytner v City of Albany Bd. of Zoning Appeals*, 211 AD2d 1000, 1000 [1995] ["this appeal has been rendered moot in view of petitioner's failure to obtain an injunction protecting his interests during the pendency of this appeal"]; *cf. Vitiello v City of Yonkers*, 255 AD2d 506, 507 [1998] [appeal was not moot where, after Supreme Court denied their application for a TRO against construction and governmental permission to proceed with the project was obtained, "the plaintiffs immediately moved in (the Appellate Division) for a preliminary injunction"]). In view of the foregoing authority, we are mystified by the dissent's assertion that we have "fabricate[d]" the requirement that a party seeking to halt construction move for injunctive relief at each stage of the proceeding.[3]

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[3]Petitioners cite *Matter of Parkview Assoc. v City of New York* (71 NY2d 274 [1988], *cert denied* 488 US 801 [1988]), in which the Court of Appeals held that the City was not estopped to revoke the portion of a building permit that erroneously permitted the construction of a greater number of floors than were lawful under zoning requirements, even though the revocation would require the destruction of several floors that had already been built. However, the issue in *Parkview* was not mootness (as

The dissent's position finds no support in *Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh* (226 AD2d 1031 [1996], *lv denied* 88 NY2d 811 [1996]), a case that the Court of Appeals distinguished in *Dreikausen* (98 NY2d at 173). The panel that decided *Watch Hill* included two justices of the panel that decided *Fallati* only a few months before and three justices of the panel that decided *G.Z.T. Indus.* about a year and a half later. Thus, we see little merit in the dissent's suggestion that *Watch Hill* abrogates or relaxes the requirement that a party seeking to halt construction move for injunctive relief at each level of litigation. Moreover, nowhere in the *Watch Hill* decision do we find any support for the dissent's assertion that the Court retained jurisdiction of the appeal notwithstanding the petitioners' "failure to repeatedly seek injunctive relief." And, to reiterate, the following year, in *G.Z.T. Indus.*, three of the same justices reaffirmed that an appeal seeking to halt construction may be dismissed as moot where the appellant made no effort to preserve the status quo "during the pendency of [the]

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here), but whether the circumstances of the case were such as to give rise to a "rare exception to the unavailability of estoppel against government entities" (*id.* at 279). Accordingly, *Parkview* is not authority for excusing the failure of private litigants, such as petitioners herein, to seek injunctive relief pending the determination of litigation.

appeal" (245 AD2d at 742).[4]

Also misplaced is the dissent's reliance on *Matter of Friends of Pine Bush v Planning Bd. of City of Albany* (86 AD2d 246 [1982], *affd* 59 NY2d 849 [1983]), another Third Department decision distinguished in *Dreikausen* (98 NY2d at 173). Far from supporting the dissent's contention that the present matter is not moot, *Pine Bush* expressly held that the matter before the Court was moot because the petitioners had not been diligent in seeking injunctive relief against construction activity (*see* 86 AD2d at 247). Indeed, *Pine Bush* found that the matter was moot on the ground that the petitioners, after their motion to extend the automatic stay of the respondent's action was denied, took "no further action" to maintain the status quo, and, on their appeal from a subsequent judgment of the trial court "made no motion for a stay pursuant to CPLR 5519" (*id.*). Because *Pine*

[4]As more fully discussed below, where it is contended that an appeal from a court's refusal to stop construction has been rendered moot by substantial completion of the project, the competing interests and equities must be weighed against each other in determining whether or not the appeal should be dismissed. Accordingly, even if the petitioners in *Watch Hill* failed to seek injunctive relief from the Appellate Division after Supreme Court denied their initial application (and nothing in the decision indicates that this was the case), the retention of jurisdiction of the appeal in *Watch Hill* does not constitute authority for retaining jurisdiction in every case having a similar procedural fact pattern.

Bush did not direct the cessation of further work on the project, the case does not support the dissent's view that we should order a halt to the ongoing work here. While the *Pine Bush* Court, rather than dismissing the appeal, addressed the merits after converting the article 78 proceeding to an action for a declaratory judgment (relief not requested by petitioners in this case), it did so on the ground that the issue presented was "likely to recur if not judicially resolved" (*id.* at 248). In this case, given that both the majority and the dissenters of this panel unanimously express the view that respondents' construction of the applicable zoning provision is erroneous, we do not believe that the issue presented is likely recur. Similarly, given the concurrence of the majority and the dissent on the merits of the zoning issue raised in this case, in the unlikely event that a future dispute were to raise the same issue, we think it still more unlikely that the issue would evade appellate review by reason of the denial at the trial level of a timely application for injunctive relief.

In *Dreikausen*, the Court of Appeals distinguished both *Watch Hill* and *Pine Bush* as cases in which "[c]ourts . . . have retained jurisdiction notwithstanding substantial completion in instances where novel issues or public interests such as

environmental concerns warrant continuing review" (98 NY2d at 173). In this case, the environmental concerns invoked by petitioners are the increased traffic and the aesthetic cost anticipated to result from the enlargement and expansion of the hospital buildings. In view of the advanced stage the work on the project has reached and petitioners' failure to "d[o] all they could to timely safeguard their interests" (*Vitiello*, 255 AD2d at 507), the concerns they invoke, while not to be deprecated, must be weighed against the public interest to be served by the upgrading of respondent hospital's antiquated 1950s-era facilities. The latter interest, to reiterate, is the enhancement of the hospital's ability to treat and rehabilitate sick and disabled children. Taking all of the circumstances into account, we find that the interests invoked by petitioners do not warrant retaining jurisdiction of their appeal notwithstanding their failure to take all available steps to protect their own interests.

We disagree with the dissent's suggestion that respondents' proceeding with the modernization of the children's hospital could reasonably be viewed as an instance of "bad faith," notwithstanding that Supreme Court denied petitioners' motion for a preliminary injunction and petitioners then failed even to

request such relief upon this appeal. While we agree with the dissent that, on balance, petitioners have the stronger argument on the merits, not even petitioners have suggested that respondents' position on the merits is frivolous or lacking in a good faith basis. If petitioners wished to cast the risk of going forward with the work upon respondents, it was imperative for them at least to seek relief preserving the status quo at each stage of the proceeding, including the appeal to this Court. The Court of Appeals has expressly rejected the argument that a party suing to halt construction need not seek a preliminary injunction if it anticipates that the bonding requirement for such relief will exceed the amount it wishes to provide. In *Citineighbors*, the petitioners

> "did not try to enjoin construction during this litigation's pendency, nonfeasance that they chalk up to 'monetary constraints' and the unlikelihood of success. In short, petitioners simply assumed that Supreme Court would not grant them injunctive relief or, in the alternative, would require an undertaking in an amount more than they could or wanted to give. Under *Dreikausen*, however, petitioners were required, at a minimum, to seek an injunction in the circumstances presented here. Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer,

> petitioners may not expect us to overlook the substantial completion of this construction project" (2 NY3d at 729-730).

Finally, while the dissenter states that he "seriously doubt[s] the veracity of the respondents' statements that the structure is virtually completed," we find that respondents have established that, as of the time the appeal was argued, the construction was so far advanced that it could not be undone without undue hardship. Under this standard, the construction need not be "virtually completed" to render the dispute moot (*see William Israel's Farm Coop.*, 25 AD3d at 517 [appeal was dismissed as moot where the petitioner did not seek injunctive relief against the construction and "the new building's superstructure (was) 75% complete"]). That the current stage of the construction is not reflected in the record is irrelevant because "mootness is an issue that can be raised at anytime and, in fact, it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot" (*Gabriel v Prime*, 30 AD3d at 956 [internal quotation marks, brackets and citation omitted]).

> All concur except Saxe, J.P. and Catterson, J. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, by dismissing this appeal as moot and declining to reach the merits of the zoning issue the majority has essentially affirmed an error of law. As set forth more fully below, the error fatally infects the State Environmental Quality Review (hereinafter referred to as "SEQRA") negative declaration issued on the project which is a 90,000-square foot expansion of St. Mary's Hospital in the Weeks Woodlands section of Bayside, Queens.

At best, it is disingenuous of the majority to state that it would adopt the dissent's "cogent analysis" on the zoning issue if it had to reach the merits, but then to take the position that it does not need to do so. At worst, the majority tacitly but knowingly affirms an error of law, namely the erroneous interpretation of New York City Zoning Resolution (hereinafter referred to as "ZR") 24-111(a). This renders the greatest disservice to the petitioners who sought judicial intervention in order to assert their rights against those who, as characterized by the petitioners' counsel at oral argument, have the "power and the money" to proceed with dispatch.[1] In this case, the

[1]It is troubling that the majority stoops to characterizing this latter statement as one intended by the dissent to make an

majority's finding is particularly egregious given that the petitioners' applications for injunctive relief were denied repeatedly by a court that not only ignored the customary analysis appertaining to applications for such relief, but based the denial of the applications solely on its erroneous interpretation of the zoning resolution.

More significantly, the majority's holding ignores the fact that the erroneous interpretation of the zoning resolution infects the SEQRA negative declaration on the project issued by the respondent Dormitory Authority of the State of New York (hereinafter referred to as "DASNY"). Declining to reach the merits of the zoning issue is a total abnegation of this Court's

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"emotional appeal" considering the majority's emotionally manipulative observation in its very next sentence that the dissent "seems to have lost sight of the fact that [the project is intended for] sick and disabled children." Moreover, the majority's observation demonstrates a rare judicial mean spiritedness in its deliberate mischaracterization of the dissent's position as if emphasizing the legal rights of the petitioners must be equated with disregard for severely disabled children: Whatever the intended use of the facility, it does not alter the fact that those racing to get the project approved, commenced and completed are doing so with a blatant disregard for the rights of the petitioners. For example, the manager of the construction project who, as the record reflects, informed the petitioners in a July 2010 meeting that the work would be conducted after hours, and on Saturday and Sundays, and then added: "we are going to make your lives miserable over the next two years."

responsibility. See Save Audubon Coalition v. City of New York, 180 A.D.2d 348, 355, 586 N.Y.S.2d 569, 573 (1st Dept. 1992) ("judicial review of a lead agency's SEQRA determination is limited to [...] whether, substantively, the determination was affected by an error of law") (internal quotation marks omitted).

DASNY's negative declaration was based on a finding that the project will not have a "significant adverse effect on the environment" because it "does not involve the introduction of any land uses or new structures that do not conform to or comply with existing zoning." In turn, that unequivocal but totally erroneous statement relied on a simplistic interpretation of ZR 24-111(a) in conjunction with a confirmation by DOB that St. Mary's was permitted a maximum FAR of 1.0. The record reflects that the DOB confirmation was conveyed to DASNY by counsel for St. Mary's. The negative declaration and supplemental report are devoid of any suggestion that DASNY investigated any further, or that it was aware of the DOB's inconsistent posture, as set forth more fully below, on the interpretation of the zoning resolution. Or, indeed that it took the required "long hard look" at environmental issues.

For example, DASNY's report on the adverse impact of

increased traffic in the neighborhood stated that there would be no adverse impact because the expansion plans did not include an increase of inpatient beds. As the petitioners correctly point out, "inpatients" do not increase traffic. Instead, the critical inquiry should have been into St. Mary's expansion of outpatient/ambulatory services which are the types of daily services that increase traffic around a hospital. It is small wonder that DASNY's SEQRA review of the $200 million project, which, contrary to taking a "long hard look," was completed within 21 business days, now turns out to be based on an error of law.

The majority blithely dispenses with this SEQRA deficiency by summarizing the petitioners' concerns as "increased traffic and the aesthetic cost." This completely misses the point that the SEQRA negative declaration at issue is based on an acknowledged zoning violation. Yet, the majority overlooks this violation of the law because it views the facility as one for a disadvantaged group. Hence, in my opinion, the majority is compelled to fabricate the requirement that injunctive relief *must* be sought in the *Appellate Division*.

In this case, it is undisputed that the petitioners repeatedly and unsuccessfully sought injunctive relief in the

court below. The petitioners opposed the expansion on the grounds that it violates ZR 24-11(a) which limits the size of community facilities in residential neighborhoods. The hospital is located on 7.7 acres in a neighborhood of single-family detached homes on tree-lined streets. Until its plans for expansion, the hospital operated as a 97-bed inpatient facility for the rehabilitation of disabled children. Now, it plans to double the size of the structures on its property to 168,000 square feet and increase the size of its staff in order to convert from a rehabilitative facility to one providing ambulatory outpatient services. The petitioners claim that the additional transportation required by outpatients as well as staff will generate much more traffic, noise and pollution. They oppose the construction because, upon completion, the floor to area ratio (hereinafter referred to as "FAR")[2] would increase from 0.38 to 0.77. The petitioners claim this is a 50% larger FAR than permitted by ZR § 24-111(a).

The respondents in this action include the New York State Department of Health (hereinafter referred to as "DOH") which initially approved the project; the New York City Department of

[2]FAR is calculated by dividing the total floor area of a structure by the total area of the lot containing the building.

Buildings (hereinafter referred to as “DOB”) which issued the building permit; DASNY which conducted the SEQRA as well as providing the financing for the project, and St. Mary’s.

It is undisputed that St. Mary’s is one of the few non-residential uses in the area, and that the current building was constructed in 1950. In December 2006, St. Mary’s submitted a certificate of need for major modernization to DOH. It initially envisaged a new five story addition constructed on the east side of the existing building between the south wing and the cloister garden. The original design attempted to reduce the overall impact of the addition by “tucking” it into the existing facility.

In February 2008, DOH determined that the project was a Type I action for SEQRA purposes and that the lead agency would be Queens County or the authority having jurisdiction. It approved St. Mary’s request, subject to certain conditions and contingencies including confirmation that all necessary local zoning approvals had been granted.

On October 6, 2008, St. Mary’s sought confirmation from DOB that the maximum FAR for its building was 1. DOB denied the request, stating, “proposed hospital enlargement[/]alteration shall comply with ZR 24-111 with FAR 0.5 or secure BSA [Board of

Standards and Appeals] approval for FAR more than 0.5." A FAR of 0.5 denotes that the total floor area of a built structure on a parcel of property cannot exceed half the square footage of that parcel.

ZR 24-111(a), adopted on February 28, 1973 as an amendment to the Zoning Resolution of 1961, states that, in the district in which St. Mary's is located, the FAR for community facilities like St. Mary's, shall not exceed the floor area permitted for residential uses which was set at 0.5. The amendment concluded with an exception clause as follows: "The provisions of this paragraph shall not apply to buildings for which plans were filed with the Department of Buildings prior to November 15, 1972 including any subsequent amendments thereof."

On October 20, 2008, DOB changed its mind, stating, "O.K. to ... permit FAR of 1.0" because "building was built prior to Nov. 15, 1972." On March 25, 2010, St. Mary's requested approval from DOH for updated project costs, stating that it needed to construct a larger building than originally planned. DOH approved the request on April 9, 2010.

On May 12, 2010, DASNY voted to go forward with the financing of St. Mary's expansion. On May 21, 2010, DASNY proposed to designate itself the lead agency under SEQRA. Within

just one month, on June 22, 2010, DASNY issued a negative declaration determining that St. Mary's expansion would "not have a significant adverse effect on the environment."

On June 23, 2010, DASNY's board authorized the issuance of bonds for St. Mary's. On July 12, 2010, DOB issued a building permit, and St. Mary's announced it would begin construction on August 24, 2010. At the time of this appeal, St Mary's was proceeding with the construction of a new 90,000-square-foot building connected to its existing building.

Meanwhile on August 6, 2010, the petitioners brought the instant article 78 proceeding and action for declaratory judgment and injunctive relief against the respondents. They sought a TRO which the court denied on August 20, 2010.

On August 26, 2010, the petitioners filed an amended petition. The petitioners alleged, inter alia, that DOB and St. Mary's had failed to comply with ZR 24-111(a) and that the projected addition would bring total floor area to 168,000 square feet with a FAR of 0.77. They moved for a preliminary injunction which the court denied. The court found, inter alia, that the petitioners had failed to establish a likelihood of success on their argument that the "grandfathering" provision of ZR 24-111(a) did not apply to St. Mary's. The court held that

> "a literal reading of the grandfathering provision would appear to apply to *all* buildings whose plans were filed with DOB prior to November 15, 1972, whether or not they were completed then. Petitioners would effectively have the court insert language into ZR § 24-111(a) modifying the word 'buildings' so as to apply the provision only to buildings still under construction or in the planning pipeline, the plans for which were filed with DOB prior to November 15, 1972. However, [...] 'new language cannot be imported into a statute to give it a meaning not otherwise found therein'" (citations omitted).

The motion court's order was entered January 18, 2011. The petitioners filed a timely notice of appeal on or about March 7, 2011. They perfected the appeal by the end of March, and moved for a calendaring preference for the June 2011 term. This Court denied the motion on April 14, 2011. 2011 N.Y. Slip Op. 69941(u).

On or about April 5, 2011, the petitioners moved the court below to renew, and for a TRO enjoining construction pending a decision on the motion to renew. They stated that DOB had responded to their FOIL request after the motion court rendered its initial decision. The response included decisions by DOB and Board of Standards and Appeals (hereinafter referred to as "BSA") which interpreted ZR 24-111(a) in a manner consistent with the petitioners' interpretation that St. Mary's was prohibited from

expanding to a FAR of 1.0.

DOB opposed the petitioners' motion to renew and cross-moved for summary judgment. The petitioners cross-moved for summary judgment on the ground that the building permit that DOB issued to St. Mary's violated ZR 24-111(a). While the court rejected respondents' argument "that petitioners fail to provide a reasonable justification for not providing the purported new 'fact' sooner," it nevertheless found that this new fact would not change its prior decision. Therefore, it denied the petitioners' motion to renew. It granted DOB's cross motion for summary judgment dismissing the proceeding against it, and denied petitioners' motion for summary judgment on the issue of ZR 24-111(a), stating, "For the reasons set forth in [the prior] decision, ... the [grandfathering] provision applies to all buildings whose plans were filed prior to November 15, 1972, not merely those that were in the pipeline at that point."

The petitioners appealed on or about August 10, 2011, and the respondents moved to consolidate the two appeals and adjourn them to the December term. The petitioners opposed on the grounds that delaying the preliminary injunction appeal could foreclose it as moot. This Court calendared the appeals for the December term. At oral argument on January 18, 2012, the

respondents represented to this Court that the construction of the new building was essentially complete.

On appeal, the petitioners assert that the court below erred in its interpretation of the exception clause in ZR 24-111(a), and therefore that it erred in its denial of a preliminary injunction on the grounds that the petitioners would not succeed on the merits of their zoning claim. As the petitioners assert, the court below erroneously construed the zoning ordinance as an "invitation to create non-compliance that was not present before." Moreover, the court's interpretation is simply not supported by legislative history or by the stated purpose or intent of the City Planning Commission (hereinafter referred to as "CPC") the drafter of the Zoning Resolution provision. I agree, and for the reasons set forth below, I would reverse, and grant the petitioners an injunction enjoining the respondents from proceeding with the construction at St. Mary's Hospital until it conforms or obtains an area variance.

As a threshold matter, the decision to grant or deny a preliminary injunction lies within the discretion of the motion court and generally should not be disturbed unless it is demonstrated that the court abused its discretion. See Borenstein v. Rochel Props., 176 A.D.2d 171, 574 N.Y.S.2d 192

(1st Dept. 1991). Here, however, the court did not make the determination as an exercise of discretion by weighing the elements upon which a preliminary injunction is usually granted or denied. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 919, 552 N.E.2d 166, 167 (1990) (in addition to likelihood of success, movant must show irreparable harm in absence of injunction, and the balance of equities in movant's favor). Instead, it denied the preliminary injunction based solely on its determination that statutory interpretation forecloses the petitioners' zoning claim. Unfortunately, as the majority agrees, the court below erred on the law.

It is well settled that "[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature." N.Y. Stat. Law § 92(a) (McKinney's 2011); see e.g., Matter of M.B., 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349, 355-356, 846 N.E.2d 794, 800-801 (2006).

The intention of the Legislature is first to be sought from "a literal reading of the act itself." McKinney's Cons Laws of NY, Book 1, Statutes § 92(b). However, a "literal application" will be rejected where it would "substantially compromise[]" the "meaning and effect" of a statute. Matter of LaCroix v. Syracuse

Exec. Air Serv., Inc., 8 N.Y.3d 348, 355, 834 N.Y.S.2d 676, 679, 866 N.E.2d 1004, 1007 (2007). Courts are not foreclosed from considering legislative history. Matter of M.B., 6 N.Y.3d at 449, 451, 813 N.Y.S.2d at 357.

Further, statutes must be given "a reasonable construction, it being presumed that a reasonable result was intended by the Legislature." McKinney's Cons Laws of NY, Book 1, Statutes § 143. Nor should statutes be construed in a manner that would make them "absurd." McKinney's Cons Laws of NY, Book 1, Statutes § 145; see also Matter of Medical Socy. of State of N.Y. v. State of N.Y. Dept. of Health, 83 N.Y.2d 447, 451-452, 611 N.Y.S.2d 114, 116, 633 N.E.2d 468, 470 (1994).

In relevant part, the exception clause of ZR 24-111(a) states that the provisions restricting community facilities to a FAR of 0.5 "*shall not apply to buildings for which plans were filed with [DOB] prior to November 15, 1972 including any subsequent amendments thereof*" (emphasis added). Respondent St. Mary's, on appeal, imports the language of the court below in its entirety, arguing that the court construed the exception clause according to "its natural and most obvious sense"; that the plain text would appear to apply to all buildings whose plans were filed prior to November 15, 1972; and that the petitioners are

impermissibly urging the court below to insert language modifying the word “buildings” so as to apply the provision only to buildings still under construction or in the “pipeline.”

St. Mary’s states that its original certificate of occupancy is dated 1952, and that it provides that plans for St. Mary’s were filed in 1948. St. Mary’s therefore concludes simply – and simplistically: “Since the plans were filed with Department of Buildings before 1972, [St. Mary’s Hospital] is not subject to ZR section 24-111(a)’s restriction to a 0.5 FAR.”

Moreover, relying on “the ordinary definition of amendment, that is correction or modification” respondent adds: “[A]s DOB pointed out, and as Supreme Court correctly held the plans for the horizontal enlargement are a ‘subsequent amendment’ to the original plans, in that the enlargement is a modification of the scope of the project as shown in plans filed prior to 1972.”

Such an interpretation, however, violates a cardinal rule of statutory construction by impermissibly rendering superfluous a phrase of the provision drafted by the legislative body, in this case, the CPC. See Levine v. Bornstein, 4 N.Y.2d 241, 244, 173 N.Y.S.2d 599, 601, 149 N.E.2d 883, 885 (1958) (“all parts of an act are to be read and construed together to determine legislative intent”). The interpretation desired by the

respondents does not require the phrase “including any subsequent amendments thereof.” Had the drafters truly intended to grant a community facility like St. Mary’s a continuing and eternal right to expand its building up to a FAR of 1.0, just because plans for its 1951 facility were filed before November 15, 1972, it could have accomplished the exemption by simply stating that “the provisions shall not apply to buildings for which plans were filed prior to November 15, 1972.” St. Mary’s contention that “subsequent amendments” in this case refers to the plans for the *new* construction at St. Mary’s Hospital does not render it any less superfluous: There simply would be no necessity for the phrase if St. Mary’s interpretation of the provision were the correct one.

On the other hand, I find persuasive the petitioners’ assertion that the term “subsequent amendments” has a specific meaning which precludes the term being applied loosely to any modification or alteration -- especially one made more than 60 years after the original plans were filed. In the absence of definitions in the Zoning Resolution itself, the petitioners rely on the City Construction Code asserting as follows: that the phrase “subsequent amendments thereof” in the context of ZR 24-111(a) refers to amendments to the “plans filed prior to November

15, 1972." As such, pursuant to the New York City Administrative Code, subsequent amendments to plans or "approved construction documents" filed prior to November 15, 1972 "*shall be submitted, reviewed and approved before* the final inspection of the work [...] is completed" (emphasis added). Administrative Code of City of N.Y. § 28-104.3, § 28-101.5. A final inspection is performed by the DOB prior to the issuance of a new or amended certificate of occupancy, or a letter of completion. Administrative Code of City of N.Y. § 28-116.2.4.1, § 28-116.2.4.2.

Thus, any "subsequent amendments" to the hospital plans filed in 1948 would be amendments reflecting changes or modifications to the hospital building envisioned in the 1948 plans and could have been submitted *only before* the 1951 facility was completed and before the issuance of its certificate of occupancy. The respondents make no such claim for their current plans.[3]

Contrary to the motion court's decision, therefore, no new

[3]On the contrary, it should be noted that, at oral argument, counsel for St. Mary's impliedly conceded that the plans for the new construction are not the "subsequent amendments" contemplated by ZR 24-111(a) by refusing repeatedly to answer the question as to how the plans could be described as "amendments."

language needs be imported into the exception clause to limit the "buildings" therein to projects in the pipeline. The reference to "subsequent amendments" per se limits the scope of the exception clause to projects which were commenced prior to November 15, 1972 and were still "in the works" awaiting final inspection and certificates of occupancy. Hence, I conclude that the term "subsequent amendments" simply cannot apply to plans filed by St. Mary's with DOB in 2010, more than a half-century after St. Mary's original plans were filed with DOB.

This interpretation is further supported by the legislative history of the 1973 Zoning Resolution, and comports with the legislative intent of CPC as expressed in its report recommending adoption of the provisions. The report establishes that in 1973, CPC clearly intended to correct the overbuilding of community facilities in residential neighborhoods by limiting FAR for projects that would negatively impact residential neighborhoods in the future. The concern of the drafters was that the availability of "community facilities bulk [...] has caused buildings out of character with the surrounding residential development and has overburdened the streets and other supporting services in the area." The report highlights the fact that

"[t]hese facilities in R1 and R2 Districts

> [like Weeks Woodland] are usually developed on large lots and have made use of building types more than 4 or 5 stories high which are out of scale with the typical building type in [those] districts. Frequently they are constructed with a total disregard of the topography of the area and the existing local street patterns which are inadequate to handle the traffic generated by these uses."

The report states clearly that the provisions aimed at reducing the FAR are intended to guide the development of "[a] significant number of [community facilities which] *are presently being built or planned* using community facilities bulk" (emphasis added). The CPC report, however, recognized the "concern of sponsors who have invested large amounts of time and energy on preparing plans for these facilities and who fear the delay occasioned by another round of approvals."

The report further states: "[Community facilities] may continue to locate in R1 to R7 residential districts as-of-right so long as they have the same floor area ratio as residential buildings. In R1 and R2 districts, floor area bonuses will go as-of-right only to those community facilities which had their plans on file with the [DOB] *as of* November 15, 1972" (emphasis added). Hence, it is evident, that the CPC enacted the provisions for community facilities *in the process* of being planned, constructed and built at that time. As the petitioners

assert, it is more logical to draw the inference that the purpose of the exception clause was to protect a developer's investment in current plans rather than exempt non-conforming structures for which plans had not been filed – and would not be filed for another 37 years.

Specifically, the use of "as of" in the context of discussing ongoing projects suggests a "cut-off" date/deadline for projects in the planning stages at the time the 1973 provisions were being drafted. Neither the tenor nor the language of the report even remotely suggests that November 15, 1972 is a "grandfathering" date allowing future expansion up to a FAR of 1 by *all* the buildings *already in existence* throughout the city.

Interestingly, in September 2011, CPC issued proposals for new amendments to the Zoning Resolution. One was a proposal to amend ZR 24-111(a) by deleting the exception clause on the grounds that it is "obsolete." This proposal was characterized as a technical amendment, a description of those amendments which the CPC, after checking with DOB, believed were not subject to dispute.

Although as a consequence of this litigation and the DOB's current interpretation, CPC subsequently abandoned the proposal,

nevertheless its initial stated intent to delete the exception clause indicates its view that there was no entity left to take advantage of the exemption. As the petitioners argue, if the exception clause meant what the respondents assert it means, CPC would not have proposed deleting it for "obsolescence."

More significantly, the record reflects that DOB has interpreted the exception clause inconsistently. Until October 20, 2008 when DOB reversed its opinion and granted St. Mary's a permit for its expansion plans, it appears to have adhered to the interpretation urged by the petitioners.

In their motion to renew, the petitioners presented evidence, obtained after a formal FOIL request, that in 2006, DOB denied an application for expansion by Our Lady of Snow Church, Queens, also defined as a community facility under the ZR. The church argued that the exception clause of ZR 24-111(a) allowed such an expansion. DOB rejected the argument stating: "[t]he [...] statement pertaining to Bldg plans filed prior to 11/15/1972 is intended as a *vesting provision* to allow Bldgs filed prior to the effective date of the Zoning amendment *to continue* in compliance with the prior zoning allowable floor area."

Furthermore, DOB initially denied St. Mary's application on

the same basis. When the agency reversed itself within a period of just 14 days, it gave an explanation totally at odds with its prior denials, that is, it exempted St. Mary's from the 0.5 FAR because "building was built prior to Nov. 15th, 1972." DOB gave no explanation for its change of position. It now states, without explanation, that its ruling in the Our Lady of Snow application was "erroneous."

Lastly, the petitioners correctly assert that their interpretation of the exception clause comports with the well established requirement that "grandfathering" provisions must be narrowly construed. Matter of Albert v. Board of Stds. & Appeals of City of N.Y., 89 A.D.2d 960, 961-962, 454 N.Y.S.2d 108, 110 (1982) ("[w]hile it is customary for a zoning ordinance to be strictly construed in favor of the property owner, there are countervailing considerations when the ordinance limits the extension of nonconforming uses, because such uses detract from the effectiveness of the comprehensive zoning plan") (citations omitted), appeal dismissed 59 N.Y.2d 673 (1983).

Given the finding that the petitioners would prevail on their zoning claim, I would reject the respondents' argument that both appeals are moot because construction is "substantially complete." First, I seriously doubt the veracity of the

respondents' statements that the structure is virtually completed. Second, even if this fact was reflected in the record, in my opinion, it could not defeat the petitioners' right to appellate review. No public policy justifies abrogating that right simply because a party with the means to press on regardless with a multi-million dollar construction has done so. Any argument that emphasizes the ground gained in the respondents' race to complete construction has been explicitly and soundly rejected by the Court of Appeals. See Dreikausen, 98 N.Y.2d at 172, 746 N.Y.S.2d at 432 ("a race to completion cannot be determinative"). The Court was unequivocal in its holding that "relief remains at least theoretically available even after completion of the project. Simply put, *structures changing the use of property most often can be destroyed* " (emphasis added). Id.; see also Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn., 2 N.Y.3d 727, 729, 778 N.Y.S.2d 740, 742, 811 N.E.2d 2, 4 (2004).

The Court provided guidelines for evaluating mootness. Chief among the factors it enumerated is "a challenger's failure to seek preliminary injunctive relief." Dreikausen, 98 N.Y.2d at 173, 746 N.Y.S.2d at 433; see also Citineighbors, 2 N.Y.3d at 730, 778 N.Y.S.2d at 742 ("under Dreikausen [...] petitioners

were required, at a minimum, to *seek* an injunction") (emphasis added). In Dreikausen and Citineighbors, the petitioners did not seek a TRO or a preliminary injunction when they filed their article 78 proceeding. See 98 N.Y.2d at 171, 746 N.Y.S.2d at 431; 2 N.Y.3d at 728, 778 N.Y.S.2d at 741. By contrast, in the case at bar, the petitioners sought a TRO when they filed their original petition, but it was denied. They sought a preliminary injunction in their amended petition in August 2010, but the court denied it in January 2011. Subsequently, they moved to renew, and again made an application for a preliminary injunction, which was also denied. The respondents' further reliance on Dever v. DeVito (84 A.D.3d 1539, 922 N.Y.S.2d 646 (3d Dept. 2011), lv. dismissed 18 N.Y.3d 864, 938 N.Y.S.2d 846, 962 N.E.2d 269 (2012)), and Matter of Sherman v. Planning Bd. of Vil. of Scarsdale (82 A.D.3d 899, 918 N.Y.S.2d 878 (2d Dept. 2011)) is misplaced even though the petitioners acknowledge that the requirement to provide a bond for delaying construction of a multi-million dollar project has deterred them from seeking a stay in this Court. In Dever, the appellant not only failed to seek a stay in the Appellate Division but also "eventually withdrew her appeal and thereafter failed to pursue any additional legal relief to preserve the status quo or prevent

further construction of defendants' residence." 84 AD3d at 1541, 922 N.Y.S.2d at 649. In Sherman, the appellants not only failed to move for a preliminary injunction in the Appellate Division but also failed to so move in Supreme Court. 82 A.D.3d at 899-900, 918 N.Y.S.2d at 878. Indeed, the record reflects that petitioners in this case have had applications for either a TRO or a preliminary injunction pending before the court below for 9 of the 12 months that the case was before that court.

In my opinion, while it is clear that the Court in Matter of Fallati v. Town of Colonie (222 A.D.2d 811, 634 N.Y.S.2d 784 (3d Dept. 1995)) –- a case upon which the majority relies because it is cited with approval by the Court of Appeals -- found mootness when petitioner failed to seek injunctive relief in the Appellate Division, it is equally clear that in Matter of Watch Hill Homeowners Assn. v. Town Bd. of Town of Greenberg (226 A.D.2d 1031, 641 N.Y.S.2d 443 (3d Dept. 1996), lv. denied 88 N.Y.2d 811, 649 N.Y.S.2d 378, 692 N.E.2d 604 (1996)), also cited with approval by the Court of Appeals, petitioner's failure to repeatedly seek injunctive relief did not lead to dismissal of the appeal. In my opinion, the majority's reasoning that, because two justices were common to the panels of both cases, Watch Hill does not abrogate or relax the requirement of moving

for relief "at each level of litigation," is incoherent. Specifically, the majority does not address the import of the plain and unequivocal language of Watch Hill which appears to apply directly to the case at bar:

> "While construction [...] can render a challenge of this type moot when the petitioner has not made *any* attempt to preserve its rights pending judicial review [...] that is not the circumstance here, for petitioner sought preliminary injunctive relief – which was denied – as soon as it became aware that construction was imminent. Respondents were thus placed on notice that if they proceeded with construction, it would be at their own risk" (emphasis added).

Matter of Watch Hill, 226 A.D.2d at 1032, 641 N.Y.S.2d at 444-445.

In other words, a finding of mootness is not mandated by the fact that a petitioner has failed to seek injunctive relief at any particular *stage of litigation;* rather the analysis must focus on the *stage of construction*, and whether a petitioner has *sought* injunctive relief before construction is substantially completed. See Matter of Dreikhausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165, 171-174, 746 N.Y.S.2d 429, 432-434, 774 N.E.2d 193, 196-198 (2002).

The majority's dictate that the petitioners should have immediately come to this Court blatantly ignores the fact that in

August 2010 on the day the TRO (temporary restraining order) was denied, the motion court *immediately* set the case down for oral argument on a preliminary injunction for early September, and the application was before that court until January 2011 when the motion court's denial was entered as an order.

The respondents were therefore on notice prior to beginning construction. Specifically, they were on notice, as of the petitioners' motion to renew in April 2011, of the fact that even the DOB had at one time interpreted the zoning resolution exemption to include only projects in the pipeline as of November 1972. It is, therefore, of no relevance, in my opinion, that they did not come "immediately" to this Court when their application for a TRO was denied on August 20, 2010.

Instead, I find that the respondents' increased construction activity at this time is all the more egregious since it strongly suggests that they simply ignored the admonition of the Court of Appeals that "a race to completion cannot be determinative." Dreikhausen, 98 N.Y.2d at 172, 746 N.Y.S.2d at 432.

In my opinion, the majority paints itself into a corner because it appears to ignore the Dreikhausen Court's holding that mootness, and consequently dismissal of an appeal is found by "weighing" various factors. In turn, weighing means assessing

the relative importance or significance of the factors in a given set of circumstances. Hence, in some cases, courts have dismissed appeals because petitioners waited until construction was virtually complete before seeking injunctive relief; in others "notwithstanding [...] completion [...] novel issues or public interests such as environmental concerns warrant continuing review." Dreikhausen, 98 N.Y.2d at 173, 746 N.Y.S.2d at 433, citing with approval Matter of Friends of Pine Bush v. Planning Bd. Of City of Albany, 86 A.D.2d 246, 450 N.Y.S.2d 966 (3d Dept. 1982) (appeal should not be dismissed on ground of mootness since a question of general interest and substantial public importance is present and is likely to recur if not judicially resolved), aff'd 59 N.Y.2d 849, 465 N.Y.S.2d 924, 452 N.E.2d 1252 (1983); Watch Hill, 226 A.D.2d 1031, 641 N.Y.S.2d 443, supra.

In declining to rule on the zoning issue, the majority leaves the door open for any community facility which initially filed plans before 1972 to be granted permission by DOB to expand up to a maximum floor to area ration (hereinafter referred to as "FAR") of 1.0 in an R2A residential neighborhood. The majority's view that agreement by the majority and dissent on the interpretation of the zoning regulation tends to make such a

situation unlikely to recur, in my opinion, is simply an evasion of the issue since that interpretation is nothing more than dicta at this point.

Finally, the Court of Appeals determined that an equally significant factor in evaluating mootness is whether the work was undertaken without authority and in bad faith. Dreikausen, 98 N.Y.2d at 173, 746 N.Y.S.2d at 433. While St. Mary's did obtain approval from the DOH and DOB, it cannot be said that it was unaware that the petitioners alleged a zoning violation. The petitioners filed a challenge with DOB, then filed their petition with Supreme Court. Subsequently the petitioners moved to renew, and noticed appeals in both proceedings.

Thus, the respondents were aware or should have been aware, at the very least, that the exception clause of ZR 24-111 (a) has been interpreted inconsistently by DOB, and that the CPC determined to delete it on the grounds of obsolescence. Hence, in my opinion, no respondent should have been sanguine about the interpretation of the provision; nor could any of the respondents have been advised that appellate review would be a foregone conclusion. Proceeding with construction with dispatch could be viewed as an "unseemly race to completion intended to moot petitioners' lawsuit." Cf. Citineighbors, 2 N.Y.3d at 729, 778

N.Y.S.2d at 742. In this case, for example, according to the petitioners' affidavits on which the court below relied, on the day of April 25, 2011, with the petitioners' appeal and a motion to renew pending, "141 trips" were made through the neighborhood by a front-end loader, and the construction company advised the petitioners that work was likely to continue through "some weekends." Moreover, the respondents ensured their "edge" in the race by opposing the petitioners' motion for expediting the first appeal, and by initiating a series of motions that delayed the date of argument. Hence, barely six months later when the respondents submitted briefs for this appeal, they were ready to argue, albeit without citation to any admissible evidence, that the petitioners' challenge was moot because foundations had been poured and the steel superstructure was 70% completed. In particular, the argument of respondents St. Mary's and DASNY's on appeal should give this Court reason to view the continuing

construction as such an "unseemly race." Relying on Knaust v. City of Kingston (157 F.3d 86, 88 (2d. Cir. 1998)), the respondents purport to inform this Court that "[it] lacks the power, once a bell has been rung, to unring it."

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

ENTERED: MAY 31, 2012

CLERK

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

7007 In re Cristina Payano, Index 401906/10
Petitioner,

-against-

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

Manhattan Legal Services, New York (Judith Lacoff of counsel), for petitioner.

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for Robert Doar, respondent.

Determination of New York State Office of Temporary Disability Assistance (OTDA), dated April 20, 2010, after a hearing, that it lacked jurisdiction to review New York City Human Resources Administration's (HRA) decision to discontinue petitioner's public assistance benefits, unanimously confirmed, the petition denied, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [O. Peter Sherwood, J.], entered on or about January 10, 2011), dismissed, without costs.

Substantial evidence supports OTDA's determination that petitioner failed to establish a basis for tolling the 60-day

time limit for her request for a fair hearing on HRA's decision to discontinue her public assistance benefits (*see* Social Services Law § 22[4][a]; 18 NYCRR 358-3.5[b][1]). Petitioner failed to preserve her contention that the time limit is tolled by her mental illness and illiteracy and the fact that the notice of decision was not in Spanish and was therefore defective (*see Matter of Myles v Doar*, 24 AD3d 677, 678 [2005]). In any event, petitioner testified that she received the notice, that she went to HRA's office on December 23, 2009 to dispute the termination of her benefits, and that, while there, she was advised of her rights to a fair hearing. Nothing in the record supports her claim that her delay in requesting a fair hearing until February 18, 2010, 10 days after the deadline, was attributable to mental illness, illiteracy or a defective notice.

Petitioner's claim that the time limit is tolled by the fact that she is a victim of domestic violence, while preserved, is

unsupported by any evidence that domestic violence prevented her from timely requesting a fair hearing.

We have considered petitioner's remaining contentions and find them without merit.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7027 Khusal Ghany, et al., Index 301731/07
Plaintiffs-Appellants,

-against-

BC Tile Contractors, Inc., et al.,
Defendants-Respondents.

Robin Mary Heaney, Rockville Centre, for appellants.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for BC Tile Contractors, Inc., respondent.

Burke, Gordon & Conway, White Plains (Michael G. Conway of counsel), for A.F. & Sons, LLC, respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about December 14, 2010, which granted the motion of defendant A.F. & Sons, LLC and the cross motion of defendant BC Tile Contractors, Inc. (BC Tile) for summary judgment dismissing the complaint and denied plaintiffs' cross motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff stonemason alleges that he was injured when he tripped over a small stone while carrying a stone weighing approximately 100 pounds across an open, grassy area. When plaintiff tripped, the stone he was carrying fell upon his knee and wrist. The small stone on which plaintiff tripped was either

created during the delivery of the stones to the worksite or when the larger stones were sized by plaintiff and his coworkers.

The motion court properly dismissed the Labor Law § 240(1) cause of action. The record establishes that the impetus for the heavy stone's fall was plaintiff's tripping on ground level, rather than the direct consequence of gravity. Accordingly, the protections of section 240(1) are not implicated (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]).

The court also properly concluded that plaintiff did not have a viable claim under Labor Law § 241(6). The Industrial Code provisions relied upon, 12 NYCRR 23-1.7(d) and 12 NYCRR 23-2.1(a)(1), were inapplicable since the accident occurred in an open, grassy area, rather than a "passageway" or "walkway" (*see Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159-160 [2005]; *O'Gara v Humphreys & Harding*, 282 AD2d 209 [2001]; *Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1998], *lv denied* 92 NY2d 819 [1999]). Moreover, the small stone on which plaintiff allegedly fell was "an unavoidable and inherent result" of the work being performed at the site (*Cabrera v Sea Cliff Water Co.*, 6 AD3d 315, 316 [2004]).

The common-law negligence and Labor Law § 200 claims were

properly dismissed as against the general contractor, A.F. & Sons, LLC. There is no evidence that this defendant exercised supervision and control over the work or had actual or constructive notice of the alleged defective condition (*see Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 162-163 [2003]).

The common-law negligence and Labor Law § 200 claims were also properly dismissed as against B.C. Tile. Labor Law § 200 imposes a duty upon an owner or general contractor to provide construction workers with a safe worksite (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

Plaintiff's claim that B.C. Tile supervised his employer, a nonparty landscaping company, and therefore was a general contractor, was plainly controverted by his admission at deposition that he did not know which entity was responsible for what work (*see e.g. Blackwell v Fraser*, 13 AD3d 157 [2004]; *Perez*

v Bronx Park S. Assoc., 285 AD2d 402 [2001], *lv denied* 97 NY2d 610 [2002]). Furthermore, both defendants testified that B.C. Tile was merely a subcontractor at the site and that A.F. & Sons, LLC was the general contractor.

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7511 China Privatization Fund (Del), L.P., Plaintiff-Respondent, Index 650587/11

-against-

Galaxy Entertainment Group Limited, Defendant-Appellant.

Linklaters LLP, New York (James R. Warnot, Jr. of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Irwin H. Warren of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 15, 2011, which denied defendant's motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, unanimously affirmed, with costs.

In 2006, pursuant to an indenture, defendant Galaxy Entertainment Group Limited (Galaxy) issued zero coupon convertible notes to fund the construction of a casino in China. Plaintiff China Privatization Fund (Del), L.P. (CPF), an investing partnership, purchased a $50 million note. The note did not accrue or pay interest but was convertible, at CPF's option and under certain circumstances, into shares of Galaxy stock. In February 2011, CPF exercised its conversion rights and

sought to convert its note. Galaxy accepted CPF's conversion and converted CPF's note into Galaxy shares.

In March 2011, CPF commenced this breach of contract action against Galaxy, alleging that Galaxy misapplied the conversion formula set forth in the indenture, and that CPF was entitled to more Galaxy shares than were issued. Galaxy moved to dismiss the complaint, arguing that it faithfully followed the indenture's conversion methodology. CPF opposed the motion, asserting that Galaxy misconstrued the plain language of the indenture. In the alternative, CPF argued that the relevant terms of the indenture are ambiguous warranting denial of the motion. The motion court denied the motion to dismiss and we now affirm.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). An agreement is unambiguous if the language used "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" (*id*. [internal quotation marks omitted]). On the other hand, a contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v*

Paul, 66 NY2d 570, 573 [1986]). "If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal . . . is not appropriate" (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [2010]).

Because the conversion methodology in the indenture is reasonably susceptible of more than one interpretation, the motion to dismiss was properly denied. The indenture contains a complex formula for determining the number of shares to which a noteholder is entitled upon conversion. The number of shares to be issued is calculated by dividing the principal balance of the note, in this case $50 million, by the "Conversion Price." The "Conversion Price" is the "then applicable Revised Conversion Price translated into U.S. dollars at the Fixed Exchange Rate." The "Revised Conversion Price" is the "Revised Reference Price multiplied by 1.20." Thus, the "Conversion Price" ultimately depends on the "Revised Reference Price."

The "Revised Reference Price" is determined pursuant to Section 13.08 of the indenture, which provides, in relevant part:

> "(a) If the average Market Price for the Shares for any of the eight 13-consecutive week periods (each, a '**Relevant Period**') beginning on the Issue Date and ending prior to the second anniversary of the Issue Date is lower than the then applicable Initial Reference Price, then the then applicable

> Initial Reference Price shall be revised at the beginning of the next Relevant Period and be for such next Relevant Period the greater of (x) such average Market Price for the preceding Relevant Period and (y) the Floor Price, and such then applicable Initial Reference Price as so revised shall constitute the Revised Reference Price for such next Relevant Period, subject to adjustment pursuant to Section 13.09(h) and Section 9.01" (bolding in original).

The "Initial Reference Price" is defined as "HK$7.80 per Share initially, subject to adjustment pursuant to Section 13.09 and Section 9.01 (but without giving effect to any adjustment pursuant to Section 13.08)." The parties agree that there were no adjustments pursuant to the provisions set forth in §§ 13.09 and 9.01.

The dispute between the parties centers around whether the "Initial Reference Price" remained a constant figure at HK$7.80 per Share during the eight Relevant Periods or was a changing figure based on successive applications of the formula in Section 13.08(a). Under CPF's interpretation, the "Initial Reference Price" was not constant, but rather, changed with each quarterly computation, and reflected the cumulative changes of all the past quarterly periods. Under Galaxy's interpretation, the "Initial Reference Price" remained constant, unless adjusted pursuant to the provisions of §§ 13.09 and 9.01, which are not applicable

here. According to Galaxy, the definition of "Initial Reference Price" mandates that any revisions made to the Initial Reference Price pursuant to § 13.08(a) do not adjust the Initial Reference Price for purposes of determining the Revised Reference Price for subsequent Relevant Periods.

Each of the parties' interpretations finds support in the language of the indenture. CPF points to the repeated use of the term "then applicable Initial Reference Price" in support of its argument that it is a changing figure. Section 13.08(a) explicitly provides that if the average market price is lower than "the *then applicable* Initial Reference Price, then the *then applicable* Initial Reference Price *shall be revised* at the beginning of the next Relevant Period and [*shall*] *be* for such next Relevant Period . . ." (emphasis added). This section further provides that "such then applicable Initial Reference Price *as so revised* shall constitute the Revised Reference Price for such next Relevant Period . . ." (emphasis added). Thus, this language indicates that the Initial Reference Price can change, and that the "then applicable Initial Reference Price as so revised" rolls forward to the next Relevant Period.

Galaxy argues that the term "then applicable" merely recognizes that adjustments to the Initial Reference Price may be

made pursuant to Sections 9.01 and 13.09. Even if this interpretation is a reasonable one, we cannot say that CPF's contrary interpretation is unreasonable. CPF points out that the definition of "Initial Reference Price" already incorporates any "adjustment pursuant to Section 13.09 and Section 9.01." Thus, there arguably would be no need to use the phrase "then applicable" if the only adjustments contemplated were pursuant to those sections. Furthermore, § 13.08(a) expressly provides that the "then applicable Initial Reference Price as so revised" is itself further "subject to adjustment" pursuant to §§ 13.09 and 9.01.

In arguing that the Initial Reference Price remains constant, Galaxy points out that the indenture defines that term as "HK$7.80 per Share initially, subject to adjustment pursuant to Section 13.09 and Section 9.01 (but without giving effect to any adjustment pursuant to Section 13.08)." Thus, Galaxy argues that the revision mechanism in § 13.08(a) cannot affect the Initial Reference Price. However, as CPF argues, the definition uses the term "initially," suggesting that § 13.08 cannot cause a change to the Initial Reference Price "initially," but can be used to alter that price in subsequent periods.

Suffice it to say, the indenture is not a model for

contract drafting, and its language can be reasonably interpreted to support both Galaxy's and CPF's position. Because neither party has established that its interpretation is correct as a matter of law, the motion to dismiss was properly denied. "While it is not this Court's preference to find a triable issue of fact concerning the terms of a written agreement between two sophisticated contracting parties, our options are limited where the contractual provisions at issue are drafted in a manner that fails to eliminate significant ambiguities" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [2008]).

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

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7786 The People of the State of New York, Respondent,

Ind. 43715C/09

-against-

Emily Vega,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allan H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Colleen Duffy, J.), rendered September 20, 2010, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree and harassment in the second degree, and sentencing her to a conditional discharge and a fine of $125, unanimously affirmed.

The information charging defendant with harassment in the second degree was facially sufficient (CPL 100.40). The information set out that defendant approached the victim and stated, "[W]hat happened before ain't over and I'm going to finish what I started." The information also stated that the victim had a valid order of protection against defendant, which provided proof that "tend[ed] to support the charges" (CPL 100.15[3]; *cf. People v Todaro*, 26 NY2d 325, 329-330 [1970]).

The evidence was legally sufficient to establish defendant's guilt of harassment in the second degree. The victim testified that defendant walked "very close" to her face, and threatened that "this wasn't over yet," "that it was going to get worse" and that she "was going to finish off what she had started." The victim perceived these statements as a threat because of the way defendant said them, and because defendant had hurt her on a prior occasion (*see* Penal Law 240.26[1]; *compare People v Dietze*, 75 NY2d 47, 53-54 [1989]). We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the credibility determinations of the trial court.

Defendant failed to preserve her constitutional claim that she was denied her right to the assistance of counsel when counsel's request to make a closing argument was denied (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Kello*, 96 NY2d 740, 743 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. While a defendant sentenced to a conditional discharge has the right to assistance of counsel (*Alabama v Shelton*, 535 US 654, 658 [2002]), that right was not infringed in this matter. The record shows that counsel presented what, in effect, was a

summation, in moving to dismiss the charges at the close of the People's case and again at the close of the evidence. Counsel presented all of the arguments ultimately presented on appeal in challenging the weight and sufficiency of the evidence. The trial court, therefore, received the benefit of counsel's distillation of the evidence and highlighting of weaknesses in the prosecution's case (*cf. Herring v New York*, 422 US 853, 864 [1975]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7787 Yonkers Avenue Dodge, Inc., Index 309545/08
Plaintiff-Respondent,

–against–

BZ Results, LLC,
Defendant-Appellant.

_____

Moritt Hock & Hamroff LLP, Garden City (Michael S. Re of counsel), for appellant.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 21, 2011, which, insofar as appealed from, denied defendant's unopposed motion for summary judgment dismissing the first cause of action alleging breach of contract and for summary judgment in its favor on its first and second counterclaims, unanimously modified, on the law, to grant the motion for dismissal of the first cause of action and for summary judgment, as to liability only, on defendant's first and second counterclaims, and otherwise affirmed, without costs.

Plaintiff, owner and operator of a car dealership, and defendant, a digital market consultant firm, entered into an agreement under which defendant agreed to create for the dealership a website and digital marketing system. The agreement was for a term of 36 months, during which plaintiff would pay a

monthly fee.

The court erred in denying defendant's motion seeking summary judgment dismissing plaintiff's claim of breach of contract. Defendant provided a copy of the agreement, the billing records on the account, and an affidavit from an officer of the company. That officer averred that defendant had fulfilled all of its obligations under the agreement, but had not received the payments from plaintiff required under the agreement. Thus, defendant made a prima facie showing of entitlement to summary judgment (*see e.g. Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 96-97 [2005], *affd* 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]; *Bombardier Capital v Reserve Capital Corp.*, 295 AD2d 793, 794 [2002]).

While an unopposed summary judgment motion will be denied upon a movant's failure to establish prima facie entitlement to summary judgment or where the evidence creates a question of fact (*see Myers v Bartholomew*, 91 NY2d 630 [1998]; *Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 277 n [2006]), here defendant met its burden and the record contains no evidence creating a question of fact. The motion court found questions of fact based upon a letter from plaintiff to defendant asserting that defendant was unable to fulfill its contractual obligations.

However, the letter was unsigned and unsworn, and therefore devoid of probative value. This letter was insufficient to defeat defendant's motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Lazu v Harlem Group, Inc.*, 89 AD3d 435 [2011]).

The motion court also erred in denying defendant's motion seeking summary judgment on its first and second counterclaims, which alleged breach of contract and entitlement to contractual damages and attorneys' fees. While the contract contained various provisions for its termination, these differing contingencies did not render the contract ambiguous. Nevertheless, since defendant failed to establish its entitlement to the actual and liquidated damages sought, or the amount and reasonableness of attorneys' fees claimed, it is not entitled to judgment in a sum certain.

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7788 The Royalty Network, Inc., Index 651288/11
Plaintiff-Appellant,

-against-

Carl Harris doing business
as Phat Groov Music,
Defendant-Respondent.

Anthony Motta, New York, for appellant.

Carl Harris, respondent pro se.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 22, 2011, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

The court properly determined that New York does not have jurisdiction over defendant, a Georgia resident. Plaintiff, a New York music publishing corporation, did not make a sufficient showing of conduct by which the nondomiciliary defendant purposefully availed himself of the privilege of transacting business so as to invoke the benefits and protections of New York's laws (CPLR 302[a][1]). The consulting agreement between the parties, the various communications plaintiff relies upon which concern the songwriters that defendant referred to

plaintiff for administration and co-publishing agreements in New York, are not, under the circumstances herein, adequate transactional predicates for an assertion of jurisdiction (*see Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 [2004]). Rather, all of the New York activities relating to the consulting agreement, including publishing, administering and exploiting the songwriter's compositions in New York's media outlets, were performed by plaintiff and cannot be attributed to defendant (*see e.g. J.E.T. Adv. Assoc. v Lawn King*, 84 AD2d 744, 744-745 [1981], *appeal dismissed* 56 NY2d 648 [1982]). Similarly, the executive producer agreement between the parties which required defendant to produce, market, promote, and distribute an album and two music videos, was not sufficient to establish that defendant "contract[ed] anywhere to supply goods or services in the state" (CPLR 302[a][1]). Indeed, the agreement contains no geographic qualifications at all. Although defendant was

required to send a completed album to plaintiff in New York, nothing shows that he intended to take advantage of New York's unique resources in the entertainment industry (*cf. Courtroom Tel. Network v Focus Media*, 264 AD2d 351 [1999]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7789 In re Brandon D.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about October 22, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act, which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously reversed, on the law and the facts, without costs, appellant's suppression motion granted, and the petition dismissed.

Based on the evidence presented, appellant's motion to suppress the physical evidence and his statements should have been granted. Appellant was seized when he exited the store and complied with the officer's order to stop. It is apparent that

appellant was not free to leave (*see People v Bora*, 83 NY2d 531, 534-535 [1994]). This constituted a level-three encounter, which was not justified by a reasonable suspicion that appellant committed a crime (*see People v De Bour*, 40 NY2d 210, 223 [1976]). There was no basis to detain appellant for possession of a gravity knife since there was no evidence that he knew his friend had the knife.

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7790-
7791 In re Glenn Storman,
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

- - - - -

In re Glenn Storman,
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

Index 102373/11
113652/08

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John C. Klotz, New York, for Glenn Storman, appellant/respondent.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for New York City Department of Education, respondent/appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 29, 2010, which, among other things, granted petitioner's motion to hold respondent Department of Education (DOE) in contempt for its alleged failure to comply with a judgment, same court and Justice, entered May 19, 2009 (May judgment), unanimously reversed, on the law, without costs, and the motion denied. Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered September 9, 2011,

denying the petition to annul a determination of respondent DOE, dated October 29, 2010, which sustained petitioner's unsatisfactory rating for the 2007-2008 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In the interest of justice, we nostra sponte grant DOE leave to appeal from the contempt order of May 19, 2009, which was "made in a proceeding against a body or officer pursuant to article 78" and therefore was not appealable as of right (CPLR 5701[b][1]; *see Matter of Whitfield v Bailey*, 91 AD3d 491, 492 [2012]).

Supreme Court's direction in the May judgment to remand for "further proceedings" was not a "clear and unequivocal" mandate, and thus DOE should not have been held in contempt for allegedly disobeying it (*Hae Mook Chung v Maxam Props., LLC*, 52 AD3d 423, 423 [2008]; *see also Richards v Estate of Kaskel*, 169 AD2d 111, 122 [1991], *lv dismissed in part, denied in part*, 78 NY2d 1042 [1991]). Petitoner's remedy, if any, lies in seeking to clarify the May 19, 2009 order, which will allow the court to issue a clear and unequivocal mandate.

Petitioners's February 24, 2011 CPLR article 78 fares no better. Petitioner claims that his challenge to his

unsatisfactory rating should have been transferred to this Court and reviewed under the "substantial evidence" standard. This is error as it "should not have been transferred because it did not seek review of a determination made 'as a result of a hearing held . . . pursuant to direction by law'" (*Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [2008], quoting CPLR 7803[4]). Additionally, the administrative hearing conducted by the Chancellor's Committee "was not determinative but merely advisory" to the Chancellor (*Matter of Bigler v Cornell Univ.*, 266 AD2d 92, 93 [1999], *lv dismissed* 95 NY2d 777 [2000]). Accordingly, the "arbitrary and capricious" standard of judicial review applies, not the "substantial evidence" standard (*see Matter of Kaufman v Anker*, 42 NY2d 835, 836-837 [1977]).

Applying the proper standard, DOE's determination was not arbitrary and capricious, but was rationally based in the record, which included the investigator's report and the testimony of the investigator and principal at the administrative hearing (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576, 576 [2011]; *Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [2008]).

Petitioner's "stigma plus" due process claim is defeated by

the availability of administrative review, as well as CPLR article 78 review (*see Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 523 [2010], *affd* 18 NY3d 457 [2012]; *Pinder v City of New York*, 49 AD3d 280, 281 [2008]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7792 In re Oluwashola P.,

A Child Under Eighteen
Years of Age, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Emma T.,
Respondent-Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Tennille M. Tatum-Evans, New York, for respondent.

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

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about November 3, 2011, which dismissed the neglect petition against respondent mother, unanimously reversed, on the facts, without costs, the neglect petition granted, and the matter remanded for a dispositional hearing.

The caseworker testified that the child stated that the mother beat him with a cord on his back when he broke a toy. The child's statements were corroborated by a letter written by the mother to her boyfriend in prison, which stated that she had "just" beaten the child as if it was "judgment day," for breaking

the toy (*see In re Christopher L*, 19 AD3d 597 [2007]). The mother's statement that the letter was a "joke," and her subsequent claim that it was an expression of her feelings, not her actions, is not credible in light of the fact that the letter was entirely consistent with the four-year-old child's account of events. The fact that the caseworker did not see bruises on the child's body a week later is not dispositive. Although deference should be accorded the Family Court's determination regarding the credibility of the witnesses, this Court may properly make a finding of neglect based upon the record (*see Matter of Chanyae S [Rena W]*, 82 AD3d 1247 [2011]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Manzanet-Daniels, JJ.

7798 Philip Seldon, Index 107264/09
Plaintiff-Appellant,

-against-

Andrew Spinnell,
Defendant-Respondent.

_____

Philip Seldon, appellant pro se.

Andrew J. Spinnell, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 28, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the amended complaint, unanimously affirmed, with costs.

Plaintiff is correct that the court should not have dismissed the first through eighth, tenth, and eleventh causes of action based on res judicata and collateral estoppel. However, we affirm on other grounds raised by defendant below (*see Matter of American Dental Coop v Attorney-General of State of N.Y.*, 127 AD2d 274, 279 n 3 [1987]).

All of the plaintiff's Judiciary Law § 487 claims (the first through tenth causes of action) should have been dismissed because defendant was a party in the cases on which those causes

of action are based (*see Haber v Kisner*, 255 AD2d 223 [1998]; *Northern Trust Bank v Coleman*, 632 F Supp 648, 650 [SD NY 1986]). Plaintiff's remedy lay exclusively in the previous lawsuits (*see Yalkowsky v Century Apts. Assocs.*, 215 AD2d 214, 215 [1995]). *Amalfitano v Rosenberg* (12 NY3d 8 [2009]), on which plaintiff relies, does not overrule any of the above cases. Indeed, the defendant in *Amalfitano*, was acting in his capacity as an attorney representing a client when he commenced the lawsuit at issue (*id.* at 11). Thus, there is nothing in *Amalfitano* to suggest that it expanded Judiciary Law § 487 to apply to attorneys who are merely parties to an action rather than only to attorneys acting in their capacity as attorneys (*see Barrows v Alexander*, 78 AD3d 1693 [2010]).

Even though the eleventh cause of action does not explicitly reference Judiciary Law § 487, most of that cause of action is based on defendant's allegedly false statements in other lawsuits in which defendant was a party. The only paragraph of the eleventh cause of action that is not based on such statements fails to state a cause of action, as it does not indicate how plaintiff was damaged by defendant's alleged intimidation of a third party.

Defendant did not cross appeal from the motion court's *sub*

silentio denial of the branch of his motion which sought sanctions against plaintiff. Accordingly,, we cannot award the relief he seeks (*see Hecht v City of New York*, 60 NY2d 57 [1987]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7801 The People of the State of New York, Respondent,

-against-

Jose Perez, Defendant-Appellant.

Ind. 6453/09

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

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

Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered June 14, 2010, as amended June 29, 2010, convicting defendant, after a jury trial, of auto stripping in the second degree and possession of burglar's tools in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

Defense counsel affirmatively waived the absence of an interpreter during part of the voir dire proceedings (*see People v Keen*, 94 NY2d 533, 538 [2000]). As an alternate holding, we find defendant's argument that he was constructively absent due to the lack of an interpreter to be without merit. Although defendant was generally assisted by an interpreter during pretrial proceedings and trial, the record does not indicate that

he lacked a sufficient understanding of the English language to be able to understand the questioning of venirepersons, or that a language barrier prevented him from being able to communicate with his counsel (*see People v Santos*, 46 AD3d 365, 366 [2007], *lv denied* 10 NY3d 844 [2008]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7806N Mariellen Lane Bradley, Index 306952/09
Plaintiff-Respondent,

-against-

Peter William Bradley,
Defendant-Appellant.

Glenn S. Koopersmith, Garden City, for appellant.

Chemtob Moss Forman & Talbert, LLP, New York (Michael F. Beyda of counsel), for respondent.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 6, 2011, which granted plaintiff's motion to direct defendant to pay her $25,000 to enable her to retain counsel in an out-of-state non-matrimonial action and to pay any subsequent legal fees she incurs therein, unanimously reversed, on the law, without costs, and the motion denied.

In a matrimonial action, the court is not authorized to award counsel fees to either party for legal services rendered in a non-matrimonial action or proceeding, even where the two

actions are related (*see e.g. Schapiro v Schapiro*, 204 AD2d 87 [1994]; *Anonymous v Anonymous*, 258 AD2d 547 [1999]; *Ravel v Ravel*, 235 AD2d 410 [1997]).

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

ENTERED: MAY 31, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7807N-
7808N Andrea Sheryll, et al.,
Plaintiffs-Appellants,

Kum Ja Choi, et al.,
Plaintiffs,

-against-

United General Construction, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

Index 101932/07

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellants.

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

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 24, 2011, which denied plaintiffs-appellants' motion to strike defendant-respondent City of New York's answer, unanimously modified, on the law and on the facts, to grant the motion to the extent of directing that the City's answer be stricken, unless the City pays plaintiffs-appellants' attorney costs in the sum of $10,000, within 30 days after service of a copy of this order with notice of entry, and otherwise affirmed, with costs. Order, same court and Justice, entered December 2,

2011, which denied plaintiffs' motion to strike the City's answer, unanimously affirmed, without costs.

The nature of the sanction for disobedience regarding court-ordered disclosure generally lies within the discretion of the IAS court (*see Emmitt v City of New York*, 66 AD3d 504 [2009]). Moreover, since there is a strong preference that matters be decided on their merits (*see Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213 [2002]), we agree with the motion court that the "ultimate penalty" of striking the answer was unwarranted, at least up to this point (*cf. Elias v City of New York*, 87 AD3d 513, 517 [2011]). However, the court improvidently exercised that discretion in declining to impose a stronger sanction on defendant City for its dilatory conduct.

In the instant case, the City's unexcused conduct and pattern of delay in timely serving discovery warrants a monetary sanction as noted above (*see Figdor v City of New York*, 33 AD3d 560 [2006]; *Anonymous v High School for Envtl. Studies*, 32 AD3d

353 [2006]). This sanction should deter the City from "continuing its cavalier noncompliance with court-ordered discovery" (*Elias*, 87 AD3d at 517).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7809-
7810 The People of the State of New York,
Respondent,

-against-

Robert Spencer,
Defendant-Appellant.

Ind. 2180/09

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

Judgment of resentence, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 26, 2011, resentencing defendant upon his conviction, after a jury trial, of two counts of assault in the second degree, and one count each of obstructing governmental administration in the second degree and promoting prostitution in the fourth degree, to an aggregate term of five years, unanimously affirmed. Appeal from judgment, same court and Justice, rendered May 18, 2010, unanimously dismissed, as superceded by the appeal from the judgment rendered July 26, 2011.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 349 [2007]). The testimony of the undercover officer that defendant offered the services of prostitutes established his commission of the crime of promoting prostitution in the fourth degree (*see People v Brown*, 74 AD3d 1748 [2010], *lv denied* 15 NY3d 802 [2010]; Penal Law § 230.20[1]). There is no basis to disturb the jury's determination to credit the testimony of the officer.

Moreover, since the officers were performing a lawful duty in arresting defendant, his subsequent actions of violently refusing to be handcuffed or moved from the scene of the incident to the hospital and then to central booking, and causing physical injury to two police officers, established his guilt of assault and obstructing governmental administration.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7812 Bonifacio Hernandez, Index 109143/08
Plaintiff-Respondent,

–against–

The Argo Corp., et al.,
Defendants-Respondents-Appellants,

DMA Construction Corp.,
Defendant-Appellant-Respondent.

- - - - -

The Argo Corp., et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

–against–

Accura Restoration, Inc., et al.,
Third-Party Defendants-
Appellants-Respondents.

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Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, New York (James V. Derenze of counsel), for DMA Construction Corp., appellant-respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (William Wingertzahn of counsel), for Accura Restoration, Inc., respondent-appellant/appellant-respondent.

Smith & Laquercia, LLP, New York (Lana S. Kaganovsky of counsel), for The Argo Corp. and Jemrock Realty Co., LLC, respondents-appellants.

Diamond and Diamond LLC, New York (Stuart Diamond of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.),

entered March 15, 2011, which, insofar as appealed from as

limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, granted defendants/third-party plaintiffs Argo Corp. and Jemrock Realty Corp.'s motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them and for summary judgment on their cross claims for common-law indemnification against defendant/third-party defendant Accura Restoration, Inc., and denied their motion for summary judgment dismissing the Labor Law § 240(1) claim as against them and for summary judgment on their third-party claims for contractual indemnification against defendant/third-party defendant DMA Construction Corp., denied DMA's motion for summary judgment dismissing all claims for contribution and indemnification against it, and denied Accura's motion for summary judgment dismissing the Labor Law §§ 240(1) and 200 and the common-law negligence claims as against it and for summary judgment on its cross claim for contractual indemnification against DMA, unanimously modified, on the law, to grant conditionally Argo and Jemrock's and Accura's motions for summary judgment on their claims for contractual indemnification against DMA, and otherwise affirmed, without costs.

The configuration of the scaffold required workers regularly

to travel across an open and unguarded gap of three feet. Moreover, the deposition testimony of the various defendants was less than conclusive on the procedure that workers were supposed to follow when crossing the gap. Defendants' argument focused nearly exclusively on plaintiff's detaching himself from the rope safety line before jumping across the gap; they failed to rebut the evidence that they provided an inadequate safety device in violation of Labor Law § 240(1) (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1185]). Given defendants' statutory violation, plaintiff's conduct cannot have been the sole proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286, 290 [2003]; *Torres v Monroe Coll.*, 12 AD3d 261 [2004]).

As to the Labor Law § 200 and common-law negligence claims, the record presents an issue of fact whether Accura, which exercised daily oversight of DMA workers' safety, provided all materials, and played a role in designating where they would be kept and how accessed, had the authority to control the activity that brought about plaintiff's injury (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Moreover, there is evidence that DMA installed the scaffold under Accura's direction, and it is undisputed that Accura placed the ladder in

a location that necessitated the unusual configuration of the scaffold. Thus, issues of fact exist whether Accura was not only aware of the defective scaffold but also created the defect (*see Metus v Ladies Mile Inc.*, 51 AD3d 537 [2008]).

For the same reasons, Jemrock and Argo, whose sole liability to plaintiff was vicarious under Labor Law § 240(1), are entitled to common-law indemnification against Accura (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [2009]).

Jemrock and Argo are also entitled to conditional summary judgment on their claims for contractual indemnification against DMA, as is Accura. Since the contract provides that DMA will indemnify Jemrock, Argo and Accura "[t]o the fullest extent of the law" and only to the extent caused by its own negligence, the indemnification provision is not barred by General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204,

208-209 [2008]). However, the extent to which Jemrock, Argo and Accura are entitled to indemnification depends on the extent to which DMA's negligence is determined to have contributed to the accident (*see Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [2010]).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7813 In re Kelly A., and Another,

Children Under Eighteen
Years of Age, etc.,

Ghyslaine G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Laura Dillon of counsel), attorney for the children.

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 11, 2010, which, upon a fact-finding determination that respondent mother had neglected her children, ordered the children released to their father's custody without supervision, awarded respondent supervised visitation, and ordered her to complete certain services and not to engage in any further acts of domestic violence in the presence of the children or their father, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][I]; *Matter of Tammie*

Z., 66 NY2d 1, 3 [1985]). The record establishes that while in the presence of the subject children, respondent engaged in an act of domestic violence against the children's father when she attacked him, hitting him over the head multiple times as he bent down to pick up the couple's then one-year-old son. The attack rendered the father unconscious, and he awoke to the couple's then six-year-old daughter crying and tending to his bleeding head wounds. When describing the incident to the caseworker in the following weeks and months, the daughter became visibly upset and emotionally distraught. Under these circumstances, the court properly found that due to the mother's actions, both children were placed in imminent risk of physical harm and that, at the very least, the elder child suffered emotional harm (*see* Family Ct Act § 1012 [f][i]; *see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [2010], *lv denied*, 16 NY3d 705 [2011]).

We see no reason to disturb the court's evaluation of the evidence, including its credibility determinations, as its findings are clearly supported by the record (see *In re Ilene M.*, 19 AD3d 106 [2005]).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7815 230-79 Equity, Inc., Index 101228/04
Plaintiff-Appellant,

-against-

Robert Mancuso, et al.,
Defendants,

Alan Spigelman, et al.,
Defendants-Respondents.

_____

Richard Creditor LLC, Forest Hills (Richard Creditor of counsel), for appellant.

Michelle S. Russo, Port Washington, for Edmund Stevens, Jr., Shari Ream Stevens and Barry L. Solar, respondents.

Law Office of Santo Golino, New York (Brian W. Shaw of counsel), for GBL 78th St., LLC, respondent.

Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Jesse P. Schwartz of counsel), for 240-79 Owners Corp., respondent.

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Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered December 9, 2010, which, inter alia, granted defendant 240-79 Owners Corp.'s motion for summary judgment declaring that the cost of repairing and maintaining the subject common retaining wall shall be divided proportionately among only the parties whose properties touch upon the now damaged section of the wall and that, going forward, those parties are responsible pro rata for the maintenance and

repair of only that section of the wall that touches their properties, and so declared, and granted summary judgment dismissing all causes of action, counterclaims, and cross claims against defendants Alan Spigelman and Diane Spigelman, Edward Kreps and Sharon Kreps, defendants Edmund Stevens, Jr., Shari Ream Stevens, Barry L. Solar, as trustees of the Edmund Stevens, Jr. qualified terminable interest trust for Shari Ream Stevens, and defendants Robert Mancuso, Harriet Stein Mancuso, and Bernard and Bernice Stein (collectively, 78th Street defendants), unanimously affirmed, with costs.

The motion court correctly determined that the cost of repairing and maintaining the common retaining wall should be divided proportionately among those parties whose properties touch upon the damaged section of the wall and that prospectively the parties will be responsible pro rata for the maintenance and repair of only that section of the wall that touches their property (*see* Administrative Code of City of NY § 28-305.1.1; *Bauer v Lovelace*, 272 App Div 820 [1947]).

The 78th Street defendants demonstrated that the damaged section of the wall that is the subject of this action is located on the portion of the wall that abuts plaintiff's, 240-79 Owners Corp.'s, and defendant GBL 78th Street LLC's properties. There

is no support in the record for plaintiff's assertion that the damage extends to portions of the wall that abut the 78th Street defendants' respective properties.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7819 In re Mapama Corp., Index 112602/10
Petitioner-Appellant,

-against-

The New York City Loft Board, et al.
Respondents-Respondents,

Margarete Roeder, et al,
Respondents.

_____

Peluso & Touger, LLP, New York (Pei Pei Cheng of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for The New York City Loft Board, respondent.

Robert Newmann, respondent pro se.

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Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered March 16, 2011, denying the petition to annul respondent New York City Loft Board's determination, dated May 20, 2010, which denied petitioner's application for an extension of time to legalize loft units for residential occupancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination had a rational basis. The request petitioner made before the deadline expired contained numerous procedural defects pursuant to 29 RCNY 2-01(b),

including petitioner's failure to complete the application form prescribed by respondent (subd [b][4]). Moreover, the application it made thereafter, although submitted on the proper form, was untimely, since it was filed in December 2009, long after the May 1, 2007 deadline it sought to extend (29 RCNY 2-01[b][1]). The parties' stipulation of settlement required petitioner, if it applied for an extension, to comply with 29 RCNY 2-01(b). Contrary to petitioner's argument, the December 2009 application did not constitute an amendment to an extension application pursuant to 29 RCNY 2-01(b)(4), since there was no application pending when it was made.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7820 Carmen Serbia, Index 305743/08
Plaintiff-Appellant,

-against-

Arthur Mudge, et al.,
Defendants-Respondents.

Mitchell Dranow, Sea Cliff, for appellant.

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of counsel), for respondents.

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered March 9, 2011, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "significant limitation of use" of her lumbar spine, by submitting expert medical reports finding normal ranges of motion, as well as the report of a radiologist who opined that the herniated disc shown in an MRI of the plaintiff was not acute or caused by the accident (Insurance Law § 5102[d]).

The preclusion of plaintiff's expert neurologist's and radiologist's reports was an improvident exercise of discretion, since defendants relied on plaintiff's neurologist's report, were equally untimely in serving their radiologist's report and thus cannot show prejudice by the lateness of the exchange (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 [2010], *lv denied* 15 NY3d 713 [2010]; *Browne v Smith*, 65 AD3d 996 [2009]).

In opposition, plaintiff submitted competent medical evidence raising an issue of fact as to her lumbar spine injuries, including the report of the radiologist who submitted a nonconclusory opinion sufficiently rebutting defendants' expert opinion regarding the cause of plaintiff's herniated disc, and of her treating physician, who opined, after a full examination soon after the accident, that her injuries were causally related to the accident (*see Ramos v Rodriguez*, 93 AD3d 473 [2012]).

Plaintiff adequately explained the gap in treatment by

asserting in her affidavit that she stopped receiving treatment for her injuries when her no-fault insurance benefits were cut off, and she lacked income to continue treatment (*see Browne v Covington*, 82 AD3d 406 [2011]).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7822 John Stefatos, et al., Index 600311/10
Plaintiffs-Appellants,

-against-

John Frezza, et al.,
Defendants-Respondents,

John and Jane Does, etc., et al.,
Defendants.

_____

Joanne Cassidy, Bronx, for appellants.

Welby, Brady & Greenblatt, LLP, White Plains (Geoffrey S. Pope of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 5, 2011, which granted defendants John Frezza, Fred-Doug Manager, LLC, Fred-Doug 117, LLC, Strategic Construction Corp., Strategic Construction, Ltd., Strategic Land Co., Inc. and Strategic Development Group, Inc.'s motion to dismiss the complaint except for the breach of contract cause of action as against Fred-Doug 117, LLC, unanimously affirmed, with costs.

Plaintiffs offer no substantive arguments in their opening brief regarding their declaratory judgment, accounting, conversion, malevolent indifference, appointment of a receiver, equitable lien, or constructive trust claims, and thus have

abandoned those claims (*see Edelman v Emigrant Bank Fine Art. Fin., LLC*, 89 AD3d 632, 632-633 [2011]; *see also Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510 [2011] [argument raised for the first time in reply not considered]).

The breach of contract claim that was dismissed is barred by the six-year statute of limitations (CPLR 213[2]), since the last of the projects at issue was completed by 2003 and plaintiffs did not commence this action until 2010. The fraud and misrepresentation and breach of fiduciary duty claims are duplicative of the breach of contract claim (*see Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [2010]; *CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 564-565 [2010]).

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

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7824 Latasha James, Index 303817/08
Plaintiff-Appellant,

-against-

Argel A. Perez, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Argel A. Perez, respondent.

Skenderis & Cornacchia P.C., Long Island City (Louis T. Cornacchia III of counsel), for Reyes Catalino and Duarte Corp., respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered January 31, 2011, which granted defendants' motions for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motions denied.

Plaintiff claims to have suffered permanent serious injuries as result of a motor vehicle accident between a livery cab in which she was a passenger and a second car. Defendant Perez made a prima facie showing that plaintiff's claimed injuries were not permanent or significant by submitting affirmed reports of an

orthopedic surgeon and a neurologist who found she had a full range of motion in her right knee and lumbar spine, with no evidence of neurological damage (*see* Insurance Law § 5102[d]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [2012]). In addition, defendants Catalino and Duarte Corp. made a prima facie showing that plaintiff's injuries were not causally related to the accident by submitting reports of their expert radiologist, Dr. Tantleff, who opined that the minimal disc bulges in plaintiff's lumbar spine and the abnormalities in her right knee, including a flap tear and lateral displacement, were degenerative in nature, aggravated by her weight, and not inconsistent with her age.

In opposition, plaintiff raised triable issues of fact by presenting the affirmation of her treating orthopedist, who reviewed her MRI films and the unaffirmed reports of the orthopedic surgeon who performed arthroscopic surgery on the right knee. He concluded, based on the medical records and following a series of examinations, that plaintiff had suffered permanent injuries including lumbar disc herniations and tears of the medial and lateral meniscus, caused by the accident (*see Duran v Kabir*, 93 AD3d 566 [2012]). He found limitations in lumbar spine range of motion which correlated with the MRI

findings of lumbar disc herniations (*see Gonzalez v Vasquez*, 301 AD2d 438, 439 [2003]), and made positive findings of qualitative limitations in function of the right knee, as compared to the uninjured left knee, raising an issue as to permanent injury to the right knee persisting after her arthroscopic surgery (*see Suazo v Brown*, 88 AD3d 602 [2011]; *Mitchell v Calle*, 90 AD3d 584, 584-585 [2011]). Plaintiff's expert also opined that the injuries were traumatically induced as the result of the accident, consistent with evidence in the MRI films and the 28-year-old plaintiff's lack of pre-accident right knee or lumbar spine injuries or complaints, thereby raising an issue of fact as to causation (*see Duran*, 93 AD3d at 567; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]).

With respect to plaintiff's 90/180-day claim, defendants did not dispute that she did not return to her work as a nurse's aid for over three months after the accident, during which time she had arthroscopic surgery after an unsuccessful course of physical therapy, or provide any medical evidence that she was able to perform her usual and customary activities for at least 90 of the 180 days following the accident (Insurance Law § 5102[d]; *see Quinones v Ksieniewicz*, 80 AD3d 506 [2011]). Defendants, however, did submit evidence that plaintiff's injuries were not

caused by the accident (*see Towne v Harlem Group, Inc.*, 82 AD3d 583 [2011]). Nevertheless, for the reasons stated above, the opinion of plaintiff's treating physician, as well as the medical reports relied upon, were sufficient to raise an issue of fact as to the 90/180-day claim (*id.*).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7825 Galaxy General Contracting Corp., Plaintiff-Appellant, Index 102131/10

-against-

2201 7th Avenue Realty LLC, Defendant-Respondent,

Banco Popular North America, et al., Defendants.

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Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for appellant.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered March 28, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for default judgment against defendant 2201 7th Avenue Realty LLC, unanimously reversed, on the law and the facts, without costs, and plaintiff's motion for the entry of default judgment granted in its entirety. The Clerk is directed to enter judgment accordingly.

It is uncontraverted that service of process was effected on defendant 2201 7th Avenue Realty LLC by delivery of the summons and complaint to the Secretary of State's office (Business Corporation Law § 306), and that a courtesy copy was forwarded to

defendant's prior counsel. In order to avoid the entry of default judgment upon its failure to submit a timely answer, defendant was required to come forward with a reasonable excuse for its default and to demonstrate a meritorious defense to the action (*Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789 [2011]; *see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [2007]). Under certain circumstances, law office failure may constitute a reasonable excuse, as required to avoid or vacate default judgment (39 AD3d at 419). However, claims of law office failure which are "conclusory and unsubstantiated" cannot excuse default (*Wells Fargo Bank*, 84 AD3d at 789; *Pichardo-Garcia v Josephine's Spa Corp.*, 91 AD3d 413 [2012]). If it is shown that a party has failed to proffer an acceptable excuse for its default, then it becomes unnecessary to determine whether a meritorious defense exists (*Wells Fargo Bank*, 84 AD3d at 790; *see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 531-32 [2009]).

In seeking to avoid the entry of default judgment, defendant claimed law office failure, but its newly-retained counsel attested that he could not answer for prior counsel's failure to submit a timely answer, as prior counsel had not responded to inquiries about plaintiff's complaint. Accordingly, current counsel could only speculate as to why no timely answer was

submitted. Defendant's president could provide no additional insight, averring only that while he did not recall receiving personal service of the complaint, it was his practice to forward all legal papers to prior counsel. Defendant's claim of law office failure being perfunctory and unsubstantiated, it was insufficient to avoid the entry of default judgment.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7826 & M-1558 — Index 651609/10

247 East 32nd LLC, et al.,
Plaintiffs-Respondents,

-against-

Katherine Gasparich,
Defendant-Appellant.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellant.

Law Office of Robert J. Gumenick, P.C., New York (Robert J. Gumenick of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered on or about October 13, 2011, which, among other things, granted plaintiffs' motion for summary judgment on their ejectment cause of action and to dismiss defendant's affirmative defenses, and bringing up for review an order, same court and Justice, entered September 16, 2011, which, among other things, denied defendant's cross motion for leave, nunc pro tunc, to amend her answer, unanimously affirmed, without costs. The stay of enforcement of the order and judgment is extended for 60 days from service of a copy of this order, with notice of entry.

Plaintiffs made a prima facie showing of entitlement to

judgment as a matter of law on their ejectment cause of action with evidence that they owned the subject apartment and that defendant was occupying it without their consent. In opposition, defendant failed to raise a triable issue of fact. The alleged oral agreement between defendant and her children's grandfather, plaintiffs' principal, permitting her to occupy the subject apartment rent-free until her children reached the age of majority, cannot be enforced under the statute of frauds (*see* General Obligations Law § 5–703[2]). In any event, her claimed rights as a licensee had been revoked by plaintiffs when they commenced actions to remove her from the apartment. Moreover, plaintiff did not show that she had altered her position in reliance upon the purported license, despite her claim that she provided consideration for the agreement by moving to New York from California as requested by her children's grandfather (*see e.g. Faith United Christian Church v United Christian Church*, 266 AD2d 428, 429 [1999]).

Leave to file a late amended answer was properly denied, as defendant failed to submit an affidavit in support of her motion and her proposed affirmative defense of irrevocable license lacked merit (*see Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572-573 [1986]).

We have considered defendant's remaining arguments, including that her children and former boyfriend are necessary parties to this action, and find them unavailing.

M-1558 - ***247 East 32nd LLC, et al. v Katherine Gasparich***

Motion to dismiss appeal as untimely denied.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7827 The People of the State of New York, Respondent,

-against-

Dewayne Richardson, Defendant-Appellant.

Ind. 6242/08

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), and Hogan Lovells US LLP, New York (Nathaniel S. Boyer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 1, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly determined that there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support the submission of a charge on the justification defense (*see People v Reynoso*, 73 NY2d 816 [1988]; *People v Watts*, 57 NY2d 299 [1982]). Defendant was observed repeatedly stomping the victim's head and chest with his heavy boots, while the victim was on the ground covered in blood.

Under the circumstances, defendant's boots constituted a dangerous instrument within the meaning of Penal Law § 10.00[13]; *see People v Carter*, 53 NY2d 113, 116-117 [1981]), and his conduct, which caused the victim to sustain significant injuries, constituted deadly physical force within the meaning of Penal Law § 10.00(11). Moreover, the evidence showed that defendant had an opportunity to safely retreat while the victim was lying on the ground (*see People v Taylor*, 92 AD3d 556 [2012]; *People v Mayorquin*, 30 AD3d 317 [2006], *lv denied* 7 NY3d 850 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7828N Olga Batyreva, Index 117451/09
Petitioner-Appellant,

-against-

N.Y.C. Department of Education,
Respondent-Respondent.

Olga Batyreva, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 22, 2010, denying the petition to vacate an arbitration award, dated November 24, 2009, which found that respondent had just cause to terminate petitioner, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The award was made in accord with due process, is supported by adequate evidence, is rational and is not arbitrary and capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [2008]). Each of the sustained specifications was well supported by both documentary evidence and witness testimony.

Petitioner failed to meet the high burden of showing, by

clear and convincing evidence, that the hearing officer was partial (*see Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272 [1996]). We find no basis in the record to support a finding of partiality. To the extent petitioner's contention is premised upon the hearing officer's credibility determinations, her arguments are unavailing because she failed to show that the hearing officer's credibility findings evince a bias against her.

We reject petitioner's contention that the penalty of termination is unwarranted and shocks the conscience. Not only does the high volume of sustained specifications of misconduct, standing alone, justify termination (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 240 [1974]), but also, petitioner's repeated unsuccessful attempts to cast respondent, the witnesses, the hearing officer, a federal judge, and a Supreme Court Justice as somehow biased against her tend to show her "failure to take responsibility for her actions" (*see*

Cipollaro v New York City Dept. of Educ., 83 AD3d 543, 544 [2011]; *City School Dist. of the City of New York v McGraham*, 17 NY3d 917, 920 [2011]).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7829N Onkar Singh, Index 310467/10
Plaintiff-Respondent,

-against-

Empire International, Ltd., et al.,
Defendants-Appellants.

_____

Gallo Vitucci & Klar LLP, New York (Yolanda L. Ayala of counsel), for appellants.

Law Offices of Neil Kalra, P.C., Forest Hills (Nilay Shah of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 23, 2011, which, in an action for personal injuries arising out of a motor vehicle accident, denied defendants' motion to change the venue of the action from Bronx County to Queens County, unanimously affirmed, without costs.

Defendant Serour's conclusory affidavit attesting to a Queens County residency, unsupported by documentation of such residency, was insufficient to satisfy defendants' initial burden of showing that the venue chosen by plaintiff was improper (*Furth v ELRAC, Inc.*, 11 AD3d 509, 510 [2004]; *McKenzie v MAJ Tr.*, 204 AD2d 154 [1994]). In any event, plaintiff sufficiently rebutted defendants' proof by submitting the police accident report, which shows that all parties, including Serour, had addresses outside

of New York State at the time of the accident, thereby permitting plaintiff to designate any county as the venue for trial (*see* CPLR 503[a]; *Furth*, 11 AD3d at 510). The utility bills defendants submitted for the first time in reply were properly rejected, as the reply was late and defendants failed to explain why they did not submit the bills with the original moving papers (*Furth*, 11 AD3d at 510). In any event, the bills were issued around the time of the accident, not the commencement of the action, and thus were insufficient to raise an issue of fact, especially since defendants offered no explanation for the different addresses on the bills and Serour's driver's license (*see Hernandez v Seminatore*, 48 AD3d 260 [2008]; *compare Herrera v A. Pegasus Limousine Corp.*, 34 AD3d 267 [2006]).

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7830N Isabel Hernandez, Index 16906/04
Plaintiff-Appellant, 42074/09

-against-

The City of New York,
Defendant,

The New York City Transit Authority,
Defendant-Respondent.

[And A Third-Party Action]

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about January 25, 2011, which, in this personal injury action, denied plaintiff's motion for an order deeming the facts in her notice to admit as having been admitted by defendant-respondent and to strike the portion of defendant's answer that denied those facts, unanimously reversed, on the law, without costs, and the motion granted.

Defendant is deemed to have admitted the facts contained in plaintiff's notice to admit, as it did not timely respond to the notice (*see* CPLR 3123[a]; *see also New Image Constr., Inc. v TDR*

Enters. Inc., 74 AD3d 680, 681 [2010]). Indeed, defendant did not respond to the notice to admit until 2½ years later, and then simply objected to the requests as improper and denied the facts "on information and belief." Contrary to defendant's contention, the notice to admit, which addressed matters regarding the ownership, control and duty to maintain the metal grating upon which plaintiff allegedly fell, did not demand answers to material issues of fact. Indeed, defendant's answer did not unequivocally deny the allegation that it "had charge" of the metal grating and a duty to maintain it. Further, the notice to admit properly addressed factual issues likely to be within defendant's knowledge or which it could ascertain upon reasonable inquiry (*see Villa v New York City Hous. Auth.*, 107 AD2d 619, 620 [1985]). Absent any explanation for the belated and patently inadequate response to the notice (*see Rosenfeld v Vorsanger*, 5 AD3d 462, 463 [2004]), plaintiff's motion should have been granted.

Plaintiff is especially entitled to the relief she requests, given that defendant failed to proffer any proof on the issue of ownership or control of the grating. Moreover, defendant's belated response, after the expiration of the statute of limitations on plaintiff's negligence claim, prejudiced plaintiff

as she was unable to bring a claim against the purported actual owner of the grating. By contrast, defendant has impleaded the purported actual owner and may be able to prevail on its claim for common-law indemnification.

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

ENTERED: MAY 31, 2012

CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6110 California Suites, Inc., Index 111448/08
Plaintiff-Appellant,

-against-

Russo Demolition Inc., et al.,
Defendants,

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

_____

Altman Schochet LLP, New York (Irina Fulman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 24, 2010, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
John W. Sweeny, Jr.
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

6110
Index 111448/08

_____x

California Suites, Inc.,
Plaintiff-Appellant,

-against-

Russo Demolition Inc., et al.,
Defendants,

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

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered May 24, 2010, which granted the City defendants' motion to dismiss the complaint as against them, and denied plaintiff's cross motion to amend the complaint.

Altman Schochet LLP, New York (Irina Fulman, Zalman Schochet and Michael A. Valentine of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo, Stephen J. McGrath and Karen Selvin of counsel), for respondents.

TOM, J.P.

In September 2006, plaintiff, the owner of a six-story hotel located at 610 West 111th Street in Manhattan, known as the Ellington Hotel, was issued a building permit by the Department of Buildings (DOB) to construct a five-story addition on the roof of the hotel. In October, the DOB halted construction at the site and conducted an audit, issuing a list of objections to the work that had been performed.

In November 2006, the DOB notified plaintiff of its intent to revoke the permit based on the objections raised on the audit unless plaintiff demonstrated why the permit should not be revoked. In May 2007, the DOB revoked all permits and directed that all work cease. In June 2008, the DOB conducted a structural integrity assessment of the illegally altered building and concluded that due to improper construction, the "structural stability of the building [hotel] is affected," and a "Life-safety risk is present due to the lack of required egress from the building–accesses to the roof and exits from the roof." The DOB issued an "Emergency Declaration" dated June 23, 2008, informing plaintiff that the "building, or [a] portion thereof, has been declared unsafe and in imminent peril," that "because of the severity of the condition," the structure "must be repaired or demolished immediately" and that "responsibility to take such

action is yours." The Emergency Declaration further states that the City would perform the necessary remedial work at plaintiff's expense if plaintiff failed to cure the defects. The New York City Department of Housing Preservation and Development (DHPD) sent plaintiff an "Urgent Notice," dated July 14, 2008 advising that it would retain a contractor, at plaintiff's expense, to cure the emergency condition unless plaintiff acted immediately. Plaintiff failed to respond, and DHPD engaged defendant Russo Demolition, Inc. to conduct remedial work. Between August 18 and August 25, 2008, Russo Demolition undertook and completed the demolition of the steel structure erected on the roof of the premises.

On August 26, 2008, plaintiff commenced this action against Russo Demolition alleging trespass, conversion and negligence. The complaint has since been amended, first to add the municipal defendants and, again, to name a second Russo defendant, A. Russo Wrecking, Inc. (collectively, Russo). The second amended complaint asserts that on or about August 19, 2008, Russo, acting on behalf of the municipal defendants, unlawfully entered onto plaintiff's hotel property and removed the steel structure from the roof. The complaint further asserts that Russo failed to provide any evidence of its authority to remove the steel structure despite plaintiff's repeated requests.

As noted, the original complaint, which had alleged trespass and conversion, named only Russo Demolition as defendant. Legal proceedings were initiated on August 21, 2008, when plaintiff applied for a temporary restraining order and preliminary injunction against any further entry onto its premises or removal of its property by Russo Demolition. The municipal defendants were added some seven months later, when the complaint was amended on March 17, 2009. The complaint assumed its present form when it was amended several months later to add a cause of action for negligence.

It may be fairly inferred from the second amended complaint that plaintiff alleges Russo lacked lawful authority to remove the steel structure from the roof of plaintiff's hotel because the DHPD likewise lacked lawful authority to direct Russo to perform the necessary demolition work. However, the issue of lack of notice was first raised in plaintiff's opposition papers to defendant's dismissal motion, which, relying on *Calamusa v Town of Brookhaven* (272 AD2d 426 [2000]) and *Scott v Town of Duanesburg* (176 AD2d 988 [1991]), advanced the theory that the municipal defendants' failure to provide notice and opportunity to be heard before the demolition work was performed "is a violation of due process rights for which liability will attach" (internal quotation marks omitted). Therefore, by way of cross

motion, plaintiff sought to amend the complaint to allege explicitly that the demolition work was performed "without providing to Plaintiff notice of the Municipal Defendants' intent to demolish the steel structure and an opportunity to cure the existing condition, to the extent such condition was dangerous or unsafe."

Defendants' motion to dismiss asserted that the complaint fails to state a cause of action for conversion, trespass or negligence, arguing that absolute immunity extends to acts within the exercise of administrative discretion – here, the determination that removal of the steel structure was warranted. Furthermore, the municipal defendants alleged that plaintiff had received the requisite notice of the proposed removal of the dangerous offending structure by certified mail.

In opposition, plaintiff contended that it "never received such notice." The opposing papers included the affidavit of Alan Lapes, the owner of the property, who stated, "I never received these notices. Moreover, no agent of California Suites Inc. ever signed any 'certified mail' receipt allegedly delivered with said notice."

In reply, the City agencies furnished affidavits by their employees attesting to their regular business practice in issuing and mailing official notices. They further produced a tracking

notice from the United States Postal Service indicating that the certified mailing was signed for by one Samal Nur and had been delivered at 3:39 P.M. on July 18, 2008.

In further opposition to the motion (denominated "sur-reply"), plaintiff submitted another affidavit from Alan Lapes stating that "the Secretary of State was directed to forward process it accepted on behalf of the corporation to 610 West 111th Street" and that the Department of Buildings had previously "mailed all notices relating to the condition of the building to the 610 address." Lapes did not deny that plaintiff maintains an office at 850 West End Avenue, where notices were sent by the municipal defendants; remarkably, he stated that plaintiff "has used the 850 address to receive financial and tax information from the Department of Finance in connection with the subject building . . . and for no other purpose." Nor did Lapes offer any explanation why Samal Nur should not be regarded as plaintiff's agent or employee despite having signed for the certified mailing on behalf of plaintiff in that capacity. Nowhere in Lapes's affidavit does he deny that Samal Nur was plaintiff's employee. The Lapes affidavit was accompanied by the affirmation of counsel raising, for the first time, the contention that notice of the proposed demolition was required to be given "in accordance with the civil practice law and rules of

the state of New York" (citing Administrative Code of City of NY § 28-216.4).

This matter is now before us on plaintiff's appeal from the award of summary judgment dismissing the action as against the municipal defendants (CPLR 3211[a][7]), and the denial of plaintiff's cross motion for leave to amend the complaint yet again (CPLR 3025[b]). The motion court held that plaintiff had received notice of the proposed demolition and that the municipal defendants were immune from liability for discretionary acts performed in an official capacity.

Plaintiff cites *Calamusa* (272 AD2d 426) and *Scott* (176 AD2d 988), in support of its contention that its constitutional rights to due process were violated because the municipal defendants failed to provide notice to plaintiff of the demolition and an opportunity to cure the defective condition. Although the cited cases are facially similar to this matter, they involve different statutes and the particular factual and procedural context is unclear.

In *Calamusa*, a case in which an injury to property was alleged, the Second Department stated:

> "A municipality may demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require immediate demolition of the building to protect the

> public from imminent danger. In this case, immediate action was not required and there was time to provide notice and an opportunity to be heard. Therefore, the failure to provide the same is a violation of due process rights for which liability will attach" (*Calamusa*, 272 AD2d at 427 [internal citations and quotation marks omitted]).

In *Scott*, as in the instant matter, the complaint alleged trespass, negligence and intentional destruction of property (but not conversion). The Third Department held that "defendant did not properly act according to its police powers in demolishing plaintiff's campsite structure because it failed to comply with plaintiff's statutory and due process rights to notice and an opportunity to be heard before the structure was declared unsafe" (*Scott*, 176 AD2d at 991). The Court rejected the defense of immunity, stating, "The decision to demolish without giving notice and an opportunity to be heard cannot be classified as a discretionary decision as fundamental due process compels the result . . . removing discretion" (*id.*).

These cases both involve the issue alluded to by the second amended complaint – the lack of authority to exercise emergency powers without giving notice of the proposed demolition – but the result in each case appears to rest on the failure to give the plaintiff any notice at all that such action was imminent.

To satisfy the constitutional requirement of due process,

notice need only be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” (*Mullane v Central Hanover Trust Co.*, 339 US 306, 314 [1950]). The record amassed before the motion court amply demonstrates plaintiff’s awareness that the condition of its building was regarded as unsafe by the DOB. Furthermore, notices issued by the Department prior to directing removal of the steel structure from plaintiff’s premises were directed to an address where plaintiff concedes that it maintains an office, and a certified mailing receipt confirms that plaintiff received notice that demolition was imminent. Thus, plaintiff’s contrary contention that it did not receive reasonable notice of the proposed demolition is belied by the documentary evidence (CPLR 3211[a][1]), plaintiff’s purported constitutional challenge lacks substance, and its proceeding challenging the administrative action taken by the DOB is precluded because it is untimely as discussed below and, in any event, without evidentiary support in the administrative record (*see Nole v Passidomo*, 118 AD2d 326, 329 [1986] [record devoid of evidence that submitted evidence at administrative level supporting claims or that she pursued administrative remedies though invited to do so]).

The record in this matter reflects that plaintiff, its

agents and employees, were apprised of every aspect of the municipal defendants' administrative actions taken in regard to the property. In late September 2006, plaintiff obtained a building permit to expand its hotel by adding a five-story addition to the roof of the building. In mid-October, the Department issued a stop-work order, followed by an audit of the building site, after which the Department sent an extensive list of objections to the project's architect. A notice of intent to revoke the building permit was issued in late November, and the permit was ultimately revoked in May 2007.

A year later, two Department of Buildings' representatives conducted an inspection of the premises, accompanied by Alan Lapes. The resulting special report dated June 19, 2008 found, among other items, that the requisite access to and egress from the roof were lacking because the doors from the stairs to the roof were blocked by the installed steel structures; the mandatory three-foot, six-inch high parapet wall was partially demolished for the installation of the steel beams; and there were 18 outstanding Department of Buildings' violations against the premises. The engineer's report noted the building permit issued to plaintiff in this case anticipated that the structural steel for the proposed five-story addition would consist of "14-inch W-beams" that would "bear on the 13-inch existing exterior

wall of the building." Instead, the engineer observed that only 12-inch beams had been installed and that "the existing 8-inch parapet wall is being used as a bearing wall," rather than the 13-inch exterior wall, the condition of which he noted to be "questionable due to weathering and mortar deterioration," affecting the building's structural stability. The engineer further noted, as a life-safety risk, that "both doors from the stair bulkhead to the roof and accesses to both fire escapes . . . are blocked by installed steel structures." Consequently, the Manhattan Borough Commissioner issued an emergency declaration dated June 23, 2008 that the building was "unsafe and in imminent peril," informing plaintiff of its responsibility to immediately take remedial action or such work would be performed by the City at the owner's expense.

A subsequent notice dated July 14, 2008 informed the owner that the DHPD "will engage a contractor to cure the emergency condition unless you act immediately to correct the condition." This notice was sent by certified mail and signed for by Samal Nur. These 2008 notices, submitted by the municipal defendants in connection with their motion, were mailed to plaintiff at 850 West End Avenue in Manhattan. In support of the motion, the municipal defendants submitted documents sent to plaintiff at the 850 West End Avenue address. Included were notices sent by the

Department of Finance, as well as copies of an indenture and a mortgage stating plaintiff's office address to be 850 West End Avenue. Also submitted was a copy of the building permit for the project showing that it was issued to Alan Lapes, identified as the general contractor and conducting business as Metro Maintenance Corporation. The certified mailing of notice of the imminent demolition (documented by a signed receipt and tracking notice), with plaintiff's admission that it maintains an office at the address where the mailing was received, together with other notices mailed to the same location, and evidence of the agencies' mailing procedures establish due notice (*see Matter of Cruz v Wing*, 276 AD2d 307 [2000], *lv denied* 96 NY2d 702 [2001]), which the bare denial of plaintiff's principal is insufficient to rebut (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]; *Northern v Hernandez*, 17 AD3d 285, 286 [2005]).

The substance of plaintiff's opposition to the dismissal motion was that the Department of Buildings made the determination to remove the steel structure on the roof of plaintiff's hotel and forwarded a memorandum to that effect to DHPD without first affording plaintiff notice. Between the time opposing papers and the surreply were filed, plaintiff changed its argument from an assertion that it received *no* notice of the proposed agency action to the assertion that it did not receive

what it now contends is the *proper* notice of such action, that is, notice mailed to the address on file with the Secretary of State. While the lack of any notice implicates a constitutional violation of plaintiff's due process rights, the lack of proper notice merely implicates a "violation of lawful procedure" (CPLR 7803[3]), for which plaintiff is required to seek relief in a special proceeding (CPLR 7801).

By invoking a constitutional basis for its claim against the municipal defendants, the complaint seeks to obviate plaintiff's failure (1) to pursue its administrative remedies and (2) to observe the time limitation of CPLR 217(1) applicable to proceedings against a body or officer (CPLR 7801). As noted, the complaint was amended to add the municipal defendants seven months after the action was instituted, and their answer to that complaint asserts, as a first affirmative defense, that plaintiff "failed to timely join the City as a party to this action." While the tort action may have been timely commenced against the municipal defendants under the precedent established in *Matter of First Natl. City Bank v City of N.Y. Fin. Admin.* (26 NY2d 87 [1975]), the form in which an action is brought is not controlling; rather, "'it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought'" (*New York City Health &*

Hosps. Corp. v McBarnette, 84 NY2d 194, 201 [1994], quoting *Solnick v Whalen*, 49 NY2d 224, 229 [1980]).

As the Court of Appeals remarked, "[W]hen the claim is one against a governmental body or officer, the form of action that immediately springs to mind is a proceeding brought under CPLR article 78, a traditional, and surely the most common, vehicle for challenging a governmental decision or action" (*McBarnette*, 84 NY2d at 201). If, as plaintiff contends, its due process rights were violated by the absence of administrative notice of the proposed demolition of its property, its claim has a constitutional basis, and plaintiff is thereby relieved of the general requirement to proceed administratively (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). If, however, the constitutional claim fails (because it can be established that plaintiff had received administrative notice of the proposed demolition), the second amended complaint must then be read to allege that the City agencies exceeded their jurisdiction (CPLR 7803[2]), or violated lawful procedure (CPLR 7803[3]), in effecting the demolition of a portion of plaintiff's premises, subjecting the matter to the four-month period of limitation specified in CPLR 217. Since the municipal defendants were not named in the tort action until seven months after the administrative action complained of, the timeliness, and indeed

the viability, of plaintiff's claim rests on the sufficiency of the constitutional due process violation on which the plenary action depends.

Thus, the issue before us is the legitimacy of plaintiff's position that it lacked notice of the pending administrative action so as to warrant the further amendment of the complaint to include the allegation that its due process rights were violated, and so avoid dismissal of the action on the ground that plaintiff is attempting to contest administrative action of which it had notice but to which it failed to respond. Logically, a party cannot be faulted for failure to challenge, administratively, proposed action of which it has no knowledge. By contrast, a party may not contest administrative action taken upon its default in appearance before an agency without offering a reasonable excuse for such default (*see Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438, 439 [2009]). Nor is an administrative agency required to establish the validity of its actions where a petitioner, though afforded the opportunity, has declined to appear and contest those actions (*see Matter of Barnes v Ratner*, 57 NY2d 942, 944 [1982]; *cf. Matter of Ifill v Fischer*, 79 AD3d 1322, 1323 [2010]).

Since the record conclusively establishes that plaintiff received notice of the proposed demolition, its due process claim

is without foundation. Divested of its constitutional predicate, the complaint merely alleges that the municipal defendants failed to follow proper procedure in arriving at the determination to demolish the steel structure erected on the roof of plaintiff's premises and, in view of that omission, exceeded their authority in undertaking the demolition work. As discussed, these issues must be raised in a special proceeding under CPLR article 78 (CPLR 7803[2], 7803[3], 7804[a]) subject to a four-month statute of limitations (CPLR 217; *see Press v County of Monroe*, 50 NY2d 695 [1980]). Because this action was not commenced against the municipal defendants until seven months after the acts complained of, it is untimely and must be dismissed (*Concourse Nursing Home v Perales*, 219 AD2d 451 [1995], *lv denied* 87 NY2d 812 [1996], *cert denied* 519 US 863 [1996]). As noted by the Second Department in *Noroian v City of Port Jervis* (16 AD3d 392, 393 [2005], *appeal dismissed* 4 NY3d 881 [2005]), "[t]he plaintiff[] in this case could and should have commenced a CPLR article 78 proceeding to challenge the [agency's] determination with respect to [its] property."

It bears emphasis that permitting plaintiff to avoid the need to pursue and exhaust its administrative remedies by resorting to the simple expedient of refusing to respond to notice of pending administrative action and claiming a denial of

due process offends judicial policy (*see Press*, 50 NY2d at 704). It rewards plaintiff for its obduracy and defeats salutary purposes of the exhaustion rule which, as pertinent here, alleviates the burden on the courts to decide questions within an agency's administrative expertise and enables the agency to prepare a sufficient record for judicial review that reflects its expertise and judgment (*Watergate II Apts.*, 46 NY2d at 57). If the consequences of a refusal to appear before an administrative agency and comply with the procedure provided in CPLR article 78 can be so easily avoided, the courts will be unnecessarily burdened with administrative matters advanced as plenary actions on the basis of some supposed intrusion upon a constitutional right.

Due process is not a sword to be wielded offensively to thwart the legitimate government interest in ensuring public safety but a shield to guard against the unjustified taking of property. To rule that plaintiff should be given the opportunity to seek monetary damages for its intentional failure to appear in pursuance of its due process rights makes a mockery of the concept.

It is axiomatic that "discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found" (*McLean v City of*

New York, 12 NY3d 194, 202 [2009]). Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Arteaga v State of New York*, 72 NY2d 212 [1988]). Here, defendants' determination that the situation constituted an emergency condition either under 23-215.1 or 28-216.4, is a discretionary act immune from liability (*see Tango*, 61 NY2d at 41; *Catanzaro v Weiden*, 188 F3d 56, 62-63 [2d Cir 1999]; *Wantanabe Realty Corp. v City of New York*, 315 F Supp 2d 375, 403 [SD NY 2003]). The mailing of the notices to 850 West End Avenue was reasonably calculated to inform plaintiff of defendants' determination to demolish the structure and therefore comported with the requirements of due process (*see Schroeder v City of New York*, 371 US 208, 211 [1962]; *Dextra v City of New York*, 46 AD3d 328, 328 [2007]).

Finally, plaintiff's contention that Supreme Court erred in treating the municipal defendants' application as a motion for summary judgment without first informing the parties (CPLR 3211[c]; *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]) is specious. The rule has no application where, as here, the parties' submissions indicate that they are "'deliberately

charting a summary judgment course'" (*id.*, quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1987]). A salient feature of our judicial system is that parties are accorded great latitude in how they conduct litigation and "may to a large extent chart their own procedural course through the courts" (*Stevenson v News Syndicate Co.*, 302 NY 81, 87 [1950]; *see also Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]; *Matter of Malloy*, 278 NY 429 [1938]). They "may fashion the basis upon which a particular controversy will be resolved" (*Cullen v Naples*, 31 NY2d 818, 820 [1972]), including "the law to be applied" (*Martin v City of Cohoes*, 37 NY2d 162, 165-166 [1975]). While the parties are largely free to choose how to proceed, "they are bound by the consequences attendant upon the exercise of that prerogative" (*Sean M. v City of New York*, 20 AD3d 146, 150 [2005]; *Katz v Robinson Silverman Pearce Aronsohn & Berman*, 277 AD2d 70, 73 [2000]).

Here, both sides submitted evidentiary material to the motion court bearing on the question of notice. The municipal defendants provided extensive documentary evidence and affidavits to show that notices were mailed and received by plaintiff, and plaintiff submitted multiple affidavits by its principal disputing the same. Plaintiff even went so far as to intimate, in its surreply, that the motion must be denied because the

documentary evidence was contradicted by the affidavit of Alan Lapes, thereby precluding summary disposition. Having laid bare their proof on the issue of notice by presenting opposing evidence and disputing its import and effect, the parties clearly invited the motion court to resolve the question based on their submissions (*see e.g. Mic. Prop. & Cas. Ins. Corp. v Custom Craftsmanship of Brooklyn, Inc.*, 269 AD2d 333 [2000]). While the municipal defendants' motion was directed at the sufficiency of the pleadings (CPLR 3211), the parties treated it as an application seeking summary disposition on the factual question of notice (CPLR 3212). Under these circumstances, a court is not required to adhere to the notice requirement of CPLR 3211(e) before treating the motion as one for summary judgment, and plaintiff cannot complain that the notice issue was summarily resolved (*see e.g. Ting Kou Cheng v Brewran Vil. Hudson Assoc.*, 180 AD2d 519, 520 [1992]).

Accordingly, the order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered May 24, 2010, which granted

the City defendants' motion to dismiss the complaint as against them, and denied plaintiff's cross motion to amend the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 31, 2012

CLERK