

cancelled its contract to purchase real estate from Boss in good faith and that it did not deliver an environmental report to Boss at the contract signing; those findings were based in part on assessments of the credibility of witnesses (see *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983])).

However, the court erred in finding that Bogopa-Jerome's failure to deliver the environmental report constituted a waiver of its right to cancel the contract (see e.g. *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617-618 [1st Dept 2010])).

The court also erred in finding that Bogopa-Jerome's failure to deliver the environmental report constituted a failure of notice; the contract does not so provide (see *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 476 [2004])).

Section 6 of the rider to the contract did not give Boss the right to sue Bogopa-Jerome for an adjournment fee if Bogopa-Jerome failed to pay the fee; it provided for a different remedy.

Defendants' argument that Boss was not entitled to judgment against defendant Bogopa Service because Boss was not a holder in

due course of Bogopa Service's check is unavailing. The holder in due course doctrine is not applicable to the instant situation (see generally *Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 158-159 [1989]).

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

from sporadic seizures and speech impediments. She further alleged that her medical condition has required ongoing medical treatment, and that her physicians have advised her that she cannot leave her home unaccompanied. Given these specific factual allegations, petitioner sufficiently showed that she was medically incapacitated, thus excusing her failure to timely file a notice of claim within 90 days of the accident (see General Municipal Law § 50-e[5]; see also *Matter of Olsen v County of Nassau*, 14 AD3d 706, 707 [2d Dept 2005], and *Matter of Ferrer v City of New York*, 172 AD2d 240 [1st Dept 1991]).

After petitioner retained counsel in September 2012, she did not unreasonably delay in making the application for leave to file a late notice of claim. Petitioner's counsel explained that his public records search revealed that respondent the City of New York was only one of multiple owners of the property where the construction occurred, and that he had no way of identifying the company that performed the construction work at the site, or of knowing whether the City, or another owner, had contracted with that company for the project. Petitioner's attempts at obtaining this information before filing the motion at issue were rebuffed by the City's failures to promptly respond to her requests for information under the Freedom of Information Law. Petitioner made the motion after her search proved fruitless.

Under these circumstances, where the City contributed to the delay, and the motion was made within the one-year and ninety-day statute of limitations (see CPLR 217-a; see also General Municipal Law § 50-e[5]), the City cannot argue that petitioner unduly delayed in making the motion, or that it did not acquire essential knowledge of the facts underlying petitioner's claim within a reasonable time after the expiration of the 90-day period for filing a timely notice of claim (see *Matter of Drysdale v City of New York*, 182 AD2d 566 [1st Dept 1992], *lv dismissed* 81 NY2d 759 [1992]; *Matter of Mazzilli v City of New York*, 115 AD2d 604 [2d Dept 1985]; *Cassidy v County of Nassau*, 84 AD2d 742 [2d Dept 1981]).

The City has not shown that it has suffered substantial prejudice by the delay, especially given the transitory nature of the alleged defective condition (see *Matter of Mercado v City of New York*, 100 AD3d 445, 446 [1st Dept 2012]). The City's

conclusory claim that the passage of time may affect the availability or memories of potential witnesses is insufficient to establish prejudice (see *id.*).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14765 Reyna Sevilla, Index 302462/11
Plaintiff-Appellant,

-against-

The Calhoun School, Inc., et al.,
Defendants-Respondents.

Seligson, Rothman & Rothman, New York (Martin S. Rothman of
counsel), for appellant.

Wade Clark Mulcahy, New York (Georgia Coats of counsel), for
respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.),
entered December 23, 2013, which granted defendants' motion for
summary judgment dismissing the complaint, unanimously affirmed,
without costs.

The undisputed fact that plaintiff's slip and fall occurred
during a freezing-rain storm in progress establishes prima facie
that defendants were not negligent in failing to remove the ice
on the sidewalk in front of their building on which plaintiff
testified that she slipped (*see Pippo v City of New York*, 43 AD3d
303 [1st Dept 2007]). The record also shows that on the day of
plaintiff's accident defendants' maintenance staff followed its
regular protocol for clearing newly fallen snow and ice from the
sidewalk and the building's entrance area at 6 a.m. and again at
7 a.m., before the start of the school day. However, while

plaintiff contends that in clearing the sidewalk defendants created a hazardous condition or exacerbated a natural hazard created by the storm, she submitted no evidence to support her contention (see *Rugova v 2199 Holland Ave. Apt. Corp.*, 272 AD2d 261 [1st Dept 2000]). Nor did plaintiff raise a material issue of fact by pointing to the inconsistent testimony of a maintenance worker as to whether salt was used on the sidewalk before plaintiff's fall, since she failed to explain how the use or omission to use salt could have created or exacerbated the naturally occurring ice condition.

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

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14766-

Ind. 4344/07

14767 The People of the State of New York,
Respondent,

-against-

Kimberly Hanzlik,
Defendant-Appellant.

Gerald J. McMahon, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky,
III of counsel), for respondent.

Order, Supreme Court, Bronx County (Troy K. Webber, J.),
entered on or about February 20, 2014, which denied defendant's
CPL 440.10 motion to vacate her judgment of conviction,
unanimously affirmed.

The court properly denied defendant's motion to vacate her
conviction on the ground of ineffective assistance of counsel.
Defendant received effective assistance under the state and
federal standards (*see People v Benevento*, 91 NY2d 708, 713-714
[1998]; *Strickland v Washington*, 466 US 668 [1984]).

At trial, defense counsel impeached the principal
prosecution witness by showing that within a few months of this
1999 homicide, the witness made several statements that
completely exculpated both defendant and her codefendant. The
defense established that it was not until 2007, after a motive to

falsify had arisen, that the witness inculpated the two defendants. However, in her CPL article 440 motion, defendant faulted trial counsel for failing to use another statement, which was also made by the witness in 1999, and which exculpated defendant but inculpated the codefendant.

Trial counsel's lack of recollection makes it impossible to determine whether he failed to notice this statement, which was undisputedly disclosed as *Rosario* material, or consciously chose not to use it as a matter of strategy. Defendant asserts that trial counsel was ineffective in either event.

It was objectively reasonable to impeach the witness by means of the statements that exculpated both defendants but not by means of the statement that treated them differently. The statement at issue essentially cut both ways. While it might well have been reasonable to use this statement, it would also be reasonable to avoid revealing to the jury that in 1999 the witness made a statement that was at least partly consistent with his trial testimony, and that was arguably made before the motive to falsify arose or fully ripened. In other words, it was not unreasonable to adopt a strategy that sharply contrasted the witness's 1999 exculpation of both defendants and his radically different trial testimony.

In any event, defendant has not satisfied the prejudice

prongs of either a state or federal ineffectiveness claim. Defendant has not shown that counsel's failure to use the statement at issue deprived defendant of a fair trial, or that there is a "probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694) that use of the statement would have led to a more favorable verdict. Under the circumstances, the jury would likely have perceived the statement as merely another inconsistent statement made by the witness long before he entered into a deal with the prosecutors. As the trial actually unfolded, the jury chose to credit the witness's testimony, and discredit the contradictory earlier narrative. It is not likely that introduction of a half-consistent, half-inconsistent statement would have altered the jury's analysis. Moreover, as previously discussed, use of the additional statement could have been counterproductive. Finally, as we noted on defendant's direct appeal (95 AD3d 601 [1st Dept 2010], *lv denied* 19 NY3d 997 [2012]), the testimony of this witness was corroborated by an eyewitness who placed defendant at the scene.

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

ENTERED: APRIL 9, 2015


DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14768 Elyass Eshaghian, et al., Index 652577/12
Plaintiffs-Respondents,

-against-

Asher Roshanzamir,
Defendant-Appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Herman Cahn of counsel), for appellant.

Wilk Auslander LLP, New York (Stuart M. Riback of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 22, 2013, which granted plaintiffs' motion to renew defendant's motion to dismiss the complaint, and, upon renewal, denied defendant's motion, unanimously affirmed, without costs.

The Agreement of Sale and Purchase between defendant LLC and nonparty 587 Fifth JV, LLC, constitutes a new fact within the meaning of CPLR 2221(e)(2). Defendants' claim that plaintiff knew of or approved the contract is without support in the record, which shows that plaintiff learned of the contract only when 587 Fifth commenced an action to enforce it, and received the full contract only when the contract was produced in connection with that action.

The court correctly found that the terms of the contract

would change its prior determination (*see id.*).

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

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14769-

14770 In re Elyorah E.,
 Petitioner-Respondent,

-against-

Ian E.,
 Respondent-Appellant.

Daniel R. Katz, New York, for appellant.

Debbie Yatzkan Jonas, Bronx, for respondent.

Order, Family Court, New York County (Jane Pearl, J.), entered on or about November 13, 2013, which, to the extent appealed from, confirmed an order of a Support Magistrate, dated September 5, 2013, finding, after a hearing, that respondent willfully violated a child support order, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about December 23, 2013, which denied respondent's objections to other portions of the magistrate's order, unanimously dismissed, without costs, as abandoned.

At the outset, we note that although respondent failed to timely perfect his appeal, petitioner neither moved to dismiss the appeal nor argued that she was prejudiced by the delay. Accordingly, in the interest of justice, we deem the appeal timely (*see Rodriguez v National Equip. Corp.*, 304 AD2d 494 [1st

Dept 2003], *lv dismissed* 1 NY3d 546 [2003]).

Petitioner presented prima facie evidence of respondent's willful violation of a lawful support order. In opposition, respondent failed to show by competent, credible evidence that he is incapable of making the required payments (*Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). Respondent argues that he demonstrated his inability to pay by establishing that he suffers from a mental illness. Even assuming that respondent's largely unsupported testimony sufficiently established that his gambling addiction is a mental illness, he failed to show that his addiction affected his ability to work (*see Matter of John T. v Olethea P.*, 64 AD3d 484, 485 [1st Dept 2009]; *Matter of Greene v Holmes*, 31 AD3d 760, 762 [2d Dept 2006]; *Boyd-Brooks v Brooks*, 6 AD3d 1143, 1143-1144 [4th Dept 2004]). Rather, the evidence established that respondent was able to work, that he often gambled away his earnings, and that his mother largely paid for his child support payments and living expenses.

In addition, respondent acknowledged that he had been gambling throughout the pendency of the proceedings, and did not seek effective treatment until nearly three years after this proceeding was commenced (*see Matter of Snyder v Snyder*, 277 AD2d 734 [3d Dept 2000]).

We note that respondent has not raised any argument on appeal relating to the order entered on or about on or about December 23, 2013.

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14771 Shekhar Basu, Index 651340/10
Plaintiff-Respondent,

-against-

Alphabet Management LLC, et al.,
Defendants-Appellants.

Sadis & Goldberg, LLP, New York (Douglas R. Hirsch of counsel),
for appellants.

Harrington Ocko & Monk, LLP, White Plains (Kevin J. Harrington
and John T. Rosenthal of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla,
J.), entered July 10, 2014, which, insofar as appealed from,
denied defendants' motion for summary judgment dismissing the
causes of action for breach of contract and unjust enrichment,
unanimously modified, on the law, to grant the motion as to the
breach of contact and unjust enrichment causes of action relating
to the alleged PIPE agreement and PIPE transactions and as to the
breach of contract cause of action relating to the alleged
Garnock agreement as against all defendants except Alphabet
Management, and otherwise affirmed, without costs.

The court correctly found that the claimed oral agreements
are not as a matter of law unenforceable for indefiniteness,
since there may exist an objective method for supplying the
missing terms needed to calculate the alleged compensation owed

plaintiff (see *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88 [1991]; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], cert denied 498 US 816 [1990]).

As the court found, General Obligations Law § 5-701(a)(1) does not bar the breach of contract claim. However, defendants may raise General Obligations Law § 5-701(a)(10) for the first time on appeal, since it is “a legal argument which appeared upon the face of the record and which could not have been avoided if raised initially” (see *Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 [1st Dept 2014] [internal quotation marks omitted]). That provision requires dismissal of the breach of contract claim insofar as it alleges a breach of the oral PIPE agreement, which involves a claim for compensation for negotiating the purchase of interests in businesses, since plaintiff acknowledged participating in the negotiations by procuring the deals and by performing research and analysis that determined for defendants the value of pursuing the deals (see *JF Capital Advisors, LLC v Lightstone Group, LLC*, 115 AD3d 591 [1st Dept 2014]). The unjust enrichment claim relating to the PIPE transactions must therefore also be dismissed (see *Snyder v Bronfman*, 13 NY3d 504 [2009]; *Kocourek v Booz Allen Hamilton Inc.*, 71 AD3d 511 [1st Dept 2010]).

The breach of contract and unjust enrichment claims relating to the alleged Garnock agreement are not barred by the statute of frauds. Nor should the unjust enrichment claim be dismissed as duplicative of the contract claim since there remains a bona fide dispute as to the existence of that contract (see *Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237 [1st Dept 1997]). However, as plaintiff does not dispute, the breach of contract claim relating to the alleged Garnock agreement should be dismissed as against all defendants except Alphabet Management LLC, the party to the alleged oral agreements. Material issues of fact whether all defendants were unjustly enriched in connection with the alleged Garnock agreement precludes summary dismissal of the unjust enrichment claim as against any defendant.

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14772- Ind. 4615/06
14773 & The People of the State of New York,
M-608 Respondent,

-against-

Lawrence Johnson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J. at
suppression hearing; Peter J. Benitez, J. at jury trial and
sentencing), rendered August 13, 2012, convicting defendant of
murder in the second degree, and sentencing him to a term of 25
years to life, unanimously affirmed.

The court's suppression rulings were proper. The initial
police questioning at issue did not require *Miranda* warnings,
because a reasonable innocent person in defendant's position
would not have thought he was in custody (see *People v Yukl*, 25
NY2d 585, 589 [1969] *cert denied* 400 US 851 [1970]). Defendant
agreed to accompany the police to the police station, where the
questioning at issue was investigatory. When viewed as a whole,
the police conduct, including any restrictions on defendant's

movements within the station house, did not convey to defendant that he was being prevented from leaving the building. The court also properly determined, after weighing the relevant factors (see *People v Paulman*, 5 NY3d 122, 130-131 [2005]), that defendant's videotaped statement to an Assistant District Attorney was attenuated from certain statements to the police that the court had suppressed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's evaluation of defendant's confession and the medical evidence. The evidence supports the conclusion that defendant committed depraved indifference murder, of the type discussed in *People v Barboni* (21 NY3d 393, 402-403 [2013]). Defendant brutally and repeatedly struck his three-month-old daughter in the head while she was lying in her bassinet, and then failed to seek medical attention. The jury could have reasonably inferred that defendant knew that the type of blows he inflicted on such a young child would require emergency treatment.

The lack of a jury instruction on corroboration of defendant's confession (see CPL 60.50) was harmless in light of the independent evidence clearly establishing that the offense had been committed (see *People v Rosado*, 194 AD2d 466 [1st Dept

1993], *lv denied* 82 NY2d 725 [1993]).

The court properly denied defendant's CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence since defendant failed to establish, among other things, that the medical evidence could not have been discovered earlier by the exercise of due diligence and that it created a probability of affecting the verdict. Defendant did not establish any other legal basis for setting aside the verdict, or any need for an evidentiary hearing.

The court properly declined to submit criminally negligent homicide as a lesser included offense (*see People v Abreu-Guzman*, 39 AD3d 413, 413-414 [1st Dept 2007], *lv denied* 9 NY3d 872 [2007]; *see also People v Nieves*, 136 AD2d 250, 258-259 [1st Dept 1988]).

We perceive no basis for reducing the sentence.

M-608 - People v Lawrence Johnson

Motion to strike portions of the People's
brief granted to the extent consented to by
the People, and otherwise denied.

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

ENTERED: APRIL 9, 2015



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respondent Walker at the hearing demonstrated that she possessed the requisite supervisory and/or administrative experience to qualify for the examination for the position of Principal Administrative Associate.

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14775-

Index 104145/12

14776 In re Rena Susan Sanders,
Petitioner-Appellant,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents-Respondents.

Rena Susan Sanders, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R.
Gustafson of counsel), for respondents.

Appeals from orders, Supreme Court, New York County (Doris
Ling-Cohan, J.), entered January 16, 2014 and February 27, 2014,
deemed appeals from judgment, same court and Justice, entered
March 17, 2014, dismissing the proceeding, brought pursuant to
CPLR article 78, seeking to, among other things, annul respondent
New York City Department of Housing Preservation and
Development's (HPD) determination, dated December 21, 2007, which
discharged petitioner from her employment, and, so considered,
the judgment unanimously affirmed, without costs.

The court correctly dismissed the proceeding as time-barred.
Petitioner failed to commence this proceeding within four months
of receiving notice of her termination (CPLR 217[1]; see *Matter
of Vadell v City of New York Health & Hosps. Corp.*, 233 AD2d 224,

225 [1st Dept 1996]). Petitioner received notice by letter on December 26, 2007, and did not commence this proceeding until November 5, 2012 – almost five years later.

This proceeding is not timely under CPLR 205(a). Pursuant to that section, this proceeding is only timely if it would have been timely when petitioner commenced a federal action. Petitioner commenced a federal action on April 24, 2009, approximately a year after the time limit for commencing this proceeding. Accordingly, this proceeding would not have been timely at the time of commencement of the federal action.

Even if the four-month statute of limitations in this proceeding did not begin to run until August 14, 2008, when HPD purportedly rejected petitioner's demand for a hearing, this proceeding is still untimely, as petitioner did not commence it or the federal action within four months of that date.

The court correctly applied a four-month statute of limitations to all of petitioner's claims in this proceeding challenging HPD's determination (see *Butler v Wing*, 275 AD2d 273, 275-276 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000]).

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

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

ENTERED: APRIL 9, 2015

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Corrected Order - May 19, 2015

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14777 Tower Insurance Company of New York, Index 153611/12
Plaintiff-Appellant,

-against-

Joseph Atuana,
Defendant-Respondent,

Eva Torres,
Defendant.

Brown & Associates, New York (James J. Croteau of counsel), for appellant.

Scher & Scher, P.C., Great Neck (Daniel J. Scher of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 26, 2013, which, inter alia, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff is not obligated to defend and indemnify the insured defendant under the homeowner's policy issued for his premises, and that the policy was properly cancelled. The Clerk is directed to enter judgment accordingly.

Despite the requirement in his policy and his representation in the application that his premises is a two-family dwelling, defendant insured provided a statement and deposition testimony which sufficiently demonstrated that the building was a three-

family dwelling. The deed and City document indicating that the building was a two-family dwelling were irrelevant (*see Hermitage Ins. Co. v LaFleur*, 100 AD3d 426 [1st Dept 2012]), and the insurers' underwriter affidavit and guidelines established that the misrepresentation in the application was material (*id.*). The insured's claimed need for discovery provides no basis to forestall summary judgment, given that he neither sought any before the motion court nor now shows that it would have assisted him in opposing the motion.

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14778	Nicolas Guaman, Plaintiff-Respondent,	Index 307124/10 84186/10 83886/11
	Paula Mayancela, Plaintiff,	84185/11

-against-

1963 Ryer Realty Corp., et al.,
Defendants-Respondents-Appellants.
- - - - -

1963 Ryer Realty Corp.,
Third-Party
Plaintiff-Respondent-Appellant,

-against-

AP Tek Construction Inc., et al.,
Third-Party
Defendants-Appellants-Respondents.
- - - - -

AP Tek Construction Inc., et al.,
Second Third-Party
Plaintiffs-Appellants-Respondents,

-against-

Mushtaq Ahmad, et al.,
Second Third-Party Defendants,

A Saad Contracting, Inc.,
Second Third-Party
Defendant-Respondent-Appellant.
- - - - -

A Saad Contracting, Inc.,
Third Third-Party
Plaintiff-Respondent-Appellant,

-against-

AP Tek Construction Inc., et al.,
Third Third-Party
Defendants-Appellants-Respondents.

Shaub Ahmuty Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants-respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for 1963 Ryer Realty Corp., and Gazivoda Realty Co., Inc., respondents-appellants.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for A Saad Contracting, Inc., respondent-appellant.

The Taub Law Firm, P.C., New York (Elliot H. Taub of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 27, 2014, 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, denied defendants' cross motions for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, granted the cross motion of defendants Gazivoda Realty Co., Inc. and 1963 Ryer Realty Corp. (collectively Ryer) for summary judgment on Ryer's common-law indemnification claim against AP Tek Construction Inc. and AP Tek Restoration (collectively AP), denied Ryer's cross motion for

summary judgment on its common-law indemnification claim against A Saad Contracting (Saad), denied Saad's cross motion for summary judgment on its common-law indemnification claim against AP, and denied AP's cross motion for summary judgment dismissing defendants' common-law indemnification claims against it, unanimously modified, on the law, to the extent of granting Saad's cross motion for summary judgment on its common-law indemnification claim against AP, and otherwise affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law on his Labor Law § 240(1) claim based on his testimony that he was injured when he fell from a height of six stories when two workers standing on the ground holding ropes that were supposed to keep the scaffold he was standing on level, simultaneously loosened the ropes, causing the scaffold to shift from a horizontal to a vertical position. Plaintiff also established that his accident was caused by the lack of a guardrail on the side of the scaffold. Plaintiff was not required to show a specific defect in the safety devices since the evidence plainly established that they did not provide adequate protection from the risk of falling (see *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]; *Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]).

In opposition, defendants failed to raise a triable issue of fact. Although they argue that plaintiff was the sole proximate cause of his injuries, they failed to submit any admissible evidence to support their allegation that plaintiff failed to attach his safety harness to the lifeline in the proper manner. Even if there were admissible evidence to that effect, the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240(1) claim (see *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d at 548).

The motion court properly declined to rule on the Labor Law § 200 and common-law negligence claims since they are academic in light of the grant of partial summary judgment on the Labor Law § 240(1) claim (see *Torino v KLM Constr.*, 257 AD2d 541, 542 [1st Dept 1999]).

The motion court erred, however, in declining to consider Saad's cross motion for summary judgment on its common-law indemnification claim against third-party defendant AP on the ground that Saad had failed to annex certain relevant pleadings to its motion papers. The pleadings had already been submitted to the court, and Saad's notice of cross motion expressly incorporated those submissions by reference. Moreover, no

substantial rights of any party appear to have been prejudiced (see CPLR 2002).

The court properly held that the valid and final decision of a Panel of the Workers' Compensation Board that AP was plaintiff's employer at the time of the accident bars AP from re-litigating the identical issue in this proceeding (see *Vogel v Herk El. Co.*, 229 AD2d 331 [1st Dept 1996]). The record establishes that AP had a full and fair opportunity to litigate this issue before the board (see *id.*). AP is also collaterally estopped from contending that Saad was plaintiff's special employer, since this argument was raised during the worker's compensation hearing and rejected by the board (see *Rosa v Quarry Crotona Homes*, 239 AD2d 273 [1st Dept 1997]; *Vogel*, 229 AD2d at 333).

The court properly granted summary judgment to Ryer on its claim for common-law indemnification from AP, and should have granted Saad's common-law indemnification claim against AP, since

the evidence showed that only AP was actively at fault, and that defendants did not exercise any authority to supervise or control the work (see *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

unregistered weapon belonging to his brother. There exists no basis to disturb the credibility determinations of the Assistant Deputy Commissioner of Trials (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed does not shock our sense of fairness (see *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14782 In re Social Service Employees Index 651849/13
 Union Local, 371, on behalf of
 its member, Matthew Opuoru,
 Petitioner-Appellant,

-against-

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

Kreisberg & Maitland, LLP, New York (Gary Maitland of counsel),
for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless
of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.),
entered on or about August 7, 2014, which denied the petition
brought pursuant to CPLR article 75 to vacate an arbitration
award, and granted respondents' cross motion to confirm the
award, unanimously affirmed, without costs.

The arbitrator, who, upon remand from this Court (100 AD3d
422 [1st Dept 2012]), and pursuant to the stipulation of the
parties, was to reconsider the penalty imposed on the employee,
did not irrationally or clearly exceed his authority by upholding

the penalty of termination imposed by respondents (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 91 [2010]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14783 Sulayman Jangana, Index 304027/11
Plaintiff-Respondent,

-against-

Nicole Equities LLC, et al.,
Defendants-Appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Lois Kim of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Carle Place (Allen J. Rosner of counsel), for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 13, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff alleges that he was injured when, while making a delivery to a tenant in defendants' building, he tripped over mislaid or raised carpeting on the staircase of the building. The evidence demonstrates that triable issues exist as to whether defendants had constructive notice of the defective condition. Plaintiff testified that he noticed the condition of the carpet when making deliveries to the premises on prior occasions. In addition, defendants' own expert stated that the carpet in question would move three-eighths of an inch upon an application

of 25 pounds of horizontal force. Contrary to defendants' contention that any defect in the carpet was trivial, whether a defective condition, here, the movement of the carpet, exists so as to create liability depends on "the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; see also *Nin v Bernard*, 257 AD2d 417 [1st Dept 1999]).

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

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

ENTERED: APRIL 9, 2015



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order of examination both found him unfit to proceed to trial due to mental illness. Although a court may not override findings of incompetency by two psychiatrists without conducting a competency hearing (*People v Rivers*, 44 AD3d 391, 392 [1st Dept 2007]), there is no record of a motion to confirm or controvert the findings, or any re-examination, hearing, or even mention of the article 730 examinations. Defendant also expanded the record by way of his own affidavit describing his mental condition at the time of his plea, as well as a report from the psychiatrist who was treating him at the time of the motion.

These unique circumstances cast grave doubt on defendant's competence at the time of his plea. It is well settled that mental incompetency is an inherently unwaivable defect (*Pate v Robinson*, 383 US 375, 384 [1966]). In addition, defendant's claim is closely intertwined with a claim of ineffective assistance of counsel, and the submissions on the motion support a conclusion that counsel rendered ineffective assistance by permitting the plea to go forward without alerting the court to the article 730 examinations. Based on all these considerations, we conclude that the motion was not barred by CPL 440.10(2)(c).

It is also clear from the passage of time and from

information contained in the parties' submissions that it would be impracticable to conduct a hearing for the purpose of reconstructing defendant's competency at the time of the plea.

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14786 Ramon Reyes, et al., Index 310971/11
Plaintiffs-Appellants,

-against-

Se Park, et al.,
Defendants-Respondents,

Jeff S. Vogel, et al.,
Defendants.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Se Park and Sang K. Park, respondents.

The Law Offices of Edward M. Eustace, White Plains (Rose M. Cotter of counsel), for Francisco Munoz-Hernandez and Arbee Management, Inc., respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 19, 2013, which, to the extent appealed from as limited by the briefs, upon defendants' motions, granted defendants summary judgment dismissing plaintiff Ramon Reyes's claims for failure to demonstrate a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion of defendants Munoz-Hernandez and Arbee Management, Inc. (collectively the Munoz-Hernandez defendants) and the motion of the Park defendants to the extent the motions are based on the lack of a permanent or significant limitation of

use of plaintiff's spine, and grant the motions of the Munoz-Hernandez defendants and of defendants Vogel and RWV Land & Livestock, Inc. (collectively the Vogel defendants) to the extent the motions are based on their lack of liability, and otherwise affirmed, without costs.

Plaintiff contends that he suffered serious injury to his cervical, thoracic and lumbar spine following a motor vehicle accident that occurred when he was a passenger in the Munoz-Hernandez defendants' vehicle, which was rear-ended by the Park defendants' car. He also alleges that he was unable to perform substantially all of his customary activities for at least 90 out of the 180 days following the accident.

The Munoz-Hernandez defendants and the Park defendants made a prima facie showing of the lack of a permanent or significant limitation to plaintiff's spine through the reports of their neurological and orthopedic experts who found normal range of motion and no evidence of orthopedic or neurological injury caused by the accident (*see Tuberman v Hall*, 61 AD3d 441 [1st Dept 2009]). Although one of their medical experts found some minor limitations in plaintiff's spinal range of motion, those findings did not undermine the expert's conclusion that plaintiff suffered only resolved sprains and that his injuries did not amount to a permanent or significant limitation of use of his

spine (*id.*).

In opposition, plaintiff raised an issue of fact through the affirmation of his treating physician who opined that plaintiff suffered permanent and significant injuries to his spine that were caused by the accident. The physician's findings, upon examination shortly after the accident and recently, included significant limitations in range of motion, muscle spasms and positive straight leg raising tests. Those findings, together with reports of positive MRI findings and EMG/NCV studies, provided objective evidence of injury (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Pantojas v Lajara Auto Corp.*, 117 AD3d 577, 578 [1st Dept 2014]; *Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]). Although the MRI reports were not annexed or affirmed, they could be considered in opposition to summary judgment, since the positive MRI findings were referred to and set forth by defendants' experts, were not disputed by defendants' experts, and were not the only objective evidence relied upon by plaintiff's doctor in support of his opinion (see *Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; *Cruz v Rivera*, 94 AD3d 576, 576 [1st Dept 2012]).

The Munoz-Hernandez defendants and the Park defendants made a prima facie showing of the lack of a 90/180-day claim by relying on plaintiff's deposition testimony that he returned to

work immediately after the accident, missed about two and one-half months from work after returning, and was not directed by his physicians to restrict his activities (see *Silverman v MTA Bus Co.*, 101 AD3d 515, 517 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Even if plaintiff had missed 90 days of work, that would not be determinative of his 90/180-day claim (see *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]), and his claimed limitations, such as his inability to clean his house or play dominoes, were not "substantially all" of his usual and customary daily activities (Insurance Law § 5102[d]; see *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]).

The Munoz-Hernandez defendants established their entitlement to summary judgment dismissing the complaint as against them on the ground of their lack of liability. The testimony of plaintiffs and of defendant Se Park showed that Park's vehicle rear-ended the Munoz-Hernandez vehicle while it was stopped or stopping at an intersection (*Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]). Park's testimony that Munoz-Hernandez came to an abrupt stop in front of him at the intersection was insufficient to rebut the presumption of Park's negligence or to raise an issue of fact as to Munoz-Hernandez's

negligence (see *id.*).

Although the Vogel defendants have not submitted a respondents' brief on appeal, upon a search of the record (see CPLR 3212[b]), we find that they also established their entitlement to summary judgment dismissing the complaint as against them. Vogel's affidavit and Park's testimony show that Park's car hit Vogel's trailer when Park swerved to the left in an attempt to avoid hitting the Munoz-Hernandez vehicle, and that the Vogel vehicle never left its lane of traffic (see *Machado v Henry*, 96 AD3d 437 [1st Dept 2012]). In opposition, plaintiff failed to raise a triable issue of fact (*id.*).

Summary judgment in favor of the Munoz-Hernandez and Vogel defendants is not premature. Plaintiff's speculation that further discovery might support a finding of liability as to either of those defendants is an insufficient basis for denying defendants' motions (see *Santana v Danco Inc.*, 115 AD3d 560 [1st Dept 2014]).

The Park defendants never moved for summary judgment on the

issue of their liability, and they are not entitled to such relief. Accordingly, the only claim remaining is plaintiff's claim of a permanent or significant limitation to his spine due to the Park defendants' alleged liability.

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ENTERED: APRIL 9, 2015

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able to perform range of motion and other testing and issue unequivocal diagnoses, and gave no indication that further examinations were required (see *Bravo v Vargas*, 113 AD3d 577, 579 [2d Dept 2014]; *Jakubowski v Lengen*, 86 AD2d 398, 400-402 [4th Dept 1982] [defendant made no showing that presence of law clerk from plaintiff's counsel's office interfered with IME]; cf. *Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011] [neuropsychological IME granted upon defendants' submission of supporting expert affidavit after plaintiff had undergone neurological and neuropsychiatric IMEs]). To the limited extent that questions were not answered during the examinations, the court appropriately directed plaintiffs to provide affidavits as to the missing responses.

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

ENTERED: APRIL 9, 2015


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Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12597-		Index 103793/12
12598-		103794/12
12599-		103796/12
12600	In re Danny Rossi, Petitioner-Respondent,	103795/12

-against-

New York City Department of
Parks and Recreation,
Respondent-Appellant.

- - - - -

In re Elizabeth A. Rossi,
Petitioner-Respondent,

-against-

New York City Department of
Parks and Recreation,
Respondent-Appellant.

- - - - -

In re Rabah Belkebir,
Petitioner-Respondent,

-against-

New York City Department of
Parks and Recreation,
Respondent-Appellant.

- - - - -

In re Martin Diaz,
Petitioner-Respondent,

-against-

New York City Department of
Parks and Recreation,
Respondent-Appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J.
Pastor of counsel), for appellant.

Danny Rossi, respondent pro se.

Elizabeth Rossi, respondent pro se.

Rabah Belkebir, respondent pro se.

Martin Diaz, respondent pro se.

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered March 25, 2013, granting petitioner Danny Rossi's petition to annul the determination of ECB, dated May 31, 2012, which sustained three notices of violation of 56 RCNY 1-03(c)(1), affirmed, without costs. Order and judgment (one paper), same court and Justice, entered March 25, 2013, granting petitioner Elizabeth A. Rossi's petition to annul the determination of ECB, dated May 31, 2012, which sustained two notices of violation of 56 RCNY 1-03(c)(1), modified, on the law, to deny the petition with respect to the notice of violation premised upon GBL 35-a (7)(i), and otherwise affirmed, without costs. Order and judgment (one paper), same court and Justice, entered March 25, 2013, granting petitioner Rabah Belkebir's petition to annul the determination of ECB, dated May 31, 2012, which sustained one notice of violation of 56 RCNY 1-03(c)(1), affirmed, without costs. Order and judgment (one paper), same court and Justice, entered March 25, 2013, granting petitioner Martin Diaz's petition to annul the

determination of the New York City Environmental Control Board (ECB), dated May 31, 2012, which sustained 11 notices of violation of Rules of City of New York Department of Parks and Recreation (56 RCNY) § 1-03(c)(1), modified, on the law, to deny the petition with respect to the two notices of violation premised upon General Business Law (GBL) § 35-a(7)(i), and otherwise affirmed, without costs.

In these related article 78 proceedings, petitioners, who are disabled veterans holding mobile food vending licenses, challenge notices of violation issued by respondent New York City Department of Parks and Recreation (DPR) for failure to comply with Parks Department officers' directives to move their food carts. Most of the notices of violation allege that petitioners were asked to move their carts because GBL 35-a(3) provides that only two street vendors holding "specialized vending licenses" (SVLs) may vend on each "block face." SVLs are issued to disabled veterans by way of a priority system based upon the veteran's date of application (GBL 35-a[1][a], [b]). When three or more SVL holders attempt to vend on the same "block face," the two SVL holders with higher priority have the exclusive right to vend, and any other SVL holder vending on that "block face" is deemed to be vending without having obtained a license (GBL 35-a[3]). Since other SVL holders with higher priority were vending

on the dates in question, the Parks Department officers asked petitioners to move, and issued the notices of violation when they refused. Separate from the "block face" issue, two of the notices of violation issued to petitioner Diaz, and one issued to petitioner Elizabeth A. Rossi, allege that they refused to move after being told that their food carts violated certain footage restrictions contained in GBL 35-a(7)(i).

GBL 35-a governs the issuance of SVLs to disabled veterans who "hawk, peddle, vend and sell goods, wares or merchandise or solicit trade" (GBL 35-a[1][a]). Petitioners argue that this statute does not apply to food vendors. The central issue presented in this appeal is whether the phrase "goods, wares or merchandise" encompasses food. We conclude that it does. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Matter of State of New York v John S.*, 23 NY3d 326, 340 [2014] [internal quotation marks omitted]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Because the terms "goods" and "merchandise" are not defined in GBL 35-a, they should be construed in accordance with their

common, everyday meaning (*Matter of New York Skyline, Inc. v City of New York*, 94 AD3d 23, 27 [1st Dept 2012], *lv denied* 19 NY3d 809 [2012])).

The word "goods" is broadly defined as "something manufactured or produced for sale" (Merriam-Webster's Collegiate Dictionary 539 [11th ed 2003]). Likewise, "merchandise" is defined as "the commodities or goods that are bought and sold in business" (*id.* at 776). As a matter of common parlance, the term "goods" plainly includes food. For example, one often refers to canned foods as "canned goods," and baked items as "baked goods." Thus, food products such as those sold by petitioners fall within the common, everyday meaning of "goods" and "merchandise" (see *Monroy v City of New York*, 95 AD3d 535 [1st Dept 2012] [food is "merchandise" as that term is used in city regulation governing the sale of merchandise]). If the legislature had intended to exclude food from the purview of GBL 35-a, it could have expressly done so, as it did, for example, in General Municipal Law § 85-a [explicitly excepting "food products" from the phrase "goods, wares or merchandise"]). Its failure to have made such an exclusion in GBL 35-a indicates an intention to include food within the broad reach of the statute.¹

¹ There is nothing in the legislative history to indicate that the legislature intended to exclude food vending.

The phrase "goods, wares or merchandise" is drawn verbatim from GBL 35-a's companion statute, GBL 32, which governs the rights of veterans to vend. That statute, from its inception, has been understood to apply to all categories of vendors, including food vendors (see e.g. *City of Buffalo v Linsman*, 113 App Div 584 [4th Dept 1906] [sale of vegetables]; *Matter of Sharpe v New York City Dept. Of Health & Mental Hygiene*, 2008 NY Slip Op 32094[U] [Sup Ct, NY County 2008] [mobile food vending]; *People v Mann*, 113 Misc 2d 980 [Dist Ct, Suffolk County 1982] [sale of hot dogs]; *People v Gilbert*, 68 Misc 48 [County Ct, Otsego County 1910] [sale of peanuts and popcorn]; see also *Good Humor Corp. v City of New York*, 290 NY 312 [1943] [involving sale of ice cream and local law regulating sale of "goods, wares or merchandise"])). It would be incongruous for the legislature to have viewed food as "goods, wares or merchandise" for purposes of GBL 32, but not for GBL 35-a.

It is axiomatic that "a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). A review of the myriad provisions in GBL 35-a makes clear that the statute was intended to, inter alia, combat sidewalk congestion and promote public safety in areas where vending is taking place. For example, vending is

prohibited on sidewalks where the pedestrian path is less than 10 feet wide (GBL 35-a[3]). There are also restrictions on, inter alia, vending within bus stops and taxi stands, and near subway entrances, driveways, disabled access ramps and entrances to stores (GBL 35-a[7][h], [1][i], [1][viii]). Other parts of the statute prohibit interference with fire hydrants and traffic barriers, use of oil and gas powered equipment, and vending over subway grates, ventilation grills and manholes (GBL 35-a [7][g], [1][iii], [1][v]). The congestion and safety concerns underlying these provisions pertain to all vendors regardless of what they are selling, and there is no rational reason why the legislature would intend for these restrictions to apply to general vendors but not food vendors.

The passing reference to food vendors in GBL 35-a(11) fails to demonstrate that the legislature did not intend food vending to be covered under the statute. That subdivision, which provides for certain caps on vending by disabled veterans, is merely an acknowledgment that there are different types of vendors - namely "food, general [and] vendors of written matter" (GBL 35-a[11]), and sheds no light on the central question of whether food is "goods" or "merchandise." Likewise, the fact that two different agencies regulate street vending in New York City does not mean that the State Legislature intended to carve

out food vending from GBL 35-a.

Having concluded that the vending limitations contained in GBL 35-a apply to the sale of food, we turn to the remaining issues presented in this proceeding. Petitioners were vending in front of the Metropolitan Museum of Art, which is abutted by a five-block span of sidewalk on the west side of Fifth Avenue extending from the side streets of East 79th Street through East 84th Street. On the east side of Fifth Avenue, this span comprises five distinct blocks separated by the above side streets, each of which forms a T-junction with Fifth Avenue. Most of the notices of violation were issued because petitioners had allegedly violated the provision in GBL 35-a(3) allowing no more than two SVL holders to vend on a given "block face."

DPR and ECB take the position that the entire span of sidewalk in front of the museum comprises a single "block face" for purposes of GBL 35-a(3). We disagree. The regulations enacted with respect to this statute define "block face" as "the area of sidewalk spanning from one intersection to the next" (Rules of City of New York Department of Consumer Affairs [6 RCNY] § 2-315[a][1]). The term "intersection" is defined in the Vehicle and Traffic Law (VTL) as, inter alia, "[t]he area embraced within the prolongation or connection of the lateral curb lines . . . of two highways which join one another at, or

approximately at, right angles" (VTL 120[a]). Likewise, the New York City Department of Transportation's regulations define "intersection" as "the area contained within the grid created by extending the curblines of two or more streets at the point at which they cross each other" (Rules of City of New York Department of Transportation [34 RCNY] § 2-01). Because the T-junctions formed where Fifth Avenue meets each of the streets from East 79th through East 84th Streets are all separate intersections, the multi-block sidewalk span in front of the museum is not a single "block face." Thus, in light of the provisions of the VTL and RCNY, ECB's interpretation of the term "block face" was an error of law. Accordingly, ECB erroneously sustained those notices of violation based on the restriction of two SVL holders per "block face."²

Contrary to the dissent's view, the "block face" issue, which was fully briefed in the article 78 proceedings below, is properly before us. CPLR 7804(g) provides, in relevant part, that "when the [article 78] proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of

² The dissent's reference to the number of bus stops in front of the museum, an issue not fully developed in the administrative record, has no bearing on the legal issue of whether the sidewalk area in front of the museum constitutes a single "block face."

all issues in the proceeding” (emphasis added). Thus, we are empowered to resolve all issues raised in the article 78 petitions, including the “block face” issue (see *Matter of 125 Bar Corp. v State Liq. Auth. of State of N.Y.*, 24 NY2d 174 [1969]; see also Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:8 [“To preserve judicial economy, . . . 7804(g) has been interpreted as a direction to the Appellate Division to consider all of the questions that are presented in an Article 78 proceeding no matter how the case arrived at its doorstep”]). We disagree with the dissent’s position that we should defer to ECB’s construction of the term “block face.” The issue before us turns solely on statutory interpretation, and no such deference is owed since we are not interpreting a statute “where specialized knowledge and understanding of underlying operational practices” or “an evaluation of factual data and inferences to be drawn therefrom is at stake” (*Matter of RAM I LLC v New York State Div. of Hous. & Community Renewal*, 123 AD3d 102, 105 [1st Dept 2014] [internal quotation marks omitted]).

ECB properly upheld those notices of violation issued to petitioners Diaz and Elizabeth A. Rossi premised upon GBL 35-a(7)(i). Under that provision, SVL holders are prohibited from “occupy[ing] more than eight linear feet of public space parallel

to the curb" and "more than three linear feet to be measured from the curb to the property line."³ The sole defense raised in the administrative proceedings to these notices of violation, which have nothing to do with the "block face" issue, was that GBL 35-a does not apply to food vending.⁴ In light of our rejection of this defense, no basis exists to vacate these notices of violation.

All concur except Tom, J.P. who dissents in part in a memorandum as follows:

³ Although, in general, the provisions of GBL 35-a(7) are not applicable to the area where petitioners were vending, the specific prohibitions contained in GBL 35-a(7)(i) apply to all SVL holders, regardless of where they vend (see GBL 35-a[3]).

⁴ In the article 78 petitions, petitioners argued that these size limitations create a disadvantage for disabled veteran food vendors since they purportedly conflict with certain city regulations. We do not reach this issue because it was not raised in the ECB proceedings (see *72A Realty Assoc. v New York City Env'tl. Control Bd.*, 275 AD2d 284, 286 [1st Dept 2000]).

TOM, J.P. (dissenting in part)

I dissent to the extent that the majority reaches matters not briefed by the parties and not reached by Supreme Court, thus providing no basis for review. It is axiomatic that in the absence of an adverse ruling by which a party is aggrieved, no appeal lies (CPLR 5511). Since petitioners have not filed a cross appeal, any administrative rulings adverse to them are likewise not subject to review in respondent's present appeal.

Petitioners are all disabled veterans of the United States Armed Services who operate as mobile food vendors on the sidewalk in front of the Metropolitan Museum of Art in Manhattan. The issue presented by this appeal is whether they were properly charged with violating General Business Law section 35-a, subdivision 3, which imposes a limit on the number of vendors who may conduct business at a particular location.

These article 78 proceedings, consolidated for appeal, challenge penalties imposed on petitioners by respondent New York City Department of Parks and Recreation (DPR) and upheld by the Environmental Control Board (ECB or the City) for refusing to leave the sidewalk area fronting the museum to comply with the statutory limit of two such vendors per restricted block face. These density restrictions are prescribed by General Business Law § 35-a, which provides for the issuance of a specialized vending

license (SVL) to any honorably discharged veteran who, like petitioners, has a service-related physical disability.

Each petitioner holds a Mobile Food Vendor Full Term License issued by the New York City Department of Health and Mental Hygiene (DOHMH), which enables the holder to conduct operations as a food vendor. Petitioner Danny Rossi owns and operates his own food vending cart, which meets the agency's specifications and requirements. Since 2007, he has been operating his food cart in front of the Metropolitan Museum of Art on the west side of Fifth Avenue in the vicinity of East 82nd Street. In addition to the cart which he personally operates, Mr. Rossi owns at least two other food vending carts. He employs his adult daughter, petitioner Elizabeth A. Rossi, to operate one and petitioner Martin Diaz to operate the other. The final petitioner, Rabah Belkebir, owns and operates his own food cart at East 79th Street and Fifth Avenue. For each cart owned, Mr. Rossi and Mr. Belkebir hold a Citywide Full Term Mobile Food Vending Permit, also issued by DOHMH, which certifies that a particular cart or vehicle is authorized for use in food vending.

Petitioners were directed to move their food carts because state law provides that only two street vendors holding "specialized vending licenses" may vend on each "block face"

(General Business Law § 35-a [3]).¹ DPR construes the five-block uninterrupted stretch of sidewalk on Fifth Avenue fronting the Metropolitan Museum of Art to constitute a single "block face" for purposes of General Business Law § 35-a, subdivision 3. Since other, more senior (higher priority number) SVL holders were present on each of the dates in question, the Parks Department officers asked the petitioners to move, and issued them notices of violation when they refused.

A brief historical analysis of the relevant statutes is instructive. Article 4 of the General Business Law confers on honorably discharged veterans of this state who procure the necessary license the right to "sell goods, wares or merchandise or solicit trade upon the streets and highways within the county of his or her residence" or within the city wholly embracing that county (General Business Law § 32 [1]). Moreover, municipalities are forbidden to promulgate any local law or regulation that prohibits or interferes with the exercise of such right by licensed veterans who are physically disabled as a result of injuries received during military service (General Business Law § 35). In *Kaswan v Aponte* (160 AD2d 324 [1st Dept 1990], *affg* 142 Misc 2d 298 [Sup Ct, NY County 1989]), this Court upheld the

¹ The term "block face" is not defined in General Business Law article 4.

right conferred by section 35, which supersedes and proscribes any local law restricting the right of disabled veterans to engage in hawking or peddling - specifically, in *Kaswan*, a local regulation intended to abate congestion. In response to our ruling, section 35 was amended to exempt cities with a population of one million or more to permit the exercise of some degree of local regulatory authority over the activities of such vendors (L 1991, ch 687, § 1). Thereafter, the legislature enacted section 35-a, which originally provided for the issuance of restricted location permits to qualifying disabled veterans (L 1995, ch 115, § 3). The statute was re-enacted in 2004 to implement the present licensing system, expressly subjecting licensees to local restrictions on the number of vendors who may operate at a given location under certain specified conditions (L 2004, ch 11, § 1).

The statute subjects the SVL holder to local restrictions on the number of vending carts, vehicles or stands imposed by the locality "[i]n areas where general vending is authorized" (General Business Law § 35-a [2]). It further confers upon the SVL holder the right to vend at times and in locations where vending is otherwise prohibited, with the proviso that no more than two SVL holders may vend on such a "restricted block face" (General Business Law § 35-a [3]). The statute provides for a priority system, based on seniority, to establish which vendors

have the right to continue operating when the density limit on the number of vendors per block face is exceeded.

DPR officers issued violations to petitioners for failing to obey directives to move their food carts. In each case, the officers asserted that they instructed the petitioner to move his or her cart because the respective petitioner did not have "priority" on that "block face" (General Business Law § 35-a [1] [b]). The summonses issued to petitioners were the subject of four administrative hearings conducted before the same Administrative Law Judge. Danny Rossi appeared pro se and also acted as the representative of the other three petitioners. The agency was represented by Parks Department Enforcement personnel, Sergeant Asha Harris and Officer Travis Herman.

Mr. Rossi began by noting that the issue of whether an enforcement officer's direction to move a food cart was lawfully issued had been the subject of several prior hearings. He submitted a number of determinations that dismissed the charge of failing to comply with a lawful order of a Parks Department officer, including one concerning Martin Diaz, all of which found that General Business Law § 35-a is inapplicable to food vendors. Mr. Rossi argued that the statute only "applies to general vending" and that "the priority system isn't used in this case." As to any restriction on the number of vendors, Mr. Rossi

contended that the location where the carts were being operated is not a restricted area for food vendors. In support of his argument, he referred to title 17 of the Administrative Code (regulating food vending)² and a listing of streets restricted under that title, which does not include the subject location. He further noted that under Parks Department regulations, the only restriction on the placement of carts is that they be located at least 30 feet from a park entrance, a rule with which he fully complied. In response, Sergeant Harris reminded the ALJ that the violations were issued to petitioners under section 35-a, not the Administrative Code. She then proceeded to explain the priority licensing system.

The ALJ issued four substantially identical decisions dismissing all of the violations against each of the four petitioners and finding that General Business Law § 35-a is inapplicable to food vendors. Thus, the ALJ concluded, petitioners were not subject to the limit of two SVL holders per block face contained in subdivision (3), the directive given to petitioners by DPR officers to remove their food carts from the sidewalk in front of the Metropolitan Museum of Art was unlawful,

² Presumably Administrative Code § 17-315 (i) requiring written authorization from the Commissioner of Parks to vend within areas under Parks Department jurisdiction.

and it could not serve as a basis for issuance of a violation for failure to comply with the officer's "lawful direction or command" (56 RCNY 1-03 [c] [1]).

The DPR pursued an administrative appeal before the ECB, which reversed the ALJ's findings. In four determinations essentially identical in substance and issued on the same day, the Board found that the restriction on the number of vendors contained in General Business Law section 35-a applies to food vendors and general vendors alike. While no definition of the terms "goods, wares or merchandise" appears in section 35-a or elsewhere in the New York State Consolidated Laws, the Board observed that the dictionary definition of "goods" includes "food products," such as "baked goods" (citing Webster's Third New International Dictionary [1986]), and that food products are among the goods subject to regulation under article 2 of the Uniform Commercial Code. The Board also rejected petitioners' contention that they did not violate the statutory prohibition against more than two SVL holders "vend[ing] simultaneously on the same block face" because, as Danny Rossi had argued, the list of restricted areas issued by DOHMH includes only the east side of Fifth Avenue, not the west side in front of the Metropolitan Museum of Art. The Board instead invoked the local requirement to obtain written permission from the Parks Commissioner to vend

in areas subject to his supervision (Administrative Code § 17-315 [i]) to find that the area fronting the museum from East 79th to East 86th Street constitutes a "restricted block face." Finally, the Board refused to consider Mr. Rossi's argument that an SVL may be used only for general vending, that it requires a general vending license and is labeled "disabled veteran general vendor" as "factual assertions made for the first time on appeal." In reversing the ALJ's determinations, the Board sustained all of the violations against petitioners.

The subject article 78 proceedings were commenced by notices of petition and petitions verified September 14, 2012. As on the administrative appeal, petitioners argued that food vendors are not regulated by the state statute but, rather, are subject to city regulation by DOHMH under article 17 of the Administrative Code. They further argued that the ECB's finding that the area between East 79th and East 86th Street is a single restricted block face for purposes of the statute is arbitrary and capricious. The City responded that while its licensing provisions have distinguished between general vendors and vendors of food since 1977, state law has never made any such distinction.

In granting the petitions, Supreme Court issued four substantially identical decisions reasoning that only general

(non-food) vendors are subject to General Business Law § 35-a, while food vendors are regulated by Administrative Code § 17-301 *et seq.* The court further noted that “[t]he Department of Consumer Affairs, which is charged with issuing general vendor licenses, explicitly excludes food vending from the purview of general vendor licenses” (citing Administrative Code § 20-452 [b]). Because it found section 35-a to be inapplicable to food vendors, the court held that the DPR officers had unlawfully directed petitioners to move their food carts and, thus, petitioners could not be charged with failing to comply with a lawful direction of a Parks Department officer. The court did not reach the question of whether the entire sidewalk area fronting the museum constitutes a single block face for purposes of restricting vending to two specialized vending licensees.

On appeal, the City, argues that while regulation of food vendors is the province of DOHMH, General Business Law § 35-a is not confined to general vendors but applies to all vendors, including food vendors.

In support of their opposing position that the numerical restrictions of section 35-a do not apply to them, petitioners, appearing *pro se*, respond first, as they argued before the ALJ, that the Department of Consumer Affairs (DCA) has no authority to regulate their operations, which fall under the aegis of DOHMH.

Second, they point out that none of them has been required to obtain an SVL in order to conduct operations as a food vendor and that a general vending license does not permit the vending of food.³ Finally, since food is not mentioned among the wares covered by General Business Law § 35-a, they contend that the statute does not apply to vendors of food.

As the City frames it, the issue before us is whether the statutory reference to those holding a "license to hawk, peddle, vend and sell goods, wares or merchandise or solicit trade upon the streets and highways" (General Business Law § 35-a [1][a]) includes food vendors within its purview or, more particularly, whether the statute includes food among the categories of "goods, wares or merchandise" sold by SVL holders. The City argues that the dictionary definition of "goods" is particularly broad and that article 2 of the Uniform Commercial Code, which applies to transactions in goods, is construed to include food items (see *e.g. Frigaliment Importing Co. v B.N.S. Intl. Sales Co.*, 190 F Supp 116 [SD NY 1960] [chicken]; *Feld v Levy & Sons*, 37 NY2d 466 [1975] [bread crumbs]).

It may well be that, as the City contends, General Business

³ General Business Law § 35-a (5) provides for a color coded identification to accompany an SVL, which shall be displayed by the SVL holder, and current DCA rules provide for the assignment of a priority rank to the vendor.

Law section 35-a can be read to encompass food vendors. It is broadly drafted and nowhere expressly exempts the vending of food from its ambit (see *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [legislative intent is best reflected by the statutory language]. For the purpose of this appeal, it may be assumed, without deciding, that the statute's scope is as broad as the City suggests. It is unnecessary to decide the issue because, even accepting the City's interpretation, the statute does not afford a predicate for issuance of the subject violations to petitioners under the particular facts of this case.

Preoccupation with state law detracts from the purpose of article 78 review. The narrower question to be decided by this Court is whether Supreme Court correctly found that the ECB's administrative order overturning the ALJ's hearing determination was "'arbitrary and capricious, affected by error of law or an abuse of discretion'" under CPLR 7803 (3) (*Matter of Castanon v Franco*, 290 AD2d 293, 293 [1st Dept 2002], quoting *Matter of Kaphan v DeBuono*, 268 AD2d 909, 911 [3d Dept 2000]).⁴ The subject violations were issued pursuant to General Business Law

⁴ The City concedes that since petitioners do not challenge any factual finding (CPLR 7803 [4]; 7804 [g]), this is the appropriate standard of review.

§ 35-a (3), which provides in relevant part:

“Specialized vending licenses issued pursuant to this section shall authorize the holders thereof to vend on block faces . . . on the days and at the times when other vending businesses have been prohibited on such block faces pursuant to any local law, ordinance, by-law, rule or regulation. Not more than two such specialized vending licenses shall be authorized pursuant to this subdivision per restricted block face”

Where, as here, a question of pure statutory interpretation is presented, the courts are not obliged to accord deference to the construction of the law espoused by the agency (*see Matter of KSLM Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]).

Whether or not General Business Law § 35-a applies to petitioners, the ECB identified no local provision that otherwise prohibited vending in front of the Metropolitan Museum of Art, thereby implicating the statutory limit of two vendors per block face. Subdivision (2) of the statute subjects qualifying disabled veterans holding SVLs to local restrictions on the placement of vending carts. Subdivision (3) permits such SVL holders to vend “on the days and at the times when other vending businesses have been prohibited on such block faces pursuant to any local law, ordinance, by-law, rule or regulation,” with the proviso that “[n]ot more than two such specialized vending licensees shall be authorized pursuant to this subdivision per

restricted block face" (General Business Law § 35-a [3]). Thus, even assuming that petitioners are bound by the statute, as the City contends, they must be shown to have been using the status of SVL holder to vend at a time and place "when other vending businesses have been prohibited." Once again, the City identifies no such local prohibition in effect at this location, and the restriction of "not more than two . . . specialized vending licenses per restricted block face" under § 35-a (3) is not implicated.

As the basis for finding the location where petitioners were issued violations to be a restricted block face, the ECB invoked section 17-315 (i) of the Administrative Code, which prohibits vending in areas subject to Parks Department jurisdiction "unless written authorization therefor has been obtained from the commissioner." This provision is inapposite. As the ALJ noted, petitioners were not cited for vending without a permit. Nor does this provision impose the type of restriction contemplated by section 3 of the statute by prohibiting the operation of "other vending businesses" on the block face on particular days and at specified times. Absent a showing that, pursuant to statute, petitioners were allowed to vend at their location when the locality prohibited other vendors from conducting business, they are not subject to the statutory limit of two such

authorized vendors (General Business Law § 35-a [3]).

Whether other regulations, such as those issued by DCA, restrict vending on the block face at the subject times is immaterial. "It is settled that a court's review of the propriety of an agency's determination is confined to the particular grounds invoked by the agency in support of its action" (*Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 136 [1st Dept 2009], *mod on other grounds* 17 NY3d 149 [2011], citing *Matter of Yarborough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 913-914 [1977]). Thus, on this record, there is no basis for finding petitioners in violation of the statutory limit of two SVL holders per block face pursuant to section 35-a, subdivision 3. Furthermore, since the applicability of section 35-a is the issue contested by the parties on appeal, there is no question that it has been preserved for review.

As an alternative basis for annulment of the ECB determination, in the verified answer to the individual petitions, it is conceded that "the City has separated vendors into general vendors and food vendors for the purposes of licensing since 1977." The ECB's determinations represent an inexplicable departure from administrative precedent and conflict with these longstanding regulatory distinctions. As pointed out

by Mr. Rossi at the start of the administrative hearing before the ALJ, a number of prior determinations found General Business Law § 35-a to be inapplicable to food vendors. The ECB acknowledged its break with agency precedent in its determination of the administrative appeal in the Martin Diaz case. Referring specifically to an October 5, 2011 determination dismissing an identical violation issued to Mr. Diaz for failing to comply with an order of a DPR officer, the Board stated, in a footnote, that “res judicata” is inapplicable due to an “intervening change in the applicable legal context. . . . The Board’s finding that GBL 35-a applies to food vendors is such a change in context.”

An agency, like a court, is not inexorably bound by the doctrine of stare decisis to conform to an incorrect application of a statute, but it is required to provide the reason for a change in its established position (*Matter of Charles A. Field Delivery Serv., [Roberts]* 66 NY2d 516, 519, 520 [1985]). Having stated that its finding that General Business Law § 35-a is applicable to food vendors constitutes a change in position, the ECB’s failure to provide any explanation renders the instant determinations arbitrary as a matter of law. As the Court of Appeals noted:

“when an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is

furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made" (*id.* at 520 [internal citation omitted]).

The ECB determination sets forth various reasons why the agency thinks section 35-a should apply to food vendors; it does not state why the City is departing from a regulatory system that has concededly drawn a clear distinction between food and non-food vendors for nearly four decades. Although the issue was placed before it, the ECB has not explained why, or by what means, regulations aimed at general vendors are to be applied to food vendors, essentially by treating them as specialized vending licensees. An agency, as a general matter, is required to adopt a rational interpretation of the law under which it operates (see *Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]), and particularly so where, as here, the agency proposes to reverse its position with respect to the law's application.

ECB's determination does not demonstrate that its interpretation of General Business Law section 35-a is consistent with the City's existing regulatory structure. As Supreme Court noted, the definition of "general vendor" specifically provides

that it "shall not include a food vendor" (Administrative Code § 20-452 [b], citing Administrative Code § 17-306 [c]). Furthermore, as Mr. Rossi observed, the specialized vending licensee is designated on the license itself as "a disabled veteran general vendor." In addition, qualification for an SVL requires proof that the applicant "holds a general vending license" (6 RCNY 2-315 [b][3][iii]). Thus, under the City's licensing system, a general vendor is not permitted to sell food; only a general vendor can apply for an SVL; the SVL is expressly denominated a "specialized license," held by a "general vendor"; and SVL holders are only restricted by General Business Law § 35-a (2) "[i]n areas where general vending is authorized." Taken together, these various provisions amply support Supreme Court's conclusion that the City's restrictions on the number of qualifying disabled veterans who may vend on a restricted block face apply exclusively to those persons it licenses as general vendors.⁵ The provisions also illustrate the extent to which

⁵ The City, at oral argument, informed this Court that it does indeed issue SVL's to food vendors, and there are indications in the record that some, if not all of the petitioners have obtained them. Presumably, to qualify, petitioners first obtained general vending licenses. The City does not explain its rationale for issuing a general vending license to a vendor who cannot use it to sell food, and neither party has provided any guidance concerning the actual use of the SVL by food vendors within the existing regulatory framework.

ECB's proposal to subject food vendors to statutory restrictions placed on SVL holders is at variance with the established regulatory scheme.

As this matter illustrates, application of general vending restrictions to food vendors presents some practical inconsistencies. The evidence presented to the ALJ by Mr. Rossi demonstrates that the areas where food vending is restricted by DCA regulations differ from those areas restricted by DOHMH regulations. The policy reasons behind the requirement of consistent results - particularly "guidance for those governed by the determination made" and "stability in the law" - are not advanced by requiring the food vendor, regulated by DOHMH, to anticipate being subjected to vending restrictions directed at the general vendor and promulgated by DCA (*Matter of Charles A. Field Delivery Serv., [Roberts]* 66 NY2d at 519). Nor are impartiality and the appearance of justice promoted by issuing a food vendor a general vending license, which does not permit the vending of food, for the apparent purpose of subjecting the food vendor to general vending restrictions (*id.*).

The majority questions the City's position that the five-block stretch of sidewalk fronting the Metropolitan Museum of Art from 79th to 84th Streets constitutes a single "block face." Agency regulations define the term as "the area of sidewalk

spanning from one intersection to the next" (6 RCNY § 2-315 [a][I]). Meanwhile, Vehicle and Traffic Law § 120, subdivision (a) defines the term "intersection" as, inter alia, "the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles." It is beyond dispute that the T-junction formed by each intervening street from 80th to 83rd Street constitutes an intersection under the statute, and ECB has offered no explanation for its contrary interpretation. The significance of the omission in the present context appears to be minimal, however, in view of Sergeant Harris's testimony that, due to the prohibition against vending in bus stops and the profusion of bus stops along the entire length of sidewalk fronting the museum, there are only two areas where vendors can legally position their carts. Thus, it may be that petitioners and the competing food vendors who outranked them were operating not only on the same block face, as construed by the ECB, but on the same block, as delineated by bounding intersections, rendering the point moot for the purpose of determining whether statutory density restrictions were exceeded.

In any event, Supreme Court did not reach the question of whether the ECB's definition of block face is arbitrary and capricious, the City is not aggrieved by any adverse decision on the matter (CPLR 5511), the subject has not been briefed by the

parties, and the issue is not before this Court. Even if the question were properly presented for review, the pertinent inquiry is whether the ECB has a rational basis for construing the sidewalk fronting the Metropolitan Museum as a single block face, not merely, as the majority decides, whether the agency's construction of the term intersection varies from that of the Vehicle and Traffic Law. "It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Matter of Howard v Wyman*, 28 NY2d at 438 [1971]; see *Matter of Tommy & Tina, Inc. v Department of Consumer Affairs of City of N.Y.*, 95 AD2d 724 [1st Dept 1983], *affd for reasons stated below* 62 NY2d 671 [1984]). In the absence of any briefing by the City concerning the reason for designating the subject location as a restricted block face, this issue is not reviewable.

Finally, a determination of whether petitioners were in violation of statutory density restrictions under the criterion established by the majority would first require a determination as to whether petitioners were vending on the same *block* as competing food vendors, a question unanswerable on the present record. We do not know where these food carts were located at the time the violations were issued. All the food carts could

have been clustered within a single block directly in front of the museum entrance, which would subject petitioners to the restriction of section 35-a (3) even if the stretch of sidewalks fronting the museum are deemed separate block faces. Thus, simply finding that "the multi-block sidewalk span in front of the museum is not a single block face" does not, as the majority presumes, automatically resolve the issue in favor of petitioners.

Accordingly, the respective judgments (each denominated order and judgment) should be affirmed.

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

ENTERED: APRIL 9, 2015



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Rules of App Div, 1st Dept [22 NYCRR] § 600.5[c], [d]). Because third-party defendants make this request and raise these arguments for the first time on appeal, they have acquiesced in any noncompliance (see *Cetnar v Kinowski*, 245 AD2d 974, 975 [3d Dept 1997]).

Third-party plaintiffs, the owners of the real property at issue, bring their Lien Law claim as "trustee" of funds allegedly received and held by the third-party defendant contractors. Although Lien Law § 77(1) provides that a trustee may maintain an action to enforce a trust, Lien Law § 70(5) provides that "[t]he assets of the trust of which [an] owner [of real property] is trustee are the funds received by him." Accordingly, third-party plaintiffs, as owners, are not the trustee of funds received by the third-party defendant contractors, and therefore they lack standing to maintain their Lien Law claim (third cause of action).

The second cause of action, for fraud/negligent misrepresentation, is not duplicative of defendant/third-party plaintiff ESF's breach of contract counterclaim against plaintiff/third-party defendant Ferro Fabricators, Inc., since it does not allege that Ferro entered into a contract intending not to perform (see *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). However, the claim must still

be dismissed for failure to plead with requisite particularity pursuant to CPLR 3016(b) (see e.g. *Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014] [holding that claims were not pleaded with requisite particularity because the words used by the defendants and the date of the alleged false representations were not set forth]). Here, the third-party complaint only contains general allegations as to the alleged misrepresentations and virtually no information as to when and by whom these representations were made.

Similarly, third-party plaintiffs' fourth cause of action, for negligence/professional malpractice, is not duplicative of ESF's breach of contract counterclaim, because "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship [and] [p]rofessionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]).

However, although the third-party complaint alleges that Ferro and third-party defendant Gregory Dec owed a duty to perform engineering services in a professional manner and without negligence, it fails to state nonconclusory allegations as to how the third-party defendants negligently discharged the alleged duties and what damage the alleged failure caused (*cf. 17 Vista*

Fee Assoc. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 82-83 [1st Dept 1999]).

With respect to the first cause of action, alter-ego liability is not an independent cause of action (see e.g. *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). In any event, the first cause of action alleging alter-ego liability is too conclusory, since it fails to plead any particularized facts (see e.g. *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007]).

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

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197 [1941]; *Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC*, 20 NY3d 438, 445 [2013]). That the notes did not incorporate the agreement by reference does not alter this conclusion (see *Brax Capital Group, LLC v Winwin Gaming, Inc.*, 83 AD3d 591, 592 [1st Dept 2011]).

However, in interpreting the term "Permitted Investors," the court relied unduly on the rule of construction set forth in the notes that made singular and plural interchangeable, and thus erred in finding the term to be singular in this instance.

"Permitted Investors" was defined as "OTK Associates, David T. Hamamoto and Yucaipa." The definition was in the conjunctive, unambiguous, and not subject to any rule of construction in the relevant documents or to any special commercially reasonable interpretation. It plainly required all three of those investors to take over the entity's board for there to be no "Change of Control." Therefore, the successful insurgency by OTK Associates alone was a "Change of Control" within the meaning of the notes.

We fail to see how the provision in question here is ambiguous. A contract is not rendered ambiguous simply because one of the parties attaches a different, subjective meaning to one of its terms (*Bajraktari Mgt. Corp. v American Intl. Group, Inc.*, 81 AD3d 432 [1st Dept 2011]). The definition of "Permitted Investors" as "OTK and [two others]," using the conjunctive "and"

and not the disjunctive "or," is plainly interpreted in the plural, because otherwise it would have stated "a Permitted Investor" not "the Permitted Investors" (see e.g. *Progressive Northeastern Ins. Co. v State Farm Ins. Co.*, 81 AD3d 1376, 1378 [4th Dept 2011], *appeal dismissed* 16 NY3d 891 [2011], *lv denied* 17 NY3d 849 [2011]). Thus, because there is no ambiguity in the word "and" in the definition of "Permitted Investors," there is no reason to resort to rules of contract construction based on contractual provisions or context, as our concurring colleague does (see *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Deerkoski v East 49th St. Dev. II, LLC*, 120 AD3d 1387 [2d Dept 2014]).

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

SAXE, J. (concurring).

The determination of this appeal turns on the most minor of terminology in the promissory notes under consideration. The provision in question defines what would constitute a change of control of the defendant company such as would entitle plaintiffs, as the company's noteholders, to demand the acceleration of repayment. The motion court's reading of the change of control provision was that the election of the new board did not constitute a change of control as defined in the notes; it therefore dismissed the complaint. The majority construes the term differently, finding that a change of control was established by the facts alleged in the complaint, and therefore reverses and reinstates the complaint. I agree with the reading of the provision made by the motion court. However, rather than suggesting that we should affirm, I suggest that in view of our two reasonable but opposite views of what is intended by the change of control provision, the intended meaning of the term should be treated as ambiguous, rather than determined as a matter of law in this context. I therefore concur in the reinstatement of the complaint, but based on this alternative reasoning.

Plaintiffs Andrew Sasson and Andy Masi, who own and operate nightclubs, sold their interests in various companies to Morgans

Hotel Group Co. (MHGC) through its subsidiary, TLG Acquisition LLC, pursuant to a Master Purchase Agreement (MPA). The MPA defined the "transaction documents" as including the MPA, two promissory notes in the aggregate amount of \$18 million, guaranties by MHGC, a Consulting Services Agreement with plaintiff Sasson, any other written document signed by the parties which is expressly identified as a "Transaction Document," and any exhibits or attachments to the MPA.

The maturity date of the notes was November 30, 2015, with interest payable at 8% until November 30, 2014 and thereafter at 18%. However, the notes were required to be prepaid if a "Note Acceleration Event" occurred, and, in the event of a defined "change of control" in MHGC, repayment was required within 40 days of notice. Failure to prepay would constitute a default, increasing the interest to 16% until November 30, 2014, and thereafter to 20%.

The notes and guaranties defined the required "change of control" in MHGC as:

"(a) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group [within the meaning of the 1934 SEC Act and rules], of voting stock of MHGC representing more than 50% of the aggregate total voting power [of MHGC voting stock], or

"(b) *the occupation of a majority of the seats (other than vacant seats) on the board of directors of MHGC by individuals who were neither (i) nominated by the board of*

directors of MHGC or the Permitted Investors nor (ii) appointed by directors so nominated” (emphasis added).

So, a change in the identities of a majority of the board’s seats would qualify as a “change of control,” unless those individuals were nominated by the “Permitted Investors” or the board of directors of MHGC, or appointed by directors so nominated.

While the MPA, the notes and the “transaction documents” did not define the term “Permitted Investors,” the Morgans Credit Agreement did; it stated that “‘Permitted Investors’ means OTK Associates, David T. Hamamoto and Yaucaipa.” And, that definition is appropriately incorporated into the terms of the parties’ agreement. Although the Morgans Credit Agreement was neither listed in the MPA among the “transaction documents” nor expressly labeled a “transaction document,” the notes themselves expressly define the “Morgans Credit Agreement” and refer to it by providing that one of the grounds upon which the notes would be accelerated was acceleration of the indebtedness under the Morgans Credit Agreement.

The final relevant provision of the agreement appears in two places in the notes, essentially providing that when construing any terms used in the note, “the plural shall include the singular, and the singular shall include the plural.”

The circumstance that forms the basis for this litigation is

the election of a new slate of directors to MHGC. Specifically, on June 14, 2013, following a proxy battle, the shareholders elected the slate of new directors nominated by OTK Associates (OTK), one of the listed "Permitted Investors" named in the Morgans Credit Agreement. Following this election, plaintiffs demanded repayment of the notes in reliance on the "change of control" provision. Morgans refused to pay, and failed to do so before the 40 day deadline, and plaintiffs then commenced this action, alleging breach of the notes and guaranties.

Defendants moved to dismiss, contending that the election of the new slate of directors did not qualify as a change of control within the meaning of the notes because the directors were nominated by "Permitted Investors." The motion court agreed, and granted the motion. The majority now reverses, reading the "Permitted Investors" exception to the Change of Control provision to apply only when all three "Permitted Investors" named in the Morgans Credit Agreement jointly nominated the new directors.

The majority says that the motion court unduly relied on the rule of construction set forth in the notes that made singular and plural interchangeable, while failing to take into account that the term "Permitted Investors" was defined in the conjunctive as "OTK Associates, David T. Hamamoto *and* Yucaipa"

(emphasis added). The majority agrees with plaintiffs that for the exclusion to apply, the new board majority must have been nominated by all three "Permitted Investors," acting collectively.

In my view, the majority places excessive emphasis on the use of the word "and" in the definition of "Permitted Investors" in the Morgans Credit Agreement, when the purpose of that definition is merely to list the three entities that qualify as "Permitted Investors." Our focus should be on the phrasing in the notes that excludes a "change of control" based on a new board majority that was nominated by "the Permitted Investors."

In addition to the use of the conjunctive "and" in the Morgans' Credit Agreement definition of "Permitted Investors," the majority relies on the use of the definite article and the plural phrasing of the words "the Permitted Investors" in the notes, to conclude that the "change of control" exception must be limited to situations where the nomination of the new directors was by all three listed "Permitted Investors," acting as one unit. However, this interpretation ignores the notes' two provisions specifying that the plural form shall include the singular, and the additional directive that any capitalized term shall be equally applicable to both the singular and plural forms of the terms defined. Applying those contract provisions, the

reference to "the Permitted Investors" should be interpreted to refer equally to a single Permitted Investor. Viewed this way, the language of the notes enables any of the three "Permitted Investors" to nominate a new board without triggering the Change of Control provision. Furthermore, I agree with the motion court's observation that given the improbability of three unrelated "Permitted Investors" acting collectively to nominate board members, common sense informs us that any intended requirement that they act collectively would be specifically and clearly stated.

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]; *China Privatization Fund [Del], L.P. v Galaxy Entertainment Group Ltd.*, 95 AD3d 769, 770 [1st Dept 2012]). Since the provision in question here is reasonably susceptible of more than one interpretation, its meaning may not

properly be determined as a matter of law. Accordingly, I agree with the majority's reinstatement of the complaint, but disagree with the majority's determination construing the notes' change of control provision as a matter of law.

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

ENTERED: APRIL 9, 2015

A handwritten signature in black ink, appearing to read "Eric Schuck", written over a horizontal line.

DEPUTY CLERK

Tom, J.P., Renwick, Andrias, Richter, JJ.

14311-

Index 156148/12

14311A The South Tower Residential Board
of Managers of Time Warner Center
Condominium,
Plaintiff-Respondent,

-against-

The Ann Holdings, LLC, etc.,
Defendant-Appellant.

Dechert LLP, New York (James M. McGuire of counsel), for
appellant.

Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger
of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh,
J.), entered April 23, 2014, directing defendant to convey its
condominium unit to MS6TC, LLC, unanimously affirmed, without
costs. Appeal from order, same court and Justice, entered
February 27, 2014, which granted plaintiff's motion for summary
judgment, and denied defendant's cross motion for discovery,
unanimously dismissed, without costs, as subsumed in the appeal
from the judgment.

In this case, defendant, the owner of a condominium unit,
objects to the purchase of the unit by nonparty MS6TC, LLC
(MS6TC), whose principal is Jacob Wohlstadter, defendant's
neighbor. Defendant entered into a contract to sell the unit to

a third party, subject to plaintiff condominium board's right of first refusal. Plaintiff chose to exercise its right of first refusal, and assigned that right to MS6TC as its designee to purchase the unit. Jacob Wohlstadter's wife, Deborah, was a member of plaintiff board. In support of its summary judgment motion, plaintiff submitted evidence that Ms. Wohlstadter did not participate in the board's deliberations or discussions regarding the designation of MS6TC. As part of the purchase, Mr. Wohlstadter agreed to pay the board approximately \$400,000 to license the hallway between his unit and defendant's unit.

On appeal, defendant argues that the condominium bylaws did not permit the board to designate a third-party entity as a purchaser of the unit. In the alternative, defendant argues that summary judgment was premature because there are questions of fact as to whether plaintiff's decision to designate MS6TC is protected by the business judgment rule. Defendant seeks discovery to ascertain if the decision was made in bad faith, and involved self-dealing and unequal treatment.

Section 8.1.1(b) of the condominium's bylaws give plaintiff a right of first refusal:

Promptly after a Sale Agreement . . . has been fully executed, the Offeree Unit Owner [*i.e.*, the seller] shall send written notice thereof to [plaintiff] . . . The giving of such notice . . . shall constitute an offer by the Offeree Unit Owner to sell its . . . Unit

. . . to [plaintiff], or its designee (corporate or otherwise), on behalf of all ST [South Tower] Residential Owners, upon the same terms and conditions as contained in such Sale Agreement . . . [Plaintiff] may, by sending written notice . . . to such Offeree Unit Owner, not later than twenty . . . days after receipt of [the Owner's] notice, . . . elect to purchase such . . . Unit

The bylaws authorize plaintiff to exercise its right of first refusal through a designee, and do not require the designee to be an entity organized and owned by plaintiff.

In support of its argument that a "designee" under section 8.1.1(b) must be an entity organized by the board, defendant first relies on section 2.2.2 of the bylaws, which says that plaintiff:

shall be entitled to make determinations with respect to all matters relating to the operation and the affairs of the [Residential Section of the South Tower], including . . .

(p) Organizing corporations, limited liability companies and/or other entities to act as designees of [plaintiff] with respect to such matters as [plaintiff] may determine, including . . . in connection with the acquisition of title to . . . ST Residential Units acquired . . . by [plaintiff] on behalf of the ST Residential Unit Owners.

However, section 2.2.2 merely permits plaintiff to organize a corporation or other entity to be its designee; it does not require that the designee be organized by plaintiff.

Defendant also relies on section 8.6, which says, "The purchase of any ST Residential Unit . . . by [plaintiff] or its designee, on behalf of all ST Residential Unit Owners, may, at the option of [plaintiff], be made from the funds deposited in the capital and/or expense accounts of [plaintiff] by or on behalf of ST Residential Unit Owners." Defendant contends "it is absurd to suppose that a third-party entity could, at [plaintiff's] option . . . use funds in . . . capital or expense accounts or funds from new assessments on all owners to purchase the Unit." However, section 8.6 merely says that the purchase "may" be made from such funds. It does not prohibit the use of other monies for this purpose.

Defendant's argument that issues of fact exist as to whether plaintiff is entitled to the protection of the business judgment rule is not persuasive. "The business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks omitted]). Plaintiff had a legitimate reason for its decision to designate MS6TC to purchase

defendant's unit. Wohlstadter had agreed to pay plaintiff approximately \$400,000 to license the hallway between his unit and defendant's unit, and this was a significant financial benefit for the building.

The business judgment rule does not protect boards that engage in favoritism (see *40 W. 67th St. v Pullman*, 100 NY2d 147, 157 [2003]) or "unequal treatment of shareholders" (*Schultz v 400 Co-op. Corp.*, 292 AD2d 16, 22 [1st Dept 2002]; see also *Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002]). However, even if, arguendo, plaintiff engaged in some favoritism by designating MS6TC, defendant failed to show prejudice therefrom (see *Schultz*, 292 AD2d at 22). Plaintiff's exercise of its right of first refusal means that defendant will receive the same amount of money it would have received had the unit been sold to the party with whom defendant had contracted. Defendant argues that it was prejudiced because it potentially could have obtained a higher sale value if Mr. Wohlstadter had participated in a legitimate bidding process. This argument is speculative, and it is unclear how discovery from plaintiff would elucidate this issue.

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

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

ENTERED: APRIL 9, 2015

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DEPUTY CLERK

midtrial disclosure of a written statement made by defendant's father to a detective, in which the father acknowledged seeing blood on the victim's face after the incident. Although discoverable as Rosario material regarding the detective, the underlying statement was made by defendant's own key witness; thus defendant could not have been surprised by it (*People v Perez*, 221 AD2d 169, 170 [1st Dept 1995], lv denied 87 NY2d 976 [1996]).

Defendant was not deprived of a fair trial by the prosecutor's use, during cross-examination, of defense counsel's note of her interview of defendant's father, which had been disclosed to the prosecutor (see CPL 240.45[2][a]). According to the note, defendant's father "sa[id] that [the father] passed the box cutter to [defendant] and he cut the [victim's] face." The note, on its face, provided the People with a good faith basis to ask questions based on its contents and the prosecutor was not required to accept defense counsel's assertion that the note was merely a reflection of neighborhood gossip. Moreover, the court instructed the jury that questions were not evidence and that only the questions together with their answers were evidence. The jury is presumed to have followed this instruction (see *People v Davis*, 58 NY2d 1102, 1104 [1983]).

Defendant was not deprived of his constitutional right to

conflict-free representation by the prosecutor's use of defense counsel's note of her interview with defendant's father, as well as statements made by defendant during a proffer session at which counsel was present and at which defendant agreed that his statements could be used by the People in rebuttal. In neither instance did counsel effectively become a witness against her client and the court expressly offered counsel the option of taking the stand to explain. Counsel would have given testimony helpful to, and not in conflict with, defendant. Under these circumstances, there was no conflict, nor any potential for conflict, to trigger a need for an inquiry (see *People v Baldi*, 54 NY2d 137, 150-151 [1981]; *People v Newman*, 216 AD2d 151 [1st Dept 1995], *lv denied* 87 NY2d 849 [1995]). Moreover, as the trial unfolded, there was no need for defense counsel to offer any testimony.

The portion of the prosecutor's summation to which defendant objected constituted permissible comment on the evidence.

Defendant's remaining challenges to the prosecutor's summation and cross-examination are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: APRIL 9, 2015

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Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14744 235 W 71 Units LLC, etc.,
 Plaintiff-Respondent,

Index 157466/13

-against-

Maria Arias Zeballos,
 Defendant-Appellant,

"John Doe", et al.,
 Defendants.

Housing Conservation Coordinators, Inc., New York (Stuart W. Lawrence of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 23, 2014, which denied defendant's motion to dismiss plaintiff's complaint seeking an order of ejectment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In June 2008, defendant, previously the tenant of an apartment subject to rent stabilization law, entered into a Relocation Agreement with the prior owner of the building pursuant to which she agreed to move out of her rent-regulated apartment and into a condominium apartment, in exchange for consideration and subject to certain conditions. The Relocation Agreement provided that defendant would be a "Free Market"

tenant, but that "with respect to the percentage increase of rent only, Tenant's percentage increase, shall be governed by the applicable laws governing Rent Stabilized tenants," that her tenancy would continue for the duration of her life with no right of survivorship, and that her son could continue to reside in the apartment in her absence "provided Tenant maintains the Premises as her Primary Residence, as such term is defined in the Rent Stabilization Code and Law." The parties also executed a lease which, inter alia, required defendant to use the apartment as her "primary residence." The lease provides that, in the event of defendant's default, the landlord is required to provide "written notice of default stating the type of default," including specific periods for certain types of defaults and a catchall provision providing 10 days notice to cure for "[f]ailure to comply with any other term or Rule in the Lease [Agreement], 10 days."

Plaintiff purchased the apartment from the prior owner in December 2012, and five months later served defendant with a document entitled "Notice of Landlord's Intention to Commence Proceeding to Recover Housing Accommodations Based on Non-Primary Residence." After plaintiff commenced the instant proceeding, defendant moved to dismiss on the ground that plaintiff had failed to provide a notice to cure as required by the express

terms of the lease.

We agree with defendant. While plaintiff argues that the Relocation Agreement created a "quasi-Rent Stabilized tenancy," so that a notice to cure is not required when the claimed default is based on nonprimary residence (see *21 W. 58th St. Corp. v Foster*, 44 AD3d 410, 411 [1st Dept 2007]; *Matter of Stahl Assoc. Co. v State Div. Of Hous. & Community Renewal, Off. Of Rent Admin.*, 148 AD2d 258, 268 [1st Dept 1989]), the Relocation Agreement and lease only incorporate specified portions of the Rent Stabilization Code and scheme, namely, the permissible percentage rent increase and the definition of primary residence. However, to the extent the Rent Stabilization Code applies, "[t]he statutory scheme simply establishes the minimum rights to be accorded tenants, and does not preclude a contract that gives a tenant greater rights" (*Minick v Park*, 217 AD2d 489, 490 [1st Dept 1995]; see also *Waring Barker Co. v Santiago*, 1998 NY Misc LEXIS 749 [App Term, 1st Dept 1998]; *626 E. 9 St. Hous. Dev. Fund Corp. v Collins*, 185 Misc 2d 628, 631 [Civ Ct, NY County 2000]).

Since defendant demonstrated that plaintiff did not comply with the notice to cure provisions of the negotiated lease for the condominium apartment, she is entitled to dismissal of the ejectment action.

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

ENTERED: APRIL 9, 2015

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Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14745 National Union Fire Insurance Index 160991/13
 Company of Pittsburgh, PA, as
 subrogee of Madison Haywood
 Development Services, Inc.,
 Plaintiff-Respondent,

-against-

Jackson Transit Authority,
Defendant-Appellant.

Fixler & LaGattuta, LLP, New York (Jason L. Fixler of counsel),
for appellant.

Order, Supreme Court, New York County (Anil C. Singh, J.),
entered February 5, 2014, which denied defendant's motion to
dismiss for lack of jurisdiction, unanimously reversed, on the
law, with costs, and the complaint dismissed. The Clerk is
directed to enter judgment accordingly.

Plaintiff, who submitted only an attorney's affirmation,
which was on "information and belief," and did not even identify
the source of that information and belief, failed to make a
sufficient start to entitle it to jurisdictional discovery to
oppose defendant's motion to dismiss (*SNS Bank v Citibank*, 7 AD3d
352, 353-354 [1st Dept 2004]). Moreover, on their face,

plaintiff's speculative allegations, many of them referring to supposed past contacts with this State, did not suffice to confer jurisdiction over the defendant, in any event (see *Daimler AG v Bauman*, 134 S Ct 746, 761 (2014)).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 9, 2015



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York offenses cited by the People as analogous to the Maryland conviction, it was necessary to review "the conduct underlying the foreign conviction to determine if that conduct [was], in fact, within the scope of the New York offense" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]). Here, no such review was done, and we conclude that the Maryland statute encompasses conduct broader than the cited New York offenses.

Thus, without a review of the underlying facts of defendant's Maryland conviction, the People failed to prove by clear and convincing evidence that defendant's out-of-state conviction was equivalent to a New York offense. Without the improperly assessed 30 points, defendant qualifies as a level two sex offender.

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

ENTERED: APRIL 9, 2015



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of settlement agreements (see *Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009]) in their motions to enforce the agreement, but the arbitrators ignored the law and denied the motions without explanation (see *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481 [2006], *cert dismissed* 548 US 940 [2006]). “Although arbitrators have no obligation to explain their awards, when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account” (*Matter of Spear, Leeds & Kellogg v Bullseye Sec.*, 291 AD2d 255, 256 [1st Dept 2002] [internal quotation marks omitted]).

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

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14749N Robert Washington,
Plaintiff-Appellant,

Index 301804/13

-against-

Idrisa Sow, et al.,
Defendants-Respondents.

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

Brand Glick Brand, P.C., Garden City (Antonia Bortone of
counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-
Hughes, J.), entered January 24, 2014, which granted defendants'
motion to change venue from Bronx County to New York County,
unanimously reversed, on the law, without costs, and the motion
denied, without prejudice to renewal following discovery.

In this action for personal injuries sustained in a motor
vehicle accident that occurred in Bronx County, plaintiff
designated venue in Bronx County based on his residence there.
Defendants met their initial burden of showing that the venue
chosen by plaintiff was improper by submitting the police
accident report showing that plaintiff presented a Virginia
driver's license at the time of the accident (*see Hernandez v
Seminatore*, 48 AD3d 260 [1st Dept 2008]).

In opposition, plaintiff averred that he had been residing

in Bronx County from the time of the accident through commencement of the action a year later, and to the present. He submitted documentary evidence, including a two-year renewal lease for a Bronx apartment and a utility bill addressed to him and his cotenant, the woman who owned the New York-registered car plaintiff was driving at the time of the accident. The lease, which described plaintiff as a tenant and was fully executed by him, his cotenant, and the owner about nine months before the action was commenced, was probative documentary evidence of plaintiff's residence in Bronx County at the time the action was commenced (see *Kelly v Karsenty*, 117 AD3d 912 [2d Dept 2014]). However, under the circumstances presented, defendants may renew the motion following discovery, should further evidence contradicting plaintiff's showing of residence in Bronx County be revealed (see e.g. *Hill v Delta Intl. Mach. Corp.*, 16 AD3d 285 [1st Dept 2005]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14750 Dennis Demetre, et al., Index 652381/12
Plaintiffs-Appellants,

-against-

HMS Holdings Corp.,
Defendant-Respondent.

Humphrey, Farrington & McClain, P.C., Independence, MO (Kenneth B. McClain of the bar of the State of Missouri, admitted pro hac vice, of counsel), for appellants.

Raines Feldman LLP, Beverly Hills, CA (Robert M. Shore of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about November 1, 2013, which, to the extent appealed from, granted the motion of defendant, HMS Holdings Corp. (HMS), to dismiss the causes of action for fraud and breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, the motion denied as to the cause of action for breach of the implied covenant of good faith and fair dealing, and otherwise affirmed, without costs.

Plaintiffs were the owners and shareholders of Allied Management Group - Special Investigation Unit (AMG). Pursuant to a stock purchase agreement (SPA), HMS acquired all of the shares in AMG. Under the SPA, the purchase price for AMG consisted of a single "up-front" cash payment of \$13 million at closing, plus

two subsequent annual "earn-out" or "contingent" payments. The earn-out or contingent payments were based on the financial performance of AMG. HMS made the up-front payment of \$13 million at closing, but plaintiffs received "zero dollars" in contingent payments at the end of June 2011 and June 2012.

The dismissal of the claim for breach of the implied covenant of good faith and fair dealing, at this juncture, is premature. The court's dismissal of the claim as duplicative of the breach of contract claim is inconsistent with its determination that the "best efforts" clause, allegedly being breached, is ambiguous as to whether it applied to HMS's post-acquisition operation of AMG. Because the issues are still undeveloped at this stage of the proceeding, both claims should be permitted to stand (*see Sims v First Consumers Natl. Bank*, 303 AD2d 288 [1st Dept 2003]).

Further, to the extent the "best efforts" clause could be found inapplicable, plaintiffs have sufficiently pleaded a claim for breach of the implied covenant, as the allegations show that HMS, in bad faith, engaged in acts that had the effect of destroying or injuring plaintiffs' right to receive "the fruits of the contract," i.e., the contingent payments (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and citation omitted]). HMS's contention that

the claim would impose on it obligations that are inconsistent with other terms of the contract is unavailing, as plaintiffs were alleging that it failed to fulfill promises that "a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). We decline to review HMS's unpreserved argument that the Uniform Commercial Code governs the agreement.

The court, however, properly dismissed the fraud claim as duplicative of the breach of contract claim, as plaintiffs' were alleging only that HMS misrepresented its intent to perform the contractual obligations at the time they were made (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Forty Cent. Park S., Inc. v Anza*, 117 AD3d 523 [1st Dept 2014]).

THIS CONSTITUTES THE DECISION AND ORDER
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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 9, 2015

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Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14752 Patricia Juliette Collins,
Plaintiff-Appellant,

Index 152320/13

-against-

628 West End LLC,
Defendant-Respondent.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel),
for appellant.

Law Offices of Jamie Lathrop, P.C., Brooklyn (Jamie Lathrop of
counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.),
entered January 30, 2014, which denied plaintiff's motion for
summary judgment, unanimously reversed, on the law, without
costs, the motion granted, it is declared that plaintiff is the
rightful tenant of the subject apartment, and the matter is
remanded for further proceedings consistent herewith.

Plaintiff established her entitlement to judgment as a
matter of law based on defendant's breach of the surrender
agreement which provided that she "shall have and retain a first
right of refusal to lease" the subject apartment ... when it
became available for rent. When the apartment became available
in 2011, defendant did not offer her the apartment but instead
rented the apartment to a third party. In opposition to
plaintiff's motion, defendant failed to raise an issue of fact.

To the contrary, after commencement of this action, defendant sent plaintiff a letter offering her a lease for the subject apartment.

Contrary to defendant's argument, its offer to lease the apartment, subsequent to the breach, could not constitute a "first right of refusal" under the terms of the surrender agreement nor was it a "cure" of its breach. Thus, it is of no moment that plaintiff did not accept the purported offer within the time frame provided for in the surrender agreement. We note that defendant's subsequent offer of the apartment to plaintiff does not render this action moot, since it did not settle the additional causes of action raised by plaintiff, including claims for attorneys' fees, renovation of the apartment and moving expenses pursuant to the surrender agreement (see *Safran v Nau*, 123 AD3d 460 [1st Dept 2014]).

Contrary to plaintiff's argument, CPLR 4547 is inapplicable since the letter offering plaintiff a lease for the apartment is not a settlement document (see *Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603 [1st Dept 2012]). Even if the letter and plaintiff's response were settlement documents, they would not be inadmissible since they were not offered to prove either

liability or the value of the claims (see *Java Enters., Inc. v Loeb, Block & Partners, LLP*, 48 AD3d 383, 384 [1st Dept 2008]).

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

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14754 In re Majid Zarinfar,
Petitioner-Appellant,

Index 116457/10

-against-

Board of Education of the City
School District of the City of
New York, et al.,
Respondents-Respondents.

Office of Richard E. Casagrande, New York (Lori M. Smith of
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless
of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Lucy
Billings, J.), entered October 30, 2013, which granted the
petition to annul respondents' determination terminating
petitioner's probationary employment, effective August 30, 2010,
and reinstating him to his teaching position with retroactive
compensation and related entitlements, to the limited extent of
granting a further hearing, in this proceeding brought pursuant
to CPLR article 78, unanimously dismissed, without costs.

A nonfinal order made in an article 78 proceeding is not
appealable as of right because the final judgment that ends the
proceeding will be appealable as of right and will bring up for
review any nonfinal order that necessarily affects the judgment
(see CPLR 5701[b][1]; *Matter of Spedicato v New York State Div.*

of Hous. & Community Renewal, 241 AD2d 343, 344 [1st Dept 1997]).

Here, the order, which is nonfinal, did not finally determine whether petitioner's claim that his termination from the probationary employment was for a constitutionally impermissible reason, violative of statute or in bad faith, in that the court directed a further hearing as to his discrimination claim. Since this appeal addresses that claim, it is premature.

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

ENTERED: APRIL 9, 2015



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the modification petition was filed, and no determination was requested or made relinquishing jurisdiction pursuant to Domestic Relations Law § 76-a(1)(a). Although the Family Court incorrectly stated that Connecticut was the child's "home state," its determination that New York is an inconvenient forum was based on a consideration and balancing of the factors listed in Domestic Relations Law § 76-f(2), and, to the extent certain factors were not mentioned, the record is sufficient to permit us to consider them (*see Matter of Anthony B. v Priscilla B.*, 88 AD3d 590 [1st Dept 2011]).

After review of the record, we find that there was a sound basis for the Family Court's finding that Connecticut is the more convenient forum to decide the modification petition. The record shows that substantial evidence is no longer available in New York State concerning the child's care, protection, training and personal relationships, because the child's school, doctors and

residence are all located in Connecticut (see *Matter of Jun Cao v Ping Zhao*, 2 AD3d 1203, 1204-1205 [3d Dept 2003], *lv denied* 1 NY3d 509 [2004]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14757 Bronx Overall Economic Development Corporation,
Plaintiff-Appellant, Index 22288/12

-against-

DNA Automotive Corp., et al.,
Defendants-Respondents,

John Hazlitt,
Defendant.

Underweiser & Underweiser LLP, White Plains (Jeffrey B. Underweiser of counsel), for appellant.

Law Office of Steven K. Meier, New York (Steven K. Meier of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered April 14, 2014, which denied plaintiff's motion for summary judgment against defendants DNA Automotive Corp. and Gary Gartenberg, and for a default judgment against defendant John Hazlitt, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for further proceedings.

In this action to enforce two promissory notes, a loan and security agreement, and a written guaranty (collectively the documents), plaintiff made a prima facie showing of its entitlement to judgment as a matter of law by submitting, among other things, the documents and evidence that defendants failed

to perform under them (see *4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014]; see also *Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]).

In opposition, defendants failed to raise a triable issue of fact. Defendants' affirmative defenses are barred by the express terms of the guaranty (see *Citibank v Plapinger*, 66 NY2d 90, 92 [1985]; see also *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

his rejection. Defendant's claim of innocence was refuted by the thorough factual allocution conducted at the time of the plea.

Furthermore, the plea was not induced by an illegal or unfulfilled sentence promise. Defendant received the precise sentence he was warned to expect in the absence of diversion, and he has not demonstrated how he was prejudiced by being sentenced in accordance with his plea.

Defendant made a valid waiver of his right to appeal (see *People v Lopez*, 6 NY3d 248 [2006]). Regardless of whether defendant validly waived his right to appeal, or whether the waiver forecloses review of the postplea denial of judicial diversion, we find that the diversion court properly exercised its discretion in determining that defendant was not a suitable candidate (see *People v O'Keefe*, 112 AD3d 524 [1st Dept 2013], *lv denied* 23 NY3d 1023 [2014]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14760N In re BRG Sports, LLC, formerly known Index 651405/14
 as Easton-Bell Sports, LLC, et al.,
 Petitioners-Appellants,

-against-

Chris Zimmerman,
Respondent-Respondent.

Seyfarth Shaw LLP, Chicago, IL (Phillip Shawn Wood of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

Kennedy Berg, LLP, New York (Gabriel Berg of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 27, 2014, which denied the petition pursuant to CPLR article 75 to stay an arbitration proceeding, unanimously affirmed, with costs.

The 2010 employment agreement, pursuant to which petitioner Easton-Bell Sports, Inc. retained respondent, provides a compensation package, including equity participation, and contains a broad arbitration provision requiring that "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, or breach hereof, shall be settled by arbitration." Following his termination in 2013, respondent commenced an arbitration alleging, inter alia, that petitioners had improperly valued the units he received of Easton-Bell Sports, LLC, at zero,

that he was entitled to receive payments under a cash incentive plan adopted by Easton-Bell Sports, Inc. in 2012, and that he was fraudulently induced to accede to changes in the equity plan.

Respondent satisfied his burden to demonstrate that the dispute at issue arises out of or relates to the employment agreement, for purposes of the broad arbitration clause contained therein (see *State of New York v Philip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006]). Petitioners argue that respondent released all claims arising under the employment agreement and that his claims arise only under the LLC agreement, which provides for venue in the New York courts, and under the Cash Incentive Plan, which does not contain an arbitration provision. However, they have not demonstrated that the express, unequivocal, and broadly worded arbitration provision in the employment agreement does not also apply to the claims at issue here, and any doubts as to whether the issue is arbitrable will be resolved in favor of arbitration (see *Matter of Trump [Carmel Fifth]*, 303 AD2d 287, 287-288 [1st Dept 2003]; *Philip Morris Inc.*, 30 AD3d at 31). The disputes concerning the efficacy and breadth of the release and

the 2012 documents are for the arbitrator to resolve (see *Matter of Schlaifer v Sedlow*, 51 NY2d 181, 185 [1980]).

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

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

ENTERED: APRIL 9, 2015

A handwritten signature in black ink, appearing to read "Eric Schlaifer", written in a cursive style.

DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14761N Risk Control Associates Index 113735/11
Insurance Group,
Plaintiff-Respondent,

-against-

Maloof, Lebowitz, Connahan &
Oleske, P.C., et al.,
Defendants-Appellants.

Schenck, Price, Smith & King, LLP, New York (John P. Campbell of
counsel), for appellants.

Behman Hambelton, LLP, New York (Crystal E. Nagy of counsel), for
respondent.

Order, Supreme Court, New York County (Debra A. James, J.),
entered June 4, 2014, which granted plaintiff's motion to amend
the complaint, unanimously reversed, on the law, without costs,
the motion denied, and the complaint dismissed. The Clerk is
directed to enter judgment accordingly.

Plaintiff, a claims administrator for an insurer, commenced
this legal malpractice action against defendants, who were
retained to represent the insurer's policyholder in a personal
injury action. In a previous appeal, plaintiff's complaint was
dismissed for its failure to allege that it had a "contractual
obligation to pay for the loss in the personal injury action,"
and to allege that it sustained actual damages because of this
obligation" (*Risk Control Assoc. Ins. Group v Maloof, Lebowitz,*

Connahan & Oleske, P.C., 113 AD3d 522, 522 [1st Dept 2014] [*Risk Control I*]).

After this Court handed down the decision affirming the dismissal of the complaint, plaintiff moved to amend its complaint by proposing to add several plaintiffs, alleging that all the plaintiffs provided insurance to the policyholder, and that all the plaintiffs retained defendants.

Leave to amend pleadings is freely granted, "unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]; *RBP of 400 W42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250 [1st Dept 2006]). At this stage of the pleadings, plaintiff need only plead allegations from which damages attributable to defendants' conduct "might be reasonably inferred" (*Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45, 45 [1st Dept 1993]).

Here, no damages can be "reasonably inferred," as plaintiff's amended allegations are defeated by the documentary evidence it submitted. The affidavit submitted by the vice

president of one of the proposed plaintiffs averred that plaintiffs were all claims administrators. Furthermore, the vice president attested that the loss, allegedly resulting from defendants' malpractice, was paid by an entity who was not a party plaintiff, or proposed party plaintiff. Thus, plaintiff failed to allege either a "contractual obligation to pay for the loss," or actual damages (*Risk Control I* at 522; *Tenzer, Greenblatt* at 45).

Moreover, plaintiff's conclusory allegations of representation will not suffice in the absence of an attorney client relationship with defendants (*see Denenberg v Rosen*, 71 AD3d 187, 196 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]).

To the extent the motion sought to add the primary insurer as a plaintiff, defendants would be unduly prejudiced by the introduction of that new party plaintiff after the statute of limitations has expired (*see Bellini v Gersalle Realty Corp.*, 120 AD2d 345 [1st Dept 1986]).

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

ENTERED: APRIL 9, 2015



DEPUTY CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12998 Martha G. Foster, et al., Index 651826/13
Plaintiffs-Appellants,

-against-

Arne Svenson,
Defendant-Respondent.

Menaker & Herrmann LLP, New York (Richard G. Menaker of counsel),
for appellants.

Cowan, DeBaets, Abrams & Sheppard LLP, New York (Nancy E. Wolff
of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower,
J.), entered August 5, 2013, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Richard T. Andrias
Roselyn T. Richter
Paul G. Feinman, JJ.

12998
Index 651826/13

x

Martha G. Foster, et al.,
Plaintiffs-Appellants,

-against-

Arne Svenson,
Defendant-Respondent.

x

Plaintiffs appeal from the order of the Supreme Court,
New York County (Eileen A. Rakower, J.),
entered August 5, 2013, which denied their
motion for a preliminary injunction and
granted defendant's cross motion to dismiss
the complaint.

Menaker & Herrmann LLP, New York (Richard G.
Menaker, Erika S. Krystian and Wojciech
Jakowski of counsel), for appellants.

Cowan, DeBaets, Abrams & Sheppard LLP, New
York (Nancy E. Wolff, Matthew A. Kaplan and
Scott J. Sholder of counsel), for respondent.

RENWICK, J.

In this action, plaintiffs seek damages and injunctive relief for an alleged violation of the statutory right to privacy. Concerns over privacy and the loss thereof have plagued the public for over a hundred years.¹ Undoubtedly, such privacy concerns have intensified for obvious reasons.² New technologies can track thought, movement, and intimacies, and expose them to the general public, often in an instant. This public apprehension over new technologies invading one's privacy became a reality for plaintiffs and their neighbors when a photographer, using a high powered camera lens inside his own apartment, took photographs through the window into the interior of apartments in a neighboring building. The people who were being photographed had no idea this was happening. This case highlights the limitations of New York's statutory privacy tort as a means of redressing harm that may be caused by this type of technological home invasion and exposure of private life. We are constrained

¹ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205 [1890].

² See e.g. Harry Lewis, *How Facebook Spells the End of Privacy*, *Bos. Globe*, June 14, 2008, at A-11; Jeffrey Rosen, *The End of Forgetting*, *N.Y. Times Mag.*, July 25, 2010, at 32; Daniel J. Solove, *The End of Privacy?*, *Sci. Am.*, Sept. 2008, at 101; Richard Stengel, *The End of Privacy? Not Yet*, *Time*, Mar. 21, 2011, at 4.

to find that the invasion of privacy of one's home that took place here is not actionable as a statutory tort of invasion of privacy pursuant to sections 50 and 51 of the Civil Rights Law, because defendant's use of the images in question constituted art work and, thus is not deemed "use for advertising or trade purposes," within the meaning of the statute.

Factual and Procedural Background

Defendant Arne Svenson is a critically acclaimed fine art photographer whose work has appeared in galleries and museums throughout the United States and Europe. Beginning in or about February 2012, after "inheriting" a telephoto camera lens from a "birder" friend, defendant embarked on a project photographing the people living in the building across from him. The neighboring building had a mostly glass facade, with large windows in each unit. Defendant photographed the building's residents surreptitiously, hiding himself in the shadows of his darkened apartment. Defendant asserts that he did so for reasons of artistic expression; he obscured his subjects' faces, seeking to comment on the "anonymity" of urban life, where individuals only reveal what can be seen through their windows. After approximately one year of photography, defendant assembled a series of photographs called "The Neighbors," which he exhibited in galleries in Los Angeles and New York.

The exhibit's promotional materials on defendant's website stated that for his "subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high." Defendant further stated that "The Neighbors" did not know they were being photographed, and he "carefully" shot "from the shadows" of his apartment "into theirs." Defendant apparently spent hours, in his apartment, waiting for his subjects to pass the window, sometimes yelling to himself, "Come to the window!" A reporter for The New Yorker magazine spent time with defendant while he was surreptitiously photographing his subjects. During this time, defendant took a photo of a "little girl, dancing in her tiara; half naked, she looked like a cherub. As she turned away, [defendant] took a photograph. I don't like it when little girls are running around without their tops,' he said, 'but this is a beautiful image."

During the New York exhibition of "The Neighbors," plaintiffs and other residents of the building learned, through media coverage of the exhibition, that they had been defendant's unwitting subjects. Plaintiffs, in particular, learned that their children, then aged three and one, appeared in the exhibition, in the photographs numbered six and twelve. Despite defendant's professed effort to obscure his subjects' identity,

plaintiffs' children were identifiable in these photographs, one of which showed their son in his diaper and their daughter in a swimsuit; the other showed plaintiff mother holding her daughter.

Upon viewing defendant's website, and discovering that the photographs of her children were being offered for sale, plaintiff mother called defendant to demand that he stop showing and selling the images of her children. Defendant agreed with respect to the photo with the children together (#6), but was noncommittal about the photo of plaintiff's daughter (#12). Plaintiffs then retained counsel, who sent letters to defendant and the Manhattan gallery where the photos were being shown, demanding that the photographs of plaintiffs' children be removed from the exhibition, the gallery's website, and defendant's website. Defendant and the gallery complied. Plaintiffs' counsel sent a similar demand to an online art sales site called "Artsy." It, too, complied.

Despite this, one of the photographs of plaintiffs' daughter (#12) was shown on a New York City television broadcast discussing defendant and his show. Other showings followed, including one on NBC's "Today Show" on May 17, 2013, displaying photograph #12, showing plaintiffs' daughter's face. In addition, the address of the building was revealed in print and electronic media, including a Facebook page.

In May 2013, plaintiffs commenced this action seeking injunctive relief and damages pursuant to the statutory tort of invasion of privacy and the common law tort of intentional infliction of emotional distress. Plaintiffs simultaneously moved for a preliminary injunction and a temporary restraining order. The TRO was granted on consent. Defendant then submitted his opposition to the motion for a preliminary injunction and cross-moved to dismiss the complaint, asserting the theory that because the photographs were art, they were protected by the First Amendment, and their publication, sale, and use could not be restrained.

In August 2013, Supreme Court denied plaintiffs' motion for a preliminary injunction; instead, it granted defendant's cross-motion to dismiss the entire complaint. In so doing, the court concluded that the photographs were protected by the First Amendment. The court found that the photographs conveyed defendant's "thoughts and ideas to the public" and "served more than just an advertising or trade purpose because they promote the enjoyment of art in the form of a displayed exhibition." This Court, however, granted a preliminary appellate injunction pending the outcome of this appeal.

Discussion

As indicated, the denial of the preliminary injunction and

the dismissal of the complaint were based on the same ground, namely that the alleged conduct constituting the privacy invasion are not actionable under the statutory tort of invasion of privacy (see Civil Rights Law §§ 50-51 (McKinney 1999)).

New York State's privacy statute was borne out of judicial prompting from the Court of Appeals in *Roberson v Rochester Folding Box Co* (171 NY 538 [1902]). In *Roberson*, the Court of Appeals declined to establish a common law right to privacy where a flour company "obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff" without the plaintiff's consent (*id.* at 542). The "25,000 likenesses of the plaintiff . . . ha[d] been conspicuously posted and displayed in stores, warehouses, saloons and other public places." The plaintiff sought an injunction preventing further use of the photographs as well as damages in the sum of \$15,000 (*id.*). The Supreme Court, affirmed by the Appellate Division (64 App Div 30 [1901]), decided that the plaintiff had a "right . . . to be let alone" (32 Misc 344, 347-348 [1900]) a "so-called right of privacy" (171 NY at 544), which had been invaded by the widespread distribution of her image.

The Court of Appeals, however, reversed, reasoning that the adoption of such a right would result in "a vast amount of litigation [that would] border[] upon the absurd," because the

assertions of a right to privacy, according to the court, would be limitless (*id.* at 545). The Court of Appeals ultimately found that “[t]he legislative body could very well ... provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent,” as only the legislature can draw “arbitrary distinctions which no court should promulgate as a part of general jurisprudence” (*id.* at 545, 555).

Public outcry over the perceived unfairness of *Roberson* led to a rapid response by the New York State legislature (see *Lerman v Flynt Distrib. Co.*, 745 F2d 123, 129 [2d Cir 1984], *cert denied* 471 US 1054 [1985]). Within a year of *Roberson*, New York enacted a statutory right to privacy (L.1903, ch 132). The statutorily-created right prohibits the use of a person's “name, portrait or picture” (Civil Rights Law § 50) or “name, portrait, picture or voice” (Civil Rights Law § 51) for advertising or trade purposes. Section 50 provides for criminal penalties for such prohibited uses, while section 51 gives the individual victim of such appropriation the right to obtain an injunction and bring a cause of action to obtain compensatory and exemplary damages (*id.*). Two phrases in the New York privacy statute describe the type of unauthorized use that is prohibited. The phrases are: 1) “for advertising purposes” and 2) “for the purposes of trade.”

The legislature's use of the broad, unqualified terms for advertising and trade purposes, on their face, appear to support plaintiffs' contention that the statutory terms apply to all items which are bought and sold in commerce. Courts, however, have refused to adopt a literal construction of these terms because the advertising and trade limitations of the privacy statute were drafted with the First Amendment in mind. As the Court of Appeals held in *Arrington v NY Times* (55 NY2d 433, 440 [1982]), the terms trade and advertising concomitantly act as a narrowly-construed categorization crafted by the Legislature to strike a balance between the concerns of private individuals and the First Amendment. Accordingly, the Court of Appeals has consistently held that the privacy statute should not be construed to apply to publications regarding newsworthy events and matters of public concern (see *Howell v New York Post Co*, 81 NY2d 115, 123 [1993]; *Finger v Omni Publis, Intl.*, 77 NY2d 138, 141-142 [1990]). Thus, the prohibitions of sections 50 and 51 of the privacy statute are not applicable to newsworthy events and matters of public concern because such dissemination or publication is not deemed strictly for the purpose of advertising or trade within the meaning of the privacy statute (see *Arrington*, 55 NY2d 433, 440).

The newsworthy and public concern exemption's primary focus

is to protect the press's dissemination of ideas that have informational value. However, the exemption has been applied to many others forms of First Amendment speech, protecting literary and artistic expression from the reach of the statutory tort of invasion of privacy (see e.g. *University of Notre Dame Du Lac v Twentieth Century-Fox Film Corp.*, 22 AD2d 452, 456 [1st Dept 1965], *affd* 15 NY2d 940 [1965] [motion picture and novel]).

Similarly, the exemption has been applied in cases addressing written and non-written materials published or televised for the purpose of entertainment (see e.g. *Freihofer v Hearst Corp.*, 65 NY2d 135, 140-141 [1985]; *Stephano v News Group Publs*, 64 NY2d 174, 184 [1984] [applying the exception to an article of consumer interest regarding events in the fashion industry]; *Gautier v Pro-Football, Inc.*, (304 NY 354 [1952] [dismissing complaint of animal trainer who objected to televised broadcast of act performed during half-time at professional football game]). This is because there is a strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues (see *Time, Inc. v Hill*, 385 US 374, 388 [1967], citing *Thornhill v State of Alabama*, 310 US 88, 102 [1940]).

Since the newsworthy and public concern exemption has been applied to many types of artistic expressions, including

literature, movies and theater, it logically follows that it should also be applied equally to other modes of artistic expression. Indeed, works of art also convey ideas. Although the Court of Appeals has not been confronted with the issue of whether works of art fall outside the ambit of the privacy statute, other courts that have addressed the issue have consistently found that they do (see e.g. *Altbach v Kulon*, 302 AD2d 655 [3d Dept 2003]; *Nussenzweig v DiCorcia*, 11 Misc 3d 1051(A) [Sup Ct, NY County, 2006], *affd* 38 AD3d 339 [1st Dept 2007], *affd* 9 NY3d 184 [2007]; *Hoepker v Kruger*, 200 F Supp 2d 340 [SD NY 2002]; *Simeonov v Tiegs*, 602 NYS2d 1014 [Civ Ct, NY County 1993]).

For instance, in *Altbach v Kulon*, the Third Department held that an artist's publication of a town justice's photograph, along with a painting of the justice that caricatured him by portraying him as a devil with a horn and a tail, was constitutionally protected as a work of art (302 AD2d at 657-658). In *Altbach*, the defendant distributed flyers with the caricature and a photo of the justice to promote the opening of his art gallery (*id.* at 655). Preliminarily, the court found that the "similarity of poses between the photograph and the painting, together with the content of the advertising copy identifying plaintiff as an experienced attorney, attest[ed] to

the accuracy of [the] defendant's portrayal of [the] plaintiff's face and posture, while emphasizing "that the painting is a caricature and parody of the public image ..." (*id.* at 658). Nevertheless, the court found that the photograph's use can readily be viewed as ancillary to a protected artistic expression because it "prove[s] [the] worth and illustrate[s] [the] content" of the painting exhibited at defendant's gallery (*id.*).

Similarly, in *Hoepker v Kruger*, the federal district court for the Southern District of New York gave First Amendment protection to a collage photograph displayed in the Museum of Contemporary Art, in Los Angeles (200 F Supp 2d 340 [2002]). The defendant Kruger, a collage artist known for her feminist position on issues of beauty, femininity, and power, copied an image, "Charlotte As Seen By Thomas," created by plaintiff, Thomas Hoepker (*id.*). She cropped and enlarged the image and superimposed three red blocks containing the words, "It's a small world but not if you have to clean it" (*id.* at 342). Kruger's creation was printed and sold in many forms (e.g., postcards and magnets) in the museum's gift shop. It was also published in a catalog of Kruger's works (*id.*). The court held that the creation itself "should be shielded from [the plaintiff's] right of privacy claim by the First Amendment. [It] is pure First Amendment speech in the form of artistic expression ... and

deserves full protection" (*id.* at 350).

It is also worth noting *Nussenzweig v diCorcia* (38 AD3d 339 [1st Dept 2007], Tom, J.P., concurring, *affd* 9 NY3d 1184 [2007]), which involved the same issue presented here -- whether a citizen of this state retains the right to preclude the use of his likeness where such likeness is displayed in an artistic form (*id.*). The defendant, diCorcia, a respected photographer with a history of shows in New York museums, photographed a series called "HEADS," which involved candid "street photography" of people walking by a Times Square location. The images were exhibited in a gallery for sale (*id.*). The plaintiff, Nussenzweig, was readily identifiable, and did not consent to diCorcia's use of the images (*id.*). Nussenzweig was an Orthodox Jew with deep religious beliefs against the use of his image (*id.*). The exhibit was open to the public and was advertised. The 10 photos of Nussenzweig sold for \$20,000 to \$30,000 each (*id.*).

The majority found it unnecessary to address the constitutional issue and dismissed the privacy tort action as time-barred because more than one year had passed since the first (rather than the last) publication of the photographs (38 AD3d

339).³ However, a concurrence did reach the constitutional issue of whether the defendant's use of the plaintiff's photograph was entitled to First Amendment protection (*id.*). The concurrence opined that "the inclusion of the photograph in a catalog sold in connection with an exhibition of the artist's work did not render its use commercial pursuant to the privacy statute" because "the public expression of those ideas and concepts was fully protected by the First Amendment" (*id.* at 347).

In this case, we are constrained to concur with the views expressed in *Altbach, Hoepker, and Nussenzweig's* concurrence: works of art fall outside the prohibitions of the privacy statute under the newsworthy and public concerns exemption. As indicated, under this exemption, the press is given broad leeway. This is because the informational value of the ideas conveyed by the art work is seen as a matter of public interest. We recognize that the public, as a whole, has an equally strong interest in the dissemination of images, aesthetic values and symbols contained in the art work. In our view, artistic expression in the form of art work must therefore be given the

³ The Court of Appeals affirmed, agreeing with this Court and resolving the issue in favor of the limitations period running from the first invasion or use (*Nussenzweig v diCorcia*, 9 NY3d 184).

same leeway extended to the press under the newsworthy and public concern exemption to the statutory tort of invasion of privacy.

To be sure, despite its breadth, the exception is not without limits. To give absolute protection to all expressive works would be to eliminate the statutory right of privacy. Accordingly, under New York law, the newsworthy and public concern exception does not apply where the newsworthy or public interest aspect of the images at issue is merely incidental to its commercial purpose. For instance, the newsworthy and public concern exemption does not apply where the unauthorized images appear in the media under the guise of news items, solely to promote sales; such advertisement in disguise is commercial use deserving no protection from the privacy statute (see e.g. *Beverley v Choices Women's Med. Ctr.*, 78 NY2d 745, 751-755 [1991] [non-media defendant who produced and distributed a calendar to promote its medical center that included a picture of plaintiff not entitled to protection of newsworthy and public concern exception based on theme of women's progress where calendar was clearly designed to advertise the medical center]; cf. *Stephano v News Group Publs, Inc.*, 64 NY2d 174, 185 [1984] [model for article on men's fashion not entitled to protection of Civil Rights Law § 51 where photo was also used in column containing information on where to buy new and unusual products]).

Similarly, when a court determines that there is no real relationship between the use of the plaintiff's name or picture and the article it is used to illustrate, the defendant cannot use the newsworthy and public concern exception as a defense. This is because, by definition, if a person's image has no real relationship to the work then its only purpose must be for the sale of the work (*compare Thompson v Close-Up, Inc.*, 277 App Div 848 [1st Dept 1950] [publication of photograph did not fall within exceptions to Civil Rights Law §§ 50 or 51 where plaintiffs had no connection to dope peddling, which was the subject of defendant's article]; with *Murray v New York Mag. Co.*, 27 NY2d 406 [photograph of plaintiff dressed in Irish garb while watching St. Patrick's day parade spotlighted a newsworthy event and bore a real relationship to article about contemporary attitudes of Irish-Americans in New York City]; and *Finger v Omni Publs. Intl.*, 77 NY2d 138 [photograph of plaintiffs and their six children bore real relationship to article entitled, "Want a big family?" and fell within the newsworthy exception despite fact that family had no involvement with subject matter of article, caffeine-enhanced in vitro fertilization, where both title and photo involved theme of fertility]).

Applying the newsworthy and public concern exemption to the complaint herein, we conclude that the allegations do not

sufficiently plead a cause of action under the statutory tort of invasion of privacy. As detailed above, plaintiffs essentially allege that defendant used their images in local and national media to promote "The Neighbors," an exhibition that included photographs of individuals taken under the same circumstances as those featuring plaintiffs. Plaintiffs further allege that the photographs were for sale at the exhibit and on a commercial website.

Accepting, as we must, plaintiffs' allegations as true (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), they do not sufficiently allege that defendant used the photographs in question for the purpose of advertising or for purpose of trade within the meaning of the privacy statute. Defendant's used of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art. While a plaintiff may be able to raise questions as to whether a particular item should be considered a work of art, no such question is presented here. Indeed, plaintiffs concede on appeal that defendant, a renowned fine arts photographer, assembled the photographs into an exhibit that was shown in a public forum, an art gallery. Since the images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with

the promotion of the art work was permitted. Thus, under any reasonable view of the allegations, it cannot be inferred that plaintiffs' images were used "for purpose of advertising" or "for purpose trade" within the meaning of the privacy statute.

Contrary to plaintiffs' arguments, the fact that profit might have been derived from the sale of the art work does not diminish the constitutional protection afforded by the newsworthy and public concern exemption. *Stephano v News Group Publs.* (64 NY2d 174) illustrates how the newsworthy and public concern exemption precludes right of privacy violations when the publication is distributed for profit. *Stephano*, a professional model who posed for photos for an article on men's fashion, claimed that the defendant improperly used his picture for trade or advertising purposes without his consent when it published a picture of him modeling a "bomber jacket" in a magazine column containing information regarding new and unusual products and including the approximate price of the jacket, the name of the designer, and the names of three stores where the jacket might be purchased. The motion court granted summary judgment to the defendant, concluding that the article reported a newsworthy fashion event, and was not published for trade or advertising purposes. In agreeing that the plaintiff did not have a claim under the privacy statute, the Court of Appeals explained that

"(i)t is the content of the article and not the defendant's motive ... to increase circulation which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law" (*id.* at 185).

Plaintiffs also argue that, merely because the use of a person's name, portrait, or picture is newsworthy or a matter of public concern, such as a legitimate work of art, it should not be exempt from classification as "advertising" or "trade" if it was obtained in an improper manner. Plaintiffs do not cite any authority directly on point for this proposition, and indeed there does not appear to be any. However, acknowledging that Civil Rights Law sections 50 and 51 reflect a careful balance of a person's right to privacy against the public's right to a free flow of ideas, plaintiffs argue that defendant's work should not be entitled to First Amendment protection because of the manner or context in which it was formed or made. In essence, plaintiffs seem to be arguing that the manner in which the photographs were obtained constitutes the extreme and outrageous conduct contemplated by the tort of intentional infliction of emotional distress and serves to overcome the First Amendment protection contemplated by Civil Rights Law sections 50 and 51.

The Court of Appeals has set a high bar for what constitutes outrageous behavior in this context. In *Howell* (81 NY2d 115),

the plaintiff was a patient at a private psychiatric facility who alleged that it was critical to her recovery that no one outside of her immediate family know about her commitment. A New York Post photographer trespassed onto the secluded grounds of the facility for purposes of capturing images of Hedda Nussbaum, who had been prominently thrust into the public eye a year earlier when her boyfriend Joel Steinberg murdered her daughter (*id.* at 118). Using a telephoto lens, the photographer took pictures of Nussbaum, who happened at the time to be strolling the grounds of the facility with the plaintiff (*id.*). When the pictures were published in the newspaper, the plaintiff claimed, *inter alia*, that her statutory right to privacy had been violated and that defendants had intentionally inflicted emotional distress on her (*id.* at 119).

The Court of Appeals held that the newsworthy and public concerns exception applied to bar the privacy claim because the Nussbaum affair was a matter of public interest and the photographs were directly related to the story (*id.* at 124-125). It rejected the plaintiff's contention that her presence at the facility was not newsworthy, since it was the fact of Nussbaum's interaction with the plaintiff that demonstrated Nussbaum's path to recovery from the physical and emotional abuse she had suffered at the hands of Steinberg (*id.* at 125). Notably, in

dismissing the plaintiff's claim for intentional infliction of emotional distress as being "an end run around a failed right to privacy claim," the Court observed that the "defendants acted within their legal right" (*id.*). The Court further stated:

"Courts have recognized that newsgathering methods may be tortious (*see, e.g., Galella v Onassis*, 487 F2d 986, 995 [2d Cir 1973]) and, to the extent that a journalist engages in such *atrocious, indecent and utterly despicable* conduct as to meet the rigorous requirements of an intentional infliction of emotional distress claim, recovery may be available. The conduct alleged here, however--a trespass onto Four Winds' grounds--does not remotely approach the required standard. That plaintiff was photographed outdoors and from a distance diminishes her claim even further (81 NY2d at 126) (emphasis added)."

The quoted language did not directly apply to the privacy claim in *Howell*. However, it strongly suggests that expression will not lose entitlement to the newsworthy and public concerns exemption of Civil Rights Law sections 50 and 51 unless the means by which a person's privacy was invaded was truly outrageous. Indeed, while one can argue that defendant's actions were more offensive than those of the defendant in *Howell*, because the intrusion here was into plaintiffs' home, clearly an even more private space, they certainly do not rise to the level of "atrocious, indecent and utterly despicable" (*id.*). Further, the depiction of children, by itself, does not create special circumstances which should make a privacy claim more readily

available (see *Finger*, 77 NY2d at 138). We note that defendant's conduct here, while clearly invasive, does not implicate the type of criminal conduct covered by Penal Law § 250.40 *et seq.*, prohibiting unlawful surveillance.

In short, by publishing plaintiffs' photos as a work of art without further action toward plaintiffs, defendant's conduct, however disturbing it may be, cannot properly, under the current state of the law, be deemed so "outrageous" that it went beyond decency and the protections of Civil Rights Law sections 50 and 51. To be sure, by our holding here -- finding no viable cause of action for violation of the statutory right to privacy under these facts -- we do not, in any way, mean to give short shrift to plaintiffs' concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken in this case. However, such complaints are best addressed to the Legislature -- the body empowered to remedy such inequities (see *Black v Allstate Ins. Co.*, 274 AD2d 346 [1st Dept 2000]; *Yankelevitz v Royal Globe Ins. Co.*, 88 AD2d 934 [2d Dept 1982], *affd* 59 NY2d 928 [1983]). Needless to say, as illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the Legislature to revisit this important issue, as we are constrained to apply the

law as it exists.

Accordingly, the order of the Supreme Court, New York County (Eileen Rakower, J.), entered August 5, 2013, which denied plaintiffs' motion for a preliminary injunction, and granted defendant's cross motion to dismiss the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 9, 2015

A handwritten signature in black ink, appearing to read "Eric Schuler", written in a cursive style. The signature is positioned above a horizontal line.

DEPUTY CLERK