SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 17, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6124 How Shim Yu, Index 117206/04
Plaintiff-Appellant,

-against-

General Security Insurance Co.,
Defendant-Respondent.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 21, 2010, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously reversed, on the law, with costs, the motion denied, the cross motion granted, and the matter remanded for further proceedings consistent herewith.

This is an action pursuant to Insurance Law § 3420(a)(2) by an injured person (plaintiff) against the insurer (defendant) of a tortfeasor (nonparty Lep Keng Corp.), which has not satisfied a judgment against it in plaintiff's favor. It is undisputed that

Lep Keng's notice to defendant was late. However, "[a]n insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even [where] the policyholder's own notice of the incident to its insurer is untimely" (*Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006] [internal quotation marks omitted]).

Defendant learned by August 27, 2004, at the latest, that plaintiff served the summons and complaint in the underlying personal injury action on the Secretary of State on December 31, 2001, that the Secretary of State had sent the documents to the address on file for Lep Keng, and that the documents had been returned unclaimed. Thus, defendant was aware by that date "of the grounds for disclaimer of liability or denial of coverage" (*id.* [internal quotation marks omitted]). Nevertheless, it did not disclaim until July 18, 2007, almost three years later, a delay that is unreasonable as a matter of law (*see e.g. First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]). Defendant's contention that it had to wait until the motion court in the underlying action confirmed the Special Referee's finding that Lep Keng had deliberately left mail unclaimed, is unavailing (*see Republic Franklin Ins. Co. v Pistilli*, 16 AD3d 477, 479 [2005]).

Because neither the motion papers below nor the briefs on

appeal addressed the amount of the judgment that should be entered and whether interest should be assessed, the matter should be remanded for further proceedings.

In light of the above disposition, we do not reach the parties' remaining arguments.

The Decision and Order of this Court entered herein on February 23, 2012 is hereby recalled and vacated (*see* M-1074 decided simultaneously herewith).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

6473-
6474 In re Rosemary Golia,
Petitioner-Appellant,

-against-

Meenakshi Srinivasan, et al.,
Respondents-Respondents.

Index 102004/09
102003/09

Sheldon Lobel, P.C., New York (Richard S. Lobel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for Meenakshi Srinivasan; Christopher Collins; Dara Ottley-Brown; Susan Hinkson; Eileen Montanez; Board of Standards and Appeals of the City of New York; and New York City Department of Buildings, respondents.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for Thomas Carroll, respondent.

Stroock & Stroock & Lavan LLP, New York (Michele L. Pahmer of counsel), for Breezy Point Cooperative, Inc., respondent.

Judgments, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 14, 2009, denying the consolidated petitions to annul the determinations of respondent Board of Standards and Appeals (BSA), dated January 13, 2009, which denied petitioner's appeal of a determination of respondent New York City Department of Buildings (DOB), dated August 24, 2006, declining to revoke a building permit issued to respondent Thomas Carroll, and which granted respondent Carroll's appeal of a determination of DOB, dated April 27, 2007, to the extent of

reinstating his building permit, and dismissing the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner and respondent Carroll are shareholder-tenants of respondent Breezy Point Cooperative, Inc., a housing cooperative located on the Rockaway Peninsula, in Queens County. Based on his shares in the co-op, Carroll has a proprietary lease entitling him to possession of the premises known as 607 Bayside Drive, the subject premises. Based on her shares, petitioner holds a proprietary lease entitling her to possession of the property known as 2 Bayside, which is adjacent to the rear of the premises. Carroll's lot existed before the passage of the 1961 Zoning Resolution. These proceedings followed the DOB's issuance of a new building permit to Carroll authorizing the construction of a new single-family residence on the premises.

"[T]he BSA is comprised of experts in land use and planning, and . . . its interpretation of the Zoning Resolution is entitled to deference. So long as its interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute, it will be upheld . . . [W]hen applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference" (*Matter of New York Botanical Garden v Board of Stds. & Appeals*

of City of N.Y., 91 NY2d 413, 418-419 [1998] [internal quotation marks omitted]; *see Matter of Brimberg v New York City Bd. of Stds. & Appeals*, 44 AD3d 413 [2007], *lv denied* 10 NY3d 710 [2008]).

BSA's reinstatement of the permit was based on a rational interpretation of the New York City Zoning Resolution (as amended) (ZR or Zoning Resolution) as applied to the subject site. For more than forty years, the DOB had interpreted the Zoning Resolution at Breezy Point as requiring setbacks measured from the plot line. This practice derived from the unusual manner in which the Breezy Point properties are defined, with the boundaries of many plots not coincident with the edge of adjoining walkways, service lanes or streets.

The DOB's interpretation was a reasonable one in light of the unique configuration of Breezy Point, and not inconsistent with the Zoning Resolution. "Front yard" is defined in ZR § 12-10 as a "yard extending along the full length of a front lot line." "Yard" is similarly defined as "that portion of a zoning lot . . . along the entire length of a lot line, and from the lot line for a depth or width set forth in the applicable district yard regulations." "Front yard line" is defined as "a line drawn parallel to a front lot line at a distance therefrom equal to the depth of a required front yard." "Lot line" is defined as "a

boundary of a zoning lot" (*id*.)

Petitioner insists that the Zoning Resolution mandates that setbacks be measured from the edge of a street. However, this interpretation of the Zoning Resolution, while not unreasonable, is not self-evident. Petitioner fails to appreciate the ambiguity in the Zoning Resolution, which arises out of the definition of a "front lot line" as a "street line," i.e., a "lot line separating a street from other land" (ZR § 12-10). Since many of the lot lines in Breezy Point fall within service roads, they do not separate the street from other land but are nonetheless lot lines, i.e., a "boundary of a zoning lot" (*id*.). It was thus reasonable for DOB to interpret the Zoning Resolution as requiring measurement of setbacks from the lot line, wherever it fell.

BSA correctly recognized, in any event, that because the permit was initially issued based on a reasonable interpretation of the Zoning Resolution, it was valid when issued and gave Carroll a vested right to construct his home in reliance on the validity of the permit (*compare Matter of Perrotta v City of New York*, 107 AD2d 320, 325 [1985], *affd* 66 NY2d 859 [1985]; *see e.g. Village Green Condominium Corp. v Nardecchia*, 85 AD2d 692, 693 [1981] [subsequent building inspector could not properly refuse to issue a certificate of occupancy based on an interpretation of

"place of public assembly" that was contrary to the rational interpretation of the building inspector who had initially issued the building permit]).

The court also correctly determined that the unanimous resolution of the BSA, issued January 13, 2009, was rational and therefore should not be disturbed. The BSA correctly determined that the Carroll lot existed "separately and individually from all other adjoining tracts of land" prior to the December 15, 1961 effective date of the Zoning Resolution, and therefore qualified as a preexisting small lot under the exemption set forth in ZR § 23-33(b). Since Carroll's lot qualified as an "existing small lot," the proposed new construction did not violate ZR § 23-32, which requires a minimum of 3,800 square feet for a single-family detached residence in an R4 district; ZR § 23-711, which sets forth requirements for minimum distance between buildings; or ZR § 62-71, which sets forth waterfront lot certification requirements.

By letter dated April 11, 2006, the co-op certified to DOB that the Carroll plot is as it existed in 1960. The co-op provided DOB with a copy of a 1946 topographical map, along with the plot card and a survey. In addition, the co-op's general manager testified at the public hearing that the subject premises has existed as a separate, individual lot since the co-op's

formation in 1960, and that there has been no subsequent reconfiguration of either the Carroll plot or petitioner's plot.

Petitioner, relying on a minor discrepancy between a plot card and a subsequent survey, asserts that the Carroll lot did not exist "separately and individually" on December 15, 1961 and the date of the application for a building permit. However, the BSA rationally determined that the survey was more reliable than the plot card, which was prepared by a person who was not a licensed surveyor, and that the survey, maps, and other evidence supported the finding that the Carroll lot existed as a separate and individual lot. The BSA's determination was consistent with the DOB's long-standing acceptance of the co-op's plots as separate zoning lots.

The BSA correctly determined that the Carroll lot was a corner lot and therefore exempt from the rear-yard requirements set forth in ZR § 23-47. The BSA found that the sand lane adjacent to the Carroll lot qualified as a "street" and that the street intersected with Bayside Avenue at an angle of less than 135 degrees. Based on these findings, the Carroll lot qualified as a corner lot exempt from rear-yard requirements. The BSA rationally determined that the sand lane qualified as a "street" since on December 15, 1961, it "was performing the functions usually associated with a way established on the City Map." The

sand lane was depicted on a 1946 topographical map, and on the co-op's 1960 plot card. The evidence showed, inter alia, that the sand lanes provide access to homeowners and visitors to the adjacent parking area, as well as access to emergency vehicles and sanitation trucks to the surrounding homes. The general manager of the co-op testified that the sand lanes "provide the access for service vehicles, utility vehicles and also the residents to get back to their homes," noting that these lanes "must be maintained at all times" and be "open and unencumbered."

The BSA correctly rejected petitioner's contention that the sand lane was a private road since it did not appear on the City map. The BSA explained that the definition of "street" expressly contemplates ways not shown on the city map, including a way that is not expressly public. The BSA has previously determined, in other cases, that the sand lanes in Breezy Point qualify as "streets" for zoning purposes.

It was rational for the BSA to reject the report of petitioner's surveyor, since the scale of the map on which he relied was so small as to render the purported measurement of the angle of intersection with Bayside Drive "highly questionable."

The BSA rationally determined that the proposed construction did not eliminate access to a mapped street, and thus did not violate General City Law § 36. The Carroll corner lot fronts the

sand lane, discussed above, and Bayside Drive, a mapped City street. Because more than 8% of the Carroll lot fronts on Bayside Drive, the construction did not violate Administrative Code of the City of New York § 27-291, which requires that at least 8% of the total perimeter of a proposed building front directly on a mapped street.

The BSA rationally determined that since the proposed construction merely maintained the preexisting noncompliance, the Carroll construction was exempt from the parking requirements set forth in ZR § 25-22, and Reference Standard 16-21 of the New York City Building Code involving distance between septic tanks, foundation walls and seepage pits. In the resolution, the BSA explained that on-site wastewater disposal systems within Breezy Point must meet the Department of Environmental Protection's standards "to the greatest extent feasible from an engineering point of view," and that the DOB was satisfied that Carroll had

met such standards in connection with his replacement of the septic tank.

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

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

ENTERED: MAY 17, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6498 In re Amire B.,

A Dependent Child Under
Eighteen Years of Age, etc.,

Selika B.,
Respondent-Appellant,

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

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Lawyers for Children, Inc., New York (Michael Moorman of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 9, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent abused and neglected the subject child, unanimously affirmed, without costs.

The finding of abuse and neglect was supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]). Petitioner made a prima facie showing that a spiral fracture of the infant's right humerus would ordinarily not have been sustained except by reason of respondent mother's acts or omissions, a showing which respondent failed to adequately rebut

"with a credible and reasonable explanation of how the child suffered [the injury]" (*Matter of Nakym S.*, 60 AD3d 578, 578 [2009]; *see also Matter of Nasir J.*, 35 AD3d 299 [2006]). There is no basis to disturb the court's credibility determinations with respect to the mother's varying accounts of the occurrence, nor the court's decision to credit petitioner's expert over respondent's expert. It is well settled that "the court's determination regarding credibility of the witnesses is entitled to great weight on appeal" (*Matter of Ashanti A.*, 56 AD3d 373, 373 [2008]; *Matter of Nakym S.*, 60 AD3d at 578).

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

ENTERED: MAY 17, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6884-
6884A Index 602425/09

American Cybersystems, Inc.,
Plaintiff-Respondent,

-against-

Global Risk Management, LLC,
et al.,
Defendants,

David C. Zakheim,
Defendant-Appellant.

Harry L. Klein, Brooklyn, for appellant.

Nathaniel B. Smith, New York, for respondent.

Order and amended order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 20, 2010 and October 29, 2010, respectively, which, insofar as appealed from as limited by the briefs, denied defendant David C. Zakheim's cross motion for summary judgment dismissing the third cause of action, unanimously affirmed, without costs.

The IAS Court properly denied the motion to dismiss the third cause of action for rent and other charges allegedly owed under a document executed by defendant Zakheim, guaranteeing the payment of all charges owed by defendant Global Risk Management, LLC to the nonparty overtenant under a sublease. Subsequent to the execution of the guaranty, the overtenant assigned the lease

to plaintiff. Given that the limited guaranty contained no express provision prohibiting assignment, and the sublease expressly permitted assignment, Zakheim failed to show that the cause of action against him does not fit within any cognizable legal theory (*see Cardarelli v Scodek Constr. Corp.*, 304 AD2d 894, 895 [2003]; *WHCS Real Estate Ltd. Partnership v 1610 O.C.R. Operating*, 232 AD2d 548 [1996], *lv dismissed* 91 NY2d 849 [1997]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Freedman, Manzanet-Daniels, JJ.

7063-
7064 Index 105940/08

Michael V. Stallone, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Plaza Construction Corp., et al.,
Defendants-Respondents,

Abington Properties,
Defendant,

Livingston Electrical Associates, Inc.,
Defendant-Respondent-Appellant.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for appellants-respondents.

Camacho Mauro & Mulholland, LLP, New York (Eric L. Cooper of counsel), for respondent-appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Christopher Simone of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 11, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim, and denied so much of defendant Livingston Electrical Associates' motion for summary judgment as sought to dismiss the common-law negligence claim as against it and all cross claims for contribution or indemnification against it, unanimously modified, on the law, to grant plaintiffs' motion for partial summary judgment on their

section 240(1) claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered September 26, 2011, which, upon reargument of plaintiffs' motion, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff Michael Stallone was injured when, in the course of descending a fixed 14-foot ladder linking upper and lower platforms on a large crane, his foot slipped on a metal rung and he fell 13 feet to the next platform below. The permanently affixed ladder plaintiff used was the only means by which he could reach his elevated work site and, as such, was a device within the meaning of § 240(1) (*see Crimi v Neves Assocs.*, 306 AD2d 152 [2003]; *Priestly v Montefiore Medical Ctr./Einstein Med. Ctr.,* 10 AD3d 493 [2004]). Plaintiff was entitled to partial summary judgment since the ladder "proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person," and his injuries were at least partially attributable to defendants' failure to take mandated safety measures to protect him from elevation-related risks (*Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [2007]; *Priestly*, 10 AD3d at 494-95; *Crimi,,* 306 AD2d at 153).

As to the common-law negligence claim against defendant

Livingston, issues of fact exist as to whether plaintiff's fall was caused, at least in part, by inadequate lighting in the area of the crane's internal ladder, and whether Livingston, which had a contractual duty to supply electricity to the tower crane, was on notice of recurrent electrical outages on the crane (*see e.g. O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996]).

Since Livingston has not been found free from negligence, we reject its contention that all cross claims against it for contribution or indemnification should be dismissed. To the extent Livingston argues that the indemnification provision in its contract is void as against public policy (*see* General Obligations Law § 5-322.1), this argument is unavailing in view of the language limiting Livingston's obligation to that which the law permits (*see Dutton v Pankow Bldrs.*, 296 AD2d 321 [2002], *lv denied* 99 NY2d 511 [2003]).

We have considered the parties' remaining arguments in support of affirmative relief and find them unavailing.

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

ENTERED: MAY 17, 2012

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Richter, JJ.

7330 In re Michael Rodriguez, Index 104934/10
Petitioner-Appellant,

–against–

Dr. Dora Schriro, etc., et al.,
Respondents-Respondents.

Koehler & Isaacs, LLP, New York (Julie Pearlman Schatz of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered April 14, 2011, dismissing the proceeding brought pursuant to CPLR article 78 seeking, inter alia, to annul the summary termination of petitioner's employment as a correction officer or, in the alternative, to compel respondents to conduct an evidentiary hearing, unanimously affirmed, without costs.

Petitioner, a correction officer employed by respondent New York City Department of Correction, pleaded guilty in Pennsylvania to stalking, which is a first degree misdemeanor (*see* 18 Pa CSA § 2709.1[a][2], [c][1]). Pursuant to Public Officers Law § 30(1)(e), his employment was terminated summarily. In this proceeding pursuant to CPLR article 78, petitioner seeks to annul the summary termination and be reinstated to his position with back pay and benefits, or in the alternative, to

compel respondents to conduct a hearing to determine the disciplinary action against him. The motion court concluded that summary termination was appropriate and we now affirm.

Public Officers Law § 30(1)(e) provides that an office automatically becomes vacant upon the officeholder's conviction of a felony, or a crime involving a violation of his oath of office. Here, the applicable section of the Pennsylvania criminal statute provides that "[a] person commits the crime of stalking when the person . . . (2) engages in a course of conduct or repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person" (18 Pa CSA § 2709.1[a]).

In *Matter of Feola v Carroll* (10 NY3d 569 [2008]), the Court of Appeals noted that the critical inquiry is whether the definition of the misdemeanor, without consideration of the underlying facts, contains an element "which includes 'knowing or intentional conduct indicative of a lack of moral integrity'" (*id*. at 572-573, *quoting Matter of Duffy v Ward*, 81 NY2d 127, 135 [1993]). In *Feola*, the Court found that a conviction for endangering the welfare of a child, committed outside the line of duty, warranted summary termination because "one who knowingly

engages in conduct likely to be injurious to a child's welfare would be deemed wanting in moral integrity" (*Feola*, 10 NY3d at 573). Similarly, a person who engages in the crime of stalking can be considered as wanting in moral integrity and not worthy of public confidence and trust (*see Matter of Pirozzi v Safir,* 270 AD2d 2 [2000], *lv denied* 95 NY2d 756 [2000] [aggravated harassment in the second degree]; *Matter of Segars v City of Buffalo*, 237 AD2d 910 [1997] [menacing in the second degree]). Although petitioner seeks to distinguish this Court's ruling in *Pirozzi* by noting that the crime there was committed in the line of duty, the *Feola* decision requires rejection of such a distinction.

Summary dismissal for conviction of a crime involving a violation of the oath of office requires "an intentional dishonesty or corruption of purpose inherent in the act prohibited by the Penal Law" (*Matter of Duffy*, 81 NY2d at 135 [criminal trespass not a misdemeanor that can be considered facially as a crime involving a violation of the oath of office]). Stalking is not a crime that occurs in the heat of the moment or that involves a single incident. Nor by the definition of the crime does it involve acts that have an innocent purpose. It is a course of conduct or a series of repeated acts that demonstrate an intent to place another person in reasonable fear

of bodily injury or to cause substantial emotional distress to that person.

In light of our determination that petitioner's conviction involves a violation of the oath of office, we need not reach respondents' alternative argument that this crime, which is denominated a misdemeanor, is actually a felony because Pennsylvania law permits a sentence to a term of imprisonment in excess of one year.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7674 The People of the State of New York, Respondent, Ind. 4388/08

-against-

Manuel Ducret, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 1, 2009, convicting defendant, after a jury trial, of resisting arrest, and sentencing him to a term of one year, unanimously affirmed.

When the existence of an unrelated lawsuit against one of the police witnesses came to light during trial, the court properly exercised its discretion in denying defendant's request for a midtrial adjournment of unspecified length for the purpose of obtaining additional information relating to the lawsuit and its underlying facts (*see e.g. People v Dunnell*, 63 AD3d 535, 536 [2009], *lv denied* 13 NY3d 796 [2009]). The unproven allegations against the officer were collateral (*see People v Cordero*, 306 AD2d 9, 10 [2003], *lv denied* 100 NY2d 619 [2003]; *People v Antonetty*, 268 AD2d 254 [2000], *lv denied* 94 NY2d 945 [2000]),

and the requested adjournment would have disrupted the trial and caused undue delay. Furthermore, defendant received a sufficient opportunity to cross-examine the officer about the underlying facts of the lawsuit.

The court also properly exercised its discretion in admitting medical evidence regarding the injuries suffered by the officers who were injured in this incident, even though defendant was not indicted for assault. In the circumstances of the case, this evidence was highly probative because it demonstrated the extent and violent nature of defendant's resistance, and it directly refuted claims made by defendant at trial.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7675-
7676 Index 301659/10

Bertha Ramos,
Plaintiff-Appellant,

Paulina Ramos,
Plaintiff,

-against-

Teresa Lena Napoli, et al.,
Defendants-Respondents.

Wingate, Russotti & Shapiro, LLP, New York (Joseph P. Stoduto of counsel), for appellant.

DeCicco, Gibbons & McNamara, P.C., New York (William A. Fitzgerald of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 12, 2011, which, insofar as appealed from, in an action for personal injuries, denied the motion of plaintiff Bertha Ramos for summary judgment on the issue of liability and to dismiss defendants' affirmative defenses, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 23, 2012, denying plaintiff's motion to reargue, denominated as one to "renew and/or reargue," unanimously dismissed, without costs, as taken from a nonappealable paper.

Supreme Court properly found that the parties' competing accounts raised multiple issues of fact precluding summary

judgment.

Plaintiff did not offer any new or additional facts that would have changed the prior determination denying summary judgment. Therefore, the motion was, in essence, one to reargue, the denial of which is not appealable (*see e.g. Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551 [2011], *lv denied* 17 NY3d 705 [2011]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román JJ.

7677 William Cornwell, Index 110679/10
Plaintiff-Respondent,

–against–

NRT New York LLC, et al.,
Defendants,

Amir Meiri,
Defendant-Appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Barry Mallin & Associates, P.C., New York (Michael Schwartz of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 4, 2011, which, insofar as appealed from, denied that branch of defendant Amir Meiri's cross motion seeking to dismiss plaintiff's third cause of action for breach of fiduciary duty, unanimously reversed, on the law, without costs, the motion granted in its entirety and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff, the owner of real property, failed to state a cause of action for breach of fiduciary duty against defendant Amir Meiri, a real estate broker, since he did not allege the existence of a fiduciary relationship. It is well settled that a real estate broker is a fiduciary with a duty of loyalty and an

obligation to act in the best interests of the principal (*see Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]). Here, however, plaintiff entered into an agreement with defendant Citi-Habitat, a licensed real estate brokerage, providing for defendant John Tarjavaara to act as the exclusive agent to find a lessee for plaintiff's apartments, thereby establishing a fiduciary relationship between plaintiff and defendant brokerage but not between plaintiff and defendant Meiri. The duty did not extend to Meiri, an independent contractor, who had no obligations to plaintiff and who dealt with plaintiff in an arm's length transaction (*see EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 219 [2011]). This is evident from the terms of the exclusive agency agreement which provided that Tarjavaara would report all activity to plaintiff on a regular basis and accompany all potential tenants and co-brokers to the premises. Meiri, who approached plaintiff without Tarjavaara present, acted in his own

personal interest in negotiating the terms of the leases with plaintiff who chose not to utilize the services of Citi-Habitat for which he had contracted.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7678 In re Bernard W. Goonewardena, Petitioner-Appellant, Index 114583-08

-against-

State of New York Workers' Compensation Board, Respondent-Respondent.

Bernard W. Goonewardena, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Won S. Shin of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered October 15, 2009, which denied the petition brought pursuant to CPLR article 78 seeking, inter alia, to annul respondents' determination dated July 2, 2008 terminating petitioner's probationary employment and dismissed the proceeding, unanimously affirmed, without costs.

It is well-settled that a probationary employee may be discharged without a hearing and without a statement of reasons, in the absence of any demonstration that the dismissal was in bad faith, for a constitutionally impermissible purpose, or in violation of law (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]; *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). Evidence in the record regarding petitioner's unsatisfactory completion of his duties provide a rational basis

for respondent's determination, particularly since petitioner received ample opportunity to improve (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Matter of Bienz v Kelly*, 73 AD3d 489 [2010]). No substantial issue was raised by petitioner's allegations purporting to show bad faith (*see Matter of Jones v New York City Health & Hosps. Corp.*, 5 AD3d 338 [2004]). Thus, no hearing was required and the petition was properly denied (*see Matter of Johnson*, 68 NY2d at 650).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7679- Index 603997/06
7680-
7680A Community Counseling &
Mediation Services,
Plaintiff-Appellant-Respondent,

-against-

Richard Chera, et al.,
Defendants-Respondents,

Next Generation Chera, LLC, etc.,
Defendant-Respondent-Appellant.

Loanzon Sheikh LLC, New York (Tristan C. Loanzon of counsel), for appellant-respondent.

Wachtel Masyr & Missry, LLP, New York (Evan Weintraub of counsel), for respondent-appellant, and Richard Chera and Meir Wax, respondents.

Goldberg & Rimberg PLLC, New York (Israel Goldberg of counsel), for Long Island University, respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 6, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Richard Chera, Next Generation Chera, LLC d/b/a Next Generation LLC and Meir Wax's (collectively landlord) motion for summary judgment dismissing the second cause of action (trespass), denied Next Generation's Chera's motion for summary judgment dismissing the first cause of action (breach of lease), and, sua sponte, upon a search of the record, granted plaintiff tenant partial summary judgment on its

first cause of action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 8, 2011, which, insofar as appealed from as limited by the briefs, granted defendant Long Island University's motion for summary judgment dismissing the second cause of action as against it, deemed an appeal from judgment, same court and Justice, entered August 8, 2011, dismissing the complaint as against Long Island University, and so considered, said judgment unanimously affirmed, without costs. Appeal from said judgment, insofar as it dismissed defendant Next Generation Chera's cross claims against Long Island University, unanimously dismissed, without costs, as abandoned.

Tenant's trespass claim was properly dismissed. Paragraph 13 of the lease ("Lease ¶ 13") for the premises at issue expressly authorized landlord to erect new pipes and conduits in tenant's leasehold. Lease ¶ 13 did not condition landlord's right to install the pipes upon tenant's consent, or upon tenant's opinion as to where the pipes should be placed. Accordingly, defendants' installation of the challenged ceiling pipes was not unlawful, nor were the pipes installed in an unauthorized manner (*see e.g. Kurzner v Sutton Owners Corporation*, 245 AD2d 101 [1997]). The only qualification that Lease ¶ 13 placed on landlord's right to install the pipes is

that the pipes be "concealed within the walls, floor, or ceiling." Defendants failure to comply with the "concealment" condition establishes a breach of the lease but does not raise an issue of fact with regard to the cause of action for trespass.

Given this breach of the lease based on the failure to conceal the pipes, landlord's argument that the court erred when, upon a search of the record, it awarded tenant partial summary judgment on its breach of contract claim is unavailing. Landlord's argument that tenant "waived" any purported requirement that it "conceal" the pipes is also unavailing. While there is evidence indicating that tenant may have interfered with defendants' efforts to disguise or camouflage the pipes, no basis exists to find that tenant waived its contractual right to have the pipes concealed. Lease Rider ¶ 33 requires that any waiver of rights be in writing, and there is no evidence of a written waiver (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]). In any event, any action by tenant to prevent defendants' attempts to disguise the pipes does not constitute an unmistakable, unequivocal intention to relinquish its known right to have the pipes concealed (*see Orange Steel Erectors v Newburgh Steel Prods.*, 225 AD2d 1010, 1012 [1996]).

Landlord's argument that Lease ¶ 13 did not contain a

requirement that newly installed pipes be concealed "within walls, floor or ceiling" is belied by the plain language of the lease provision (*see e.g. Brignoni v 601 West 162 Assoc., L.P.*, 93 AD3d 417 [2012]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7681-
7682 &
M-974 In re Carl T., Sr.,
Petitioner-Respondent,

-against-

Yajaira A. C.,
Respondent-Appellant.

- - - - -

In re Carl T., Sr.,
Petitioner-Appellant,

-against-

Yajaira A. C.,
Respondent-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Carl T., Sr., appellant/respondent.

Randall S. Carmel, Syosset, for respondent/appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about March 24, 2011, which, insofar as appealed from, granted the respondent-respondent-mother a two-year final order of protection against the father; ordered that the father pay a $200 fine for causing the mother to miss two visits with the parties' child; ordered that the father attend classes to address anger management and domestic violence issues; and granted the father's petition for a modification of custody and

visitation and issued a final award of custody to the father, with the mother to have only supervised visitation with the parties' child, unanimously modified, on the law, to strike that portion of the order imposing a $200 fine on the father, and otherwise affirmed, without costs.

The father's contentions on the family offense regarding incidents that occurred post-petition are unpreserved for our review, and we decline to consider them in the interests of justice. If we were to consider them, they would not require vacatur of the protective order, as the incidents alleged in the mother's petitions formed a sufficient basis for entry of the protective order. We also find that issuance of the protective order was not an abuse of the Family Court's discretion (*see Matter of Royea v Hutchings*, 260 AD2d 678, 680 [1999]; *cf. Matter of Allen v Black*, 275 AD2d 207, 207-10 [2000]), and that the evidence at trial was sufficient to support a finding of aggravated harassment (*see People v Grant*, 77 AD3d 488 [2010], *lv denied* 16 NY3d 859 [2011]; *People v Wilson*, 59 AD3d 153 [2009], *affd* 14 NY3d 895 [2010]). Likewise, the evidence was sufficient to support the Family Court's direction that the father was obliged to undertake anger management domestic violence counseling.

However, the Family Court erred in imposing a fine upon the

father for causing the mother to miss visitation, as there was no contempt adjudication (*see e.g. Matter of Michael D. [Tiffany D.]*, 30 Misc 3d 502, 511 [2010]). As a result, that the portion of the order imposing a $200 fine must be vacated.

As to the mother's appeal, we find that the Family Court properly granted the father's petition for modification of custody and visitation. This Court's authority in custody matters is as broad as that of the trial court (*Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]; *Matter of Celenia M. v Faustino M.*, 77 AD3d 486 [2010], *lv denied* 16 NY3d 702 [2011]). A custody determination nonetheless rests with the sound discretion of the trial court and is accorded great deference on appeal, since the trial court had the opportunity to assess the witnesses' demeanor and credibility (*see Matter of Madeline S.*, 3 AD3d 13, 19 [2003]; *Victor L. v Darlene L.*, 251 AD2d 178 [1998], *lv denied* 92 NY2d 816 [1998]). Here, there was ample basis for the court's determination that the circumstances had changed sufficiently to modify the original custody order. For example, the mother made derogatory remarks to the child, and apparently failed to appreciate how these remarks affected him emotionally. Indeed, the record showed that the child was distressed by these remarks. The record also showed that the mother had physically harmed the child. Furthermore, beginning

in 2007, the mother had no steady employment, and therefore was less able than the father to provide a stable financial situation for the child. Likewise, presumably because of financial difficulties stemming from her intermittent employment, the mother no longer provided the child with an appropriate place to live, instead staying with him in a storage area that had no sink or shower. The evidence, therefore, showed not only that circumstances had changed since the mother had been awarded custody, but that the child's best interests were served by changing the custody arrangements (*see Westfall v Westfall*, 28 AD3d 1229 [2006], *lv denied* 7 NY3d 706 [2006]; *Matter of Williams v Williams*, 66 AD3d 1149, 1151-1152 [2009]).

Further, supervised visitation was warranted for the mother given her consistent pattern of destructive behavior toward the child, which continued even during supervised visits (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [2006], *lv denied* 7 NY3d 717 [2006]).

We have considered the parties' remaining contentions and find them unavailing.

M-974 - *In re Carl T. Sr. v Yajaira C.*

Motion to strike portions of brief granted, except as to material entered into evidence at trial.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7683-
7684 Index 600395/08

UrbanAmerica, L.P. II,
Plaintiff-Respondent-Appellant,

-against-

The Carl Williams Group, L.L.C., et al.,
Defendants/Counterclaim
Plaintiffs-Appellants-Respondents,

-against-

UrbanAmerica, L.P.,
Counterclaim Defendant.

_____

Robert C. Kilmer, Binghamton, for appellants-respondents.

Pillsbury Winthrop Shaw Pittman LLP, New York (Jack McKay of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 8, 2011, which, insofar as appealed from, awarded plaintiff the total sum of $9,950,178.40 as against the Carl Williams Group, L.L.C. (CWG), dismissed plaintiff's third and fourth causes of action, and dismissed the counterclaims, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered December 13, 2010, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

Plaintiff made a prima facie case against CWG on the amended and restated note "by proof of the note and the debtor's failure

to make the payments called for therein" (*Cicconi v McGinn, Smith & Co., Inc.*, 35 AD3d 292, 292 [2006]). Plaintiff did not have to prove that the funds that it lent CWG under the original note were actually disbursed to CWG; plaintiff was suing on the amended and restated note, not the original note. Nor did plaintiff have to prove that it had paid 50% of the predevelopment/pursuit costs with anything other than the money it was lending to CWG. We decline to consider defendants' argument, made for the first time in their reply brief, that it would be unconscionable to allow plaintiff to recover 100% of the monies that were lent where 50% of the funds were allegedly used to meet plaintiff's obligations.

The court properly found that plaintiff's damages on its third cause of action (for defendant Carl Williams' breach of a pledge agreement) were too speculative (*see generally Cristallina S.A. v Christie, Manson & Woods Intl.*, 117 AD2d 284, 295 [1986] ["damages may not be determined by mere speculation"]). This is not a case where "it is certain that damages have been caused by a breach of the contract, and the only uncertainty is as to their amount" (*Randall-Smith v 43rd St. Estates Corp.*, 17 NY2d 99, 106 [1966] [internal quotation marks omitted]). Mr. Williams' breach of the pledge agreement (his sale of his membership interest in CWG to nonparty Bexley Place Limited Partnership) did not, by

itself, injure plaintiff; it was the combination of the sale and Bexley's subsequent bankruptcy that prevented plaintiff from foreclosing on the membership interest.

Plaintiff's contention that it is entitled to recover the amount of its loan to CWG, plus interest, from Mr. Williams as reliance damages for breach of the pledge agreement is unavailing; plaintiff did not lend CWG millions of dollars in preparation for performance of the pledge agreement (*see St. Lawrence Factory Stores v Ogdensburg Bridge & Port Auth.*, 13 NY3d 204, 207-208 [2009]).

Plaintiff's reliance on section 12 of the pledge agreement is also unavailing because there was no sale of the pledged securities by pledgee (*i.e.*, plaintiff) and because "Obligations" are defined as "all indebtedness, liabilities and obligations of *Pledgor*" (emphasis added). The Pledgor is Mr. Williams, but the loan was made to CWG.

Plaintiff is not entitled to all of its attorneys' fees in the instant litigation pursuant to the attorneys' fees provision of the pledge agreement; the instant action involved many other issues besides Mr. Williams' breach of the pledge agreement, and "a provision for recovery of fees that are incidents of litigation should be construed strictly" (*Gottlieb v Such*, 293 AD2d 267, 268 [2002], *lv denied* 98 NY2d 606 [2002] [internal

quotation marks and citation omitted]; *see also Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]).

As pled, the fourth cause of action (for fraud) was not a fraud-on-creditors claim and did not even hint at the damages that plaintiff now seeks thereunder. Plaintiff did not move at trial to conform its pleadings to the proof. Even if we were to consider the merits of plaintiff's argument, it is far from clear that Debtor and Creditor Law § 276 applies to Mr. Williams' allegedly fraudulent transfer of his membership interest in CWG to Bexley. Mr. Williams is a Maryland resident, CWG is a Maryland company, and Bexley is a Maryland partnership. Plaintiff points to no evidence that the fraudulent transfer occurred in New York. Even if New York law applied, the amount of plaintiff's loan to CWG is not the proper measure of damages for Mr. Williams' fraudulent transfer of his membership interest to Bexley (*see Capital Distrib. Servs., Ltd. v Ducor Express Airlines, Inc.*, 440 F Supp 2d 195, 204 [ED NY 2006]). Finally, Debtor and Creditor Law § 276-a does not entitle plaintiff to recover all of its attorneys' fees in the instant litigation from Mr. Williams; the instant action involved many other issues besides fraudulent conveyance (*see Keen v Keen*, 113 AD2d 964, 966 [1985], *lv dismissed* 67 NY2d 646 [1986]; *see also Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179

[2004]).

The court properly dismissed defendants' counterclaims. The letter of intent (LOI) specifically states that it is not binding and that "the legal rights and obligations of the parties shall be only those that are set forth in such definitive transaction documents when and if executed and delivered by all parties"; therefore, it did not create a joint venture (*see e.g. Schneider v Jarmain*, 85 AD3d 581, 582 [2011]; *Aksman v Xiongwei Ju*, 21 AD3d 260, 261-262 [2005], *lv denied* 5 NY3d 715 [2005]). Contrary to defendants' claim, the LOI left important items to be negotiated (*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 212-214 [2009]).

Defendants did not prove that the parties' conduct created a joint venture. Even if plaintiff called defendants their "partner," that is not decisive (*see Kyle v Ford*, 184 AD2d 1036, 1037 [1992]).

Defendants' claim that plaintiff admitted in another lawsuit that it was in a joint venture for the Metroview land is unavailing; plaintiff alleged in the other action that it and CWG were in a joint venture for the CSC Building, not the Metroview land.

Since defendants' counterclaim for breach of a joint venture was properly dismissed, their breach of fiduciary duty

counterclaims were also properly dismissed (*see Langer v Dadabhoy*, 44 AD3d 425, 426 [2007], *lv denied* 10 NY3d 712 [2008]).

Defendants' contention that plaintiff breached the duty of good faith and fair dealing by bringing nonparty Doracon Development, LLC into the deal during a period when CWG and plaintiff were supposed to be negotiating exclusively with each other is unavailing. Plaintiff agreed not to "solicit or engage in discussions or negotiations with third parties for developer or owner participation in the development of the Project or the acquisition of the Office Building *without mutual written consent*" (emphasis added). The requirement of written consent can be waived by the parties' conduct (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104-105 [2006]), and the trial court found that it was so waived.

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

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, JJ.

7685 In re Phyllis Nuchman, Index 111217/10
Petitioner-Appellant,

-against-

Joel I. Klein, etc., et al.,
Respondents-Respondents.

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered March 14, 2011, which, among other things, denied the petition seeking to vacate a post-hearing arbitration award, dated August 2, 2010, finding petitioner guilty of various specifications and imposing a penalty of four months' suspension of petitioner's employment as a New York City schoolteacher without pay and benefits, and dismissed the proceeding brought pursuant to Education Law § 3020-a(5) and CPLR 7511, unanimously affirmed, without costs.

The arbitration award was made in accord with due process, and was not arbitrary and capricious, irrational, or lacking in evidentiary support (*see City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]). Even if respondent Department of Education (DOE) had failed to comply with the time

requirements set forth in article 21(C)(3) of the collective bargaining agreement, dismissal of the disciplinary charges against petitioner was not required. Indeed, article 21(C)(3) merely provides for the removal of a contested writing from an employee's personnel file or record in the event the procedural requirements of the article are not followed, and does not preclude the filing of formal disciplinary charges pursuant to Education Law § 3020-a (*see e.g. Hazen v Board of Educ. of City School Dist. of City of N.Y.*, 75 AD3d 471 [2010], *affd* 17 NY3d 728 [2011]).

To the extent that the record permits review, the hearing officer carefully considered all of the evidence, and its credibility findings in favor of respondents' witnesses are entitled to deference (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [2011]).

The penalty imposed does not shock our sense of fairness

(*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7686 Fay Hill, Index 300800/10
Plaintiff-Appellant,

-against-

Emmanuel K. Achiah, et al.,
Defendants-Respondents.

_____

Jason Levine, New York, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell Danziger, J.), entered December 27, 2011, which, in an action for personal injuries allegedly sustained when plaintiff pedestrian was struck by defendants' vehicle as she crossed the street, denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Summary judgment in plaintiff's favor was properly denied since the conflicting accounts of plaintiff and defendant driver

raise triable issues of fact as to how the accident occurred (*see Negron v Garcia*, 85 AD3d 513 [2011]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7687 The People of the State of New York, Ind. 5924/09
Respondent,

-against-

David Monakey,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about February 23, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 17, 2012

CLERK

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

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7688 The People of the State of New York, Respondent, Ind. 171/10

-against-

Mikequann Plummer, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered August 30, 2010, convicting defendant, after a jury trial, of robbery in the first degree and three counts of robbery in the second degree, and sentencing him to concurrent terms of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. Defendant was properly convicted of robbery in the first degree under a theory of use of a dangerous instrument (Penal Law § 160.15 [3]). Defendant struck the victim on the back of his head with an imitation pistol, causing a painful, bloody laceration. The evidence warranted an inference that this weapon, as used, was capable of inflicting

serious physical injury, such as a brain injury (*see* Penal Law 10.00[13]; *People v Carter*, 53 NY2d 113 [1981]).

Defendant's argument that the court should have granted an adverse inference charge rests on the assumption that the police lost evidence that had been in their control. However, although a jacket matching part of the victim's description of his assailant was taken from defendant after his arrest, there was conflicting information presented to the trial court regarding whether the police gave this jacket to defendant's mother. In any event, even assuming that defendant was entitled to an adverse inference charge, the absence of such a charge was harmless.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7689 Jay S. Blumenkopf, Index 109489/08
Petitioner-Appellant-Respondent,

-against-

Proskauer Rose LLP,
Respondent-Respondent-Appellant.

Liddle & Robinson, LLP, New York (James R. Hubbard of counsel), for appellant-respondent.

Proskauer Rose LLP, New York (David M. Lederkramer of counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Emily J. Goodman, J.), entered January 20, 2010, denying petitioner's motion to vacate an April 15, 2008 arbitration award in favor of respondent, and dismissing the proceeding, unanimously modified, on the law, to add a provision confirming the award pursuant to CPLR 7511(e), and otherwise affirmed, without costs.

"Petitioner failed to meet [his] heavy burden of establishing that the arbitration award was irrational, or in violation of any of the grounds enumerated in CPLR 7511(b)" (*Matter of Cherry v New York State Ins. Fund*, 83 AD3d 446, 446-447 [2011]; *Kalyanaram v New York Inst. of Tech.*, 79 AD3d 418, 419 [2010], *lv denied* 17 NY3d 712 [2011]).

The award should have been confirmed pursuant to CPLR

7511(e), which mandates confirmation upon denial of a motion to vacate or modify (*see Matter of White v Department of Law of State of N.Y.*, 184 AD2d 229 [1992], *lv denied* 80 NY2d 759 [1992]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, JJ.

7690 Jorge Munoz, et al., Index 108634/07
Plaintiffs-Respondents, 590497/09

-against-

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

Ark General Construction, Inc.,
Additional Defendant on Cross Claims.

- - - - -

The Board of Managers of Regatta Condominium, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Admiral Indemnity Company, et al.,
Third-Party Defendants-Appellants.

_____

White, Fleischner & Fino, LLP, New York (Janet P. Ford of counsel), for appellants.

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for Jorge Munoz and Jonathan Salazar, respondents.

London Fischer LLP, New York (Myra Needleman of counsel), for The Board of Managers of Regatta Condominium and Battery Park City Authority, respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered August 18, 2011, which, in the third-party action seeking a declaratory judgment, denied the cross motion of third-party defendants Admiral Indemnity Company and Clermont Specialty Managers, Ltd. (collectively, Admiral) for summary judgment, granted the motion of third-party plaintiffs

The Board of Managers of Regatta Condominium and Battery Park City Authority (BPCA) (collectively, Regatta) for summary judgment and declared that Admiral was obligated to defend and indemnify them in the underlying personal injury action, unanimously affirmed, with costs.

Admiral's disclaimer of coverage based solely on late notice of claim, issued 43 days after receiving first notification of the occurrence, claim and suit, was unreasonable as a matter of law (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 106 [2012]; *see also West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [2002], *lv denied* 98 NY2d 605 [2002]). Attached to the complaint and notice of loss form was an incident report, which was dated one year earlier, and contained the typed name of Regatta's property manager. Although unsigned, the report, received from Regatta's broker, made the basis for disclaimer "readily apparent" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [2010]), and could have been confirmed in a telephone conversation that was held between Admiral and Regatta's property manager within days of receipt.

Moreover, Admiral's argument that BPCA was not an insured under the subject policy, based on its exclusion for contractual liability, is unavailing. The exclusion states an exception for

an “insured contract,” which is defined to include a contract for a lease of premises, and as noted by the motion court, article 19 of the lease provided that Regatta Condominium would indemnify BPCA from bodily injury claims arising from work by the condominium’s contractors.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7692 Erik Osberg, Index 651125/10
Plaintiff-Appellant,

-against-

Raj Rajaratnam, etc., et al.,
Defendants-Respondents.

Sack & Sack, New York (Eric R. Stern of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Samidh Guha of counsel), for Raj Rajaratnam, respondent.

Shearman & Sterling LLP, New York (Casey O'Neill of counsel), for Galleon Group, LLC, respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 28, 2011, which, in this action alleging a breach of an employment agreement, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The record shows that pursuant to the express terms of the subject employment agreement, which plaintiff executed while represented by counsel, plaintiff was an at-will employee subject to termination "at any time, for any reason, with or without cause." Moreover, the bonus that he seeks to recover was expressly and unambiguously conditioned upon his working through the end of the relevant calendar year. Because plaintiff's employment was terminated prior to the end of the year when defendant Galleon Group, LLC folded following an investigation

for insider trading and the subsequent arrest of defendant Rajaratnam, plaintiff never became eligible to receive the bonus (*see Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 493 [1989]; *Kolmar Ams., Inc. v Bioversal Inc.*, 89 AD3d 493, 494 [2011]; *D'Amato v Morgan Stanley Dean Witter Discover & Co.*, 268 AD2d 392 [2000]).

The record further demonstrates that plaintiff's claims for breach of an implied contract and for fraud are not viable. "[A] contract cannot be implied where there is an express contract covering the same subject matter" (*Azimut-Benetti S.p.A. v Magnum Mar. Corp.*, 55 AD3d 483, 484 [2008]), and plaintiff failed to provide factual support for the allegations that the statements made by Rajaratnam were fraudulent.

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: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7693 Leticia Williams, Index 310086/08
Plaintiff-Appellant,

-against-

Erik J. Horman, et al.,
Defendants-Respondents.

Mitchell & Incantalupo, Forest Hills (Thomas V. Incantalupo of counsel), for appellant.

Epstein, Gialleonardo & Rayhill, Elmsford (Daniel F. Genovese of counsel), for Erik J. Horman, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Djiby Sy and Sunrise Limo Enterprise, respondents.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered May 4, 2011, which granted the motion of defendants Djiby Sy and Sunrise Limo Enterprise for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to dismiss the complaint as against all defendants, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The moving defendants (defendants) established their entitlement to judgment as a matter of law by showing that plaintiff did not sustain permanent consequential or significant limitations to her cervical spine and right shoulder. Defendants submitted the affirmed report of an orthopedic surgeon, who,

based upon an examination of plaintiff and a review of her medical records, concluded that plaintiff had fully recovered from a mild sprain of the cervical spine and that the injury to her right shoulder was due to a preexisting condition. Defendants also submitted the affirmed report of a radiologist who reviewed the MRIs of plaintiff's cervical spine and right shoulder, and found preexisting and degenerative conditions and no indication of traumatic injury (*see Migliaccio v Miruku,* 56 AD3d 393, 394 [2008]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's treating orthopedist examined her three months after the accident, and found normal range of motion, and subsequent conflicting findings of limitations in the cervical spine by another physician were not explained (*see Jno-Baptiste v Buckley*, 82 AD3d 578 [2011]). Plaintiff also failed to submit any recent report contradicting the findings of defendants' orthopedic surgeon that her cervical sprain had completely resolved (*see Feliz v Fragosa*, 85 AD3d 417, 418 [2011]), and offered no medical evidence refuting the findings of defendants' experts that her cervical spine condition was attributable to preexisting conditions unrelated to trauma (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435 [2011]).

Regarding her right shoulder injury, plaintiff's orthopedic

surgeon opined that the rotator cuff tear was directly related to the accident, but did not quantify any limitations in range of motion either before or after he performed surgery to repair the tear, and found only an unquantified "mild limitation of range of motion" upon recent examination following a second, unrelated injury to plaintiff's shoulder. Absent any objective medical evidence explaining or contradicting the normal findings by plaintiff's orthopedist, plaintiff failed to raise a triable issue of fact as to whether she suffered a serious injury to her shoulder following the accident (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584, 585 [2011]; *see also Winters v Cruz*, 90 AD3d 412 [2011]). Moreover, the existence of a tear in a shoulder ligament and of bulging and herniated discs is not evidence of serious injury in the absence of objective proof of the extent of the alleged physical limitations resulting from the injury, and its duration (*see DeJesus v Paulino*, 61 AD3d 605, 608 [2009]).

Defendants established their entitlement to summary judgment dismissing the 90/180-day claim based upon, inter alia, plaintiff's deposition testimony that she stayed home only for three days after the accident, and plaintiff failed to raise an issue of fact in opposition (*see Lopez v Abdul-Wahab*, 67 AD3d 598, 600 [2009]).

Furthermore, although it appears that codefendant Horman did

not move for summary judgment, dismissal of the complaint as against him is also warranted because "if plaintiff cannot meet the threshold for serious injury against one defendant, she cannot meet it against the other" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7694N Gina Miele Sereda, Index 108791/07
Plaintiff-Respondent,

-against-

Sounds of Cuba, Inc. doing business as Son Cubano and doing business as Cubano's,
Defendant-Appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (James E. Kimmel of counsel), for appellant.

Philip J. Dinhofer, LLC, Rockville Centre (Philip J. Dinhofer of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 30, 2011, which granted plaintiff's motion to quash a post-note-of-issue subpoena ad testificandum that defendant sought to serve on a nonparty witness, unanimously affirmed, without costs.

In this negligence action arising from a slip and fall, defendant demanded from plaintiff the address of a nonparty witness, a friend of plaintiff who was with her the night she fell. Before responding to all of defendant's discovery demands, including the demand for the witness's address, plaintiff filed a note of issue and certificate of readiness. The court directed that the parties resolve the outstanding discovery by a certain date, but did not vacate the note of issue. Plaintiff belatedly

submitted a P.O. box address for the witness, although she had testified that she could obtain the witness's actual home address.

While vacatur of the note of issue would have been warranted under these circumstances alone, as the P.O. box address prevents defendant from properly serving a subpoena ad testificandum on the witness (*see* 22 NYCRR § 202.21[e]; *Munoz v 147 Corp.*, 309 AD2d 647 [2003]), defendant has waived its right to such relief. Defendant did not challenge the adequacy of the address or further demand an actual address, and apparently chose to move for summary judgment dismissing the complaint without having deposed the witness. Nor did it raise the matter of the need to depose the witness during the pretrial conferences conducted after the summary judgment proceeding. Rather, defendant unexpectedly sought to serve the subpoena, dated after the pretrial conferences, on the witness at an address that was obtained from an "investigator" that it purportedly retained. By failing to diligently pursue discovery and by proceeding as it did, defendant waived its right to have the note of issue vacated (*see Colon v Yen Ru Jin*, 45 AD3d 359 [2007]; *Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218 [2005]).

Even if plaintiff's submission of an inadequate address post-note of issue constitutes an "unusual or unanticipated

circumstance" so as to warrant additional discovery under 22 NYCRR § 202.21(d), defendant's subsequent approach to the litigation also constituted waiver of its right to such relief. Under the circumstances, we perceive no reason to preclude plaintiff from offering the testimony of the witness at trial.

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

ENTERED: MAY 17, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, Freedman, Román, JJ.

7695N Armand Retamozzo, Index 113920/09
Plaintiff-Appellant,

-against-

Jason Quinones, et al.,
Defendants-Respondents,

Diana Friedland, et al.,
Defendants.

_____

Frank S. Falzone, Buffalo, for appellant.

Nixon Peabody LLP, Jericho (Christopher G. Gegwich of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Judith J. Gische, J.), entered October 8, 2010, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to compel discovery, directed that plaintiff not use any kind of recording device during depositions, and denied plaintiff's cross motion to compel discovery and for discovery sanctions, unanimously dismissed, without costs, as untimely.

Because the order appealed from is appealable as of right (*see* CPLR 5701[a][2]), plaintiff should have served and filed a notice of appeal instead of moving for leave to appeal. When the motion for leave to appeal was denied, in order to take advantage of the tolling provision provided in CPLR 5514(a), plaintiff

should have served and filed a notice of appeal within the time set forth in CPLR 5513(a), computed from the date the motion for leave to appeal was denied. He did not and thus the appeal is untimely.

In any event, were we to reach the merits, we would affirm. Plaintiff's argument that defendants failed to include an affirmation of good faith in support of their motion to compel is belied by the record. Further, the IAS court's order that plaintiff was not to have his own personal recording device during depositions was an appropriate exercise of the court's power to regulate discovery (*see* CPLR 3103), especially given plaintiff's habit of tape recording conversations without notice to his interlocutor. Plaintiff was required to provide his mental health records, as he had affirmatively placed his mental and emotional state at issue (*Fox v Marshall*, 91 AD3d 710, 711-712 [2012]). Because plaintiff had not yet produced any documents, but admitted to having responsive documents, the IAS court properly ordered him to produce the documents.

The IAS court providently exercised its discretion in finding that the interrogatory responses of defendants were adequate. The motion for sanctions was also properly denied, as

there was no indication that defendants failed to respond to discovery, let alone that they wilfully refused to provide information (*see* CPLR 3126).

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

ENTERED: MAY 17, 2012

CLERK

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

7821 In re Brandon R., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Chrystal R., etc.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

Morningside Heights Legal Services, Inc., New York (Philip M. Genty of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the child.

Order, Family Court, New York County (Jody Adams, J.), entered on or about December 14, 2010, which, following a fact-finding hearing, determined that respondent mother permanently neglected the subject child, terminated her parental rights to the child, and transferred custody and guardianship to petitioner and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The record amply demonstrates the diligent efforts by petitioner agency to assist respondent in overcoming her lifelong drug abuse problems, including repeated relapses, mental health concerns, and resistance to the Agency's efforts (*see Matter of*

Sheila G, 61 NY2d 368, 385 [1984]). The record also amply demonstrates that respondent permanently neglected the child by her failure to plan for his future. Respondent's drug addiction and antisocial personality disorder impeded her ability to care for the child, who has profound special needs, and she admitted that she regularly sent him to school dirty, unkempt, smelling of urine, and with a sore on his head, when he was in her care.

The court properly determined that it is in the child's best interests to terminate respondent's parental rights given her inability to overcome her deficiencies as a parent in the approximately three years since placement.

We have considered respondent's additional arguments and find them unavailing.

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

ENTERED: MAY 17, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7148-
7149 Women's Interart Center, Inc., Index 109017/07
Plaintiff, 113088/07

-against-

New York City Economic Development Corporation(EDC), et al.,
Defendants.

- - - - -

Women's Interart Center, Inc.,
Plaintiff-Respondent,

-against-

Clinton Housing Development Fund Corp.,
Defendant-Appellant,

City of New York,
Intervenor-Appellant.

_____

Rappaport Hertz Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for Clinton Housing Development Fund Corp., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for municipal appellant.

Bierman & Palitz, LLP, New York (Mark H. Bierman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 23, 2010, modified, on the law, to vacate the grant of partial summary judgment to plaintiff and the declarations in its favor and grant defendant Clinton Housing Development Fund Corp's motion to the extent of declaring that Clinton Housing Development Fund Corp. has standing pursuant to Real Property Actions and Proceedings Law 721(10) to commence eviction proceedings with regard to plaintiff's tenancy at 500 West 52nd Street and 549 West 52nd Street, and otherwise

affirmed, without costs. Appeal from order, same court (Cynthia S. Kern, J.), entered March 11, 2011, dismissed, without costs, as taken from a nonappealable order.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Dianne T. Renwick
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

7148-
7149
Index 109017/07
113088/07

_____x

Women's Interart Center, Inc.,
Plaintiff,

-against-

New York City Economic Development
Corporation(EDC), et al.,
Defendants.

- - - - -

Women's Interart Center, Inc.,
Plaintiff-Respondent,

-against-

Clinton Housing Development
Fund Corp.,
Defendant-Appellant,

City of New York,
Intervenor-Appellant.

_____x

Defendant Clinton Housing Development Fund Corp. appeals from the order of the Supreme Court, New York County (Karen S. Smith, J.), entered August 23, 2010, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment dismissing the complaint

and for an order severing the summary holdover proceedings and transferring them to Civil Court, and, upon a search of the record, granted partial summary judgment to plaintiff and declared in plaintiff's favor. Intervenor appeals from an order of the same court (Cynthia S. Kern, J.), entered March 11, 2011, which, to the extent appealed from, denied its purported motion to renew.

Rappaport Hertz Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz, Howard Levine and Milan Dey-Chao of counsel), for Clinton Housing Development Fund Corp., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris, Pamela Seider Dolgow and Susan M. Shapiro of counsel), for municipal appellant.

Bierman & Palitz, LLP, New York (Mark H. Bierman of counsel), for respondent.

RENWICK, J.,

The Women's Interart Center (WIC), a non-for-profit cultural organization in Manhattan's Hell's Kitchen, commenced two separate actions with regard to properties it leases from the City of New York (the City) and which it intends to purchase and develop into rehearsal studios and a cultural center. The two actions have been consolidated for a joint trial. In the first action, WIC challenges the City's termination of a contract to sell the subject properties to WIC. In the second action, WIC challenges Clinton Housing Development Fund Corp.'s (CHDFC) attempt to evict WIC from the same properties after the former acquired a putative "net lease" of the same property from the City. This appeal involves a ruling in WIC's favor in the second action, declaring that CHDFC lacks standing to commence eviction proceedings against WIC.

WIC has been involved since 1971 with theatrical productions and the support of visual artists, writers, and smaller theatrical companies, as well as others. In July 1971, WIC began to lease space at 549 West 52nd Street from the City. The lease is month to month. In the past, WIC has used its space at 549 West 52nd Street as a theater and art gallery, and for workshops, among other things. Due to the terrible condition of the building, however, WIC ceased presenting public programming

there. On January 25, 1996, WIC leased part of the second floor at 500 West 52nd Street from the City to be used as a theater. It is WIC's sole venue for public programming.

Beginning in the 1990s, WIC sought to purchase the building at 549 West 52nd Street, and an adjacent City-owned property consisting of vacant garages, for a nominal sum to create a cultural facility. The building's owner, the Department of Housing Preservation and Development (HPD), was to transfer ownership to defendant New York City Economic Development Corp. (EDC) which would then sell it and the adjacent property to WIC for two dollars. In August 2001, EDC and WIC executed a contract, which included a development plan, for the sale of the two City-owned parcels, each for one dollar. Reportedly, when all the conditions had not been met, EDC terminated the contract and the project in December 2002.

In April 2003, WIC commenced a federal action, raising both federal and state claims against the City and others. The two federal claims were a First Amendment retaliation claim and an equal protection claim. After completion of discovery, in an order dated May 23, 2005, the district court granted the defendants summary judgment dismissing WIC's federal claims. The district court declined to exercise supplemental jurisdiction over the state constitutional and common-law claims and thus

dismissed those claims for lack of subject matter jurisdiction, but without prejudice. WIC then commenced the first action (index No. 109017-07) against EDC, for breach of contract, and the City, for tortious interference with WIC's contract with EDC.

Meanwhile, on or about April 15, 1999, CHDFC and the City entered into an agreement that they called a "net lease," which was extended on October 11, 2007. The agreement covers multiple buildings, including 500 West 52nd Street and 543-549 West 52nd Street. The term of each contract is month-to-month. The rent paid by CHDFC for the entire term is one dollar and "such other amounts as shall be due and payable to [the City] hereunder." Each agreement states, "The sole and exclusive relationship of [the City] and [CHDFC] hereunder shall be that of landlord and tenant. [CHDFC] is not and shall not be deemed to be an agent . . . of [the City] by virtue of this Net Lease." Each contract says that CHDFC shall operate and manage the premises.

On March 31, 2006, the City sent WIC a letter regarding 500 West 52nd Street, stating, "effective May 1, 2006, [CHDFC] will assume management of the property that you currently lease from the Department of Housing Preservation and Development" and instructing WIC to send rent payments to CHDFC. On March 29, 2007, the City sent WIC a similar letter regarding 549 West 52nd Street for the period April 1, 2007 onward.

In August and September 2007, CHDFC informed WIC that it was terminating the latter's tenancies at 500 and 549 West 52nd Street. On March 24, 2008, CHDFC commenced holdover proceedings against WIC in Civil Court with respect to both buildings. On the same day, WIC commenced the second action in Supreme Court, seeking a declaratory judgment and a permanent injunction.

CHDFC then answered and asserted affirmative defenses. Supreme Court removed CHDFC's landlord-tenant petitions from Civil Court and consolidated them into the second action. After discovery, CHDFC moved for summary judgment dismissing the complaint and remanding the landlord-tenant cases to Civil Court. On August 19, 2010, the court denied CHDFC's motion for summary judgment in the second action. Instead, the court declared that WIC was entitled to a declaratory judgment that CHDFC lacked authority to terminate or otherwise encumber the WIC tenancies at issue here because the "Net Lease," the April 15, 1999 agreement between the City, acting through HPD, and CHDFC, constituted merely a "management agreement" respecting the subject WIC premises. This appeal followed.

CHDFC argues that Supreme Court erred when it declared that it lacked standing to institute an eviction proceeding against WIC. CHDFC contends that the agreement between it and the City is by its terms a net lease and not a contract for management

services. WIC, however, argues that the agreement, although designated as a "net lease," is by its terms a contract for management services. If the proof supports WIC's position, CHDFC's action against WIC would be illegal because as an agent of the landlord, it would not have standing to maintain an eviction proceeding (*see* RPAPL 721; *see also Key Bank of N.Y. v Becker*, 88 NY2d 899 [1996]).

To determine whether the underlying agreement is a net lease or a contract for management services, its contents must be examined in order to see what interest the parties intended to pass (*Statement, Inc v Pilgrim's Landing*, 49 AD2d 28, 33 [1975]). The mere fact that the agreement is referred to as a "net lease" does not transform it into one (*Feder v Caliguira* 8 NY2d 400, 404 [1960]; *Matter of Davis v Dinkins*, 206 AD2d 365, 366 [1994], *lv denied* 85 NY2d 804 [1995]; *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1994]; 74 NY Jur 2nd Landlord and Tenant § 2). Rather, the court must look to the rights and obligations that the agreement confers to determine its true nature (*American Jewish Theater,* 203 AD2d at 156; *Feder,* 8 NY2d at 404).

The critical question in determining the existence of a lease establishing a landlord-tenant relationship is whether exclusive control of the premises has passed to the tenant (*see*

Feder, 8 NY2d at 404; *Matter of Davis,* 206 AD2d at 366; *American Jewish Theatre,* 203 AD2d at 156; *Ferrer v Dinkins, 218 AD2d 89, 93 [1996], lv denied, 88 NY2d 801 [1996]; Slutzky v Cuomo*, 114 AD2d 116, 118 [1986], *appeal dismissed*, 68 NY2d 663 [1986]). If this control has passed, even though the use is restricted by limitations or reservations, a landlord-tenant relationship is established (*see Feder,* 8 NY2d at 404; *Layton v A. I. Namm & Sons, Inc*., 275 App Div 246, 249 [1949], *affd* 302 NY 720 [1951]). From our review of the record, we are satisfied that no genuine issue of fact is presented as to whether this control was passed. It is clear from the record that CHDFC was granted sufficient control to give rise to a landlord-tenant relationship.

A review of some of the terms contained in the "net lease" demonstrates that CHDFC had exclusive control and possession of the leased premises. Like a typical commercial net lease, the agreement imposes the responsibility for all expenses arising from the property, including the costs of repairs of every nature, utilities and insurance, upon the tenant (*see First Fed. Sav. & Loan Assn. Of Rochester v Minkoff*, 176 AD2d 1049, 1051 [1991]; *Nextel of N.Y. v Time Mgt. Corp*., 297 AD2d 282, 283 [2002]). CHDFC also bears the cost of expenses of leasing a portion of the premises to residential and commercial tenants. In addition, CHDFC agreed to indemnify and defend the City for

any damages or injury that occurred to any property or person because of its use of the leased premises. Finally, CHDFC was granted sole authority to maintain legal actions against month-to-month tenants, like WIC, for the collection of rents and evictions.

The City did reserve to itself certain rights regarding the leased premises, but these reserved rights were completely in line with the type of reservations that are permitted in a lease (*see Statement, Inc.*, 49 AD2d at 331; *Schlesinger v Rockefeller Ctr, Inc.*, 119 AD2d 462 [1986]). For instance, the City reserved to itself the right to inspect the common area of the premises at any time and the other areas at reasonable times, as well as to examine and audit the books and records pertaining to the lease premises. It also reserved to itself the rights to cure a default in CHDFC's obligations that "creates a risk of immediate harm to persons or property." Thus, the City's right of entry to the leased premises was limited strictly to those circumstances that were covered by the terms of the lease (*see American Jewish Theatre, supra*, 203 AD2d at 156; *Miller v City of New York*, 15 NY2d 34, 38 [1964]).

According to the type of functions CHDFC is required to provide under the agreement and the limited qualitative restrictions placed on its authority, we find that the total

nature of the agreement reflects that the parties entered into a lease agreement rather than a contract for management services. Indeed, the agreement does not subject CHDFC to close supervision by the City. Nor does it narrowly circumscribe CHDFC's authority over the building or its use of the rent collected.

In contrast, a management contract is defined merely as a service contract (*see* General Obligations Law § 5-903), pursuant to which a manager essentially collects rent and provides day-to-day management of the building (*see e.g. Harris v Adams & Co. Real Estate*, 62 Misc 2d 749, 753 [Civ Ct, NY County 1970]). While property management responsibilities are also part and parcel of net leases, a managing contract does not delegate such an extensive dominion and control over the premises, as delegated here, to constitute a lease (*see Slutzky,* 114 AD2d at 118).

Accordingly, the order of the Supreme Court, New York County (Karen S. Smith, J.), entered August 23, 2010, which, to the extent appealed from as limited by the briefs, denied defendant CHDFC's motion for summary judgment dismissing the complaint and for an order severing the summary holdover proceedings and transferring them to Civil Court, and upon a search of the record, granted partial summary judgment to plaintiff WIC and declared in its favor, should be modified, on the law, to vacate the grant of partial summary judgment to plaintiff and the

declarations in its favor, and to grant CHDFC's motion to the extent of declaring that CHDFC has standing pursuant to Real Property Actions and Proceedings Law 721(10) to commence eviction proceedings with regard to WIC's tenancy at 500 West 52nd Street and 549 West 52nd Street, and otherwise affirmed, without costs. The intervenor City's appeal from the order of the same court (Cynthia S. Kern, J.), entered March 11, 2011, which, to the extent appealed from, denied its purported motion to renew, should be dismissed, without costs, as taken from a nonappealable order.

All concur.

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

ENTERED: May 17, 2012

CLERK