SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 11, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Saxe, Gische, JJ.

8494 In re Carlos Gutierrez, Index 402789/10
Petitioner,

-against-

John B. Rhea, etc., et al.,
Respondents.

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The Bronx Defenders, Bronx (Runa Rajagopal of counsel), for petitioner.

Kelly D. MacNeal, New York (Melissa Renwick of counsel), for respondents.

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In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul Wooten, J.], entered July 11, 2011), to annul the determination of respondent New York City Housing Authority (NYCHA), dated June 2, 2010, which approved the decision of the Hearing Officer denying petitioner's remaining-family-member grievance, the petition is unanimously granted, without costs, the determination is annulled, and the matter is remanded for further proceedings in accordance with this decision.

Petitioner Carlos Gutierrez (Carlos) seeks to succeed to the tenancy of his late mother, Amparo Gutierrez (Amparo), as a remaining family member (RFM) in an NYCHA apartment. At the time of her death, Amparo was the tenant of record at 911 FDR Drive, apartment 5A, in the Jacob Riis Houses, a public housing complex owned and operated by NYCHA. Amparo had lived in the subject apartment for approximately 50 years, and throughout her tenancy, paid her rent on time and was in good standing with her landlord. She and her husband raised her four children, including Carlos, in the apartment. Carlos moved out in January 1975, when he was approximately 21.

On September 13, 2004, the then 74-year-old Amparo, who was widowed in 2001, wrote to NYCHA, requesting that Carlos be permitted to move back in with her to take care of her. Her letter request described her "poor health and various medical needs which include[d] congenital heart failure, diabetes, remission from cancer and the need for an oxygen tank 24 hours a day . . . requir[ing] that she depend upon others to assist her in the simplest tasks." It continued, "If my son were able to stay in my house this would be a great help and a tremendous relief and comfort to me."

Amparo then completed the required NYCHA form request to add

a tenant to a lease (*see* 24 CFR 966.4[a][1][v]). The form was dated September 23, 2004, and signed by both mother and son. That year, Carlos was 50 years old, psychiatrically disabled, and receiving Supplemental Security Income as his sole source of income. He provided NYCHA with a birth certificate, a copy of his social security card, proof of income, and proof of his prior address.

NYCHA did not act on Amparo's application within 90 days, as required by its internal rules (*see* NYCHA Management Manual, ch IV, Occupancy, subdivision IV, Changes in Family Composition). However, Amparo informed the management office that Carlos had moved in with her, and she listed Carlos and his income on her 2003, 2004, 2005, and 2006 income affidavits for the apartment. She also named him in the section of the affidavit of income requiring a description of "family composition" as a person living with her in her apartment. NYCHA's notes indicate that Amparo went to the management office on September 16, 2005 regarding an "unauthorized occupancy," but that "NYCHA told [Amparo] in 2004 that everything was ok."

On July 13, 2006, NYCHA conducted a criminal background check on Carlos, and found that he had a 10-year-old burglary conviction. Although, under NYCHA's internal rules, Amparo

should have been given the opportunity to show that her son was rehabilitated (*see* Applications and Tenancy Administration Department Manual, ch V[F][2] "Department Manual"), NYCHA made no inquiry of Amparo or Carlos in 2006 as to Carlos's conviction, and gave neither of them an opportunity to present evidence of rehabilitation at that time.

Having deemed Carlos ineligible due to a criminal conviction, a Housing Manager was required to notify Amparo that he was required to vacate the premises within 15 days (General Management Directive-3716 at VIII[B][1]), and then to initiate Termination of Tenancy proceedings if Carlos failed to leave (*id.* at VIII[B][2]). However, no one told Amparo or Carlos that Carlos had to vacate the premises in July of 2006, and no termination proceeding was initiated. In fact, the record contains no evidence that the Housing Authority issued any oral or written decision on the 2004 application to add Carlos to the lease.

On May 12, 2007, Amparo died. Carlos promptly notified the Housing Authority of his mother's death, and he continued to pay the monthly rent for the apartment. On July 30, 2007, Carlos filed a second request to be added to the lease; the request had been signed by Amparo on March 26, 2007. NYCHA issued a written

order denying the application on August 9, 2007, on the grounds that: (1) Amparo had died prior to its filing; and (2) Carlos was ineligible to gain any rights to his mother's tenancy until May 28, 2008. Assuming Carlos received this notice, it was the first indication he received that there was a problem with his tenancy.

On February 5, 2008, NYCHA commenced a holdover proceeding against Carlos in Civil Court[1]. The next day Carlos met with a project manager at the housing complex to claim RFM status. The project manager informed him that he was not entitled to stay in the apartment as an RFM because he was not part of the family composition at the time of his mother's death.

NYCHA's notes from this meeting state that Amparo's first request to add her son to her tenancy was denied because Carlos was ineligible until May 28, 2008. They state that Amparo's second request was denied because it was submitted after her death. By letter dated April 10, 2008, NYCHA notified Carlos that he had until April 24, 2008 to submit documentation, or request a personal interview with Borough Management, to support his RFM application. The District Office upheld the project manager's disposition, and Carlos filed an administrative appeal.

[1]The proceeding was discontinued on March 26, 2008, due to defective papers.

Carlos was appointed an attorney and a guardian ad litem (due to his psychiatric disability) for his administrative hearing, which was held over four days between January 2009 and February 2010. He submitted documents supporting his mother's need for his care, including a letter from a physician at Bellevue Hospital, dated August 17, 2004, detailing Amparo's medical condition; and letters from Amparo and Amparo's son-in-law, dated September 13, 2004 and October 2, 2005, emphasizing her poor health and the need for Carlos to stay with her. Jacqueline Quiros, Carlos's sister, testified at the hearing in support of her brother, stating that she had helped Amparo submit a permanent permission request in 2004 or 2005, to which Amparo never received any response.

Carlos submitted substantial documentary evidence in support of his tenancy, including compelling evidence of rehabilitation. In 1996, while drunk, Carlos was found trespassing in a hospital, was arrested, and pleaded guilty to third-degree burglary. While in prison, he became sober. Multiple sources confirmed that he retained his sobriety up until the time of the hearing. Carlos was diagnosed with bipolar disorder for the first time in prison, and in 2001 he was transferred to the Manhattan Psychiatric Institute, where he had continued his treatment without incident.

The record contains letters from social workers and a physician at Manhattan Psychiatric Center, dated March 23, 2007, November 30, 2008, and June 22, 2009, stating that Carlos had been psychiatrically stable for many years, was "100% compliant with all treatment recommendations," and continued to meet regularly with social workers and a psychiatrist, who prescribed and monitored his use of psychotropic medications. The record also contains a "petition," signed by about 23 tenants of Jacob Riis Houses, indicating their support for Carlos as a good neighbor.

The Hearing Officer denied Carlos RFM status. She held that NYCHA "belatedly but properly disapproved" Amparo's September 23, 2004 permanent permission request on July 27, 2006, when a criminal background check revealed Carlos's 1996 burglary conviction and made him "ineligible for residence until May 28, 2008."

Carlos then commenced this article 78 proceeding. He asserted that NYCHA's failure to timely respond to Amparo's 2004 permanent permission request was arbitrary and capricious, an abuse of discretion, and a violation of his due process rights. Among other things, he asserted that NYCHA's failure to give him an opportunity to demonstrate his rehabilitation from his 1996 burglary conviction was a violation of NYCHA rules and a

violation of his rights as a prospective public housing tenant.

In its answer, NYCHA denied the material allegations of the amended petition and asserted various defenses, including that Carlos cannot invoke estoppel against the agency; that his payment of rent does not vest him with RFM status; and that he lacks standing to challenge the denial of Amparo's permanent permission request.

On the issue of standing, the law is settled that a family member has a right to bring an article 78 proceeding to challenge a denial of succession rights to a public housing apartment (*see Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486, 486 [1st Dept 2010]; *Via v Franco*, 223 AD2d 479 [1st Dept 1996]).

We annul NYCHA's determination on the ground that it is not supported by substantial evidence. While the agency correctly asserts that Carlos's RFM status is jeopardized by the fact that he never received written permission to be added to his mother's lease while she was alive, the record is plain that Amparo took every step to have her son added to her lease, as required by 24 CFR 966.4(a)(1)(v), and it is undisputed that NYCHA violated a number of its own internal rules by determining that Carlos's 1996 conviction precluded him from joining Amparo's tenancy until May of 2008, without notifying Amparo or Carlos, and without

giving them the opportunity to present evidence of Carlos's rehabilitation. Furthermore, neither Amparo nor Carlos was aware that Carlos had been deemed an "ineligible" occupant, as NYCHA failed to institute proceedings to have him removed within 15 days of its decision, which, at least, would have alerted them to the problem (*see Matter of Frick v Bahou*, 56 NY2d 777, 778 [1982]["rules of an administrative agency, duly promulgated, are binding upon the agency as well as upon any other person who might be affected"]).

Finally, while estoppel is not available against a government agency engaging in the exercise of its governmental functions (*Advanced Refractory Tech. v Power Auth. of State of N.Y.*, 81 NY2d 670, 677 [1993]), we have held that NYCHA's knowledge that a tenant was living in an apartment for a substantial period of time can be an important component of the determination of a subsequent RFM application (*Matter of McFarlane v New York City Hous. Auth*, 9 AD3d 289, 291 [1st Dept 2004], citing 42 USC § 1437 [a][1][C]). In addition, Carlos has had no problems in the building or the neighborhood since moving back home in 2004.

Carlos and Amparo were consistently open and honest with NYCHA, and they followed its rules. Carlos did not conceal the

fact of his arrest in 1996. He provided extensive support for the conclusion that he is vigilant in addressing all of the issues related to his mental illness and his substance abuse. The rent for the apartment has been paid by Amparo and Carlos consistently in a timely manner.

Because neither Carlos nor his mother was made aware of the 2006 criminal background check (or any conclusions drawn therefrom at the time by NYCHA), he was not given an opportunity to be heard on the crucial issue of his rehabilitation "at a meaningful time and in a meaningful manner" (*Mathews v Eldridge*, 424 US 319, 333 [1976] [internal quotation marks omitted]). We do not dispute that NYCHA has broad discretion to restrict the occupancy of its apartments and to enact an extensive set of procedural and substantive requirements to be met in the process of selecting its tenants. In the circumstances presented, however, Amparo was entitled to notice of the fact that the Housing Authority had a problem with her son's application (namely, his conviction), so that she could provide evidence of his rehabilitation (*see Matter of Miller v New York City Hous. Auth.*, 279 AD2d 349, 350 [1st Dept 2001], *lv denied* 97 NY2d 602 [2001]).

Because Amparo was deprived of the opportunity to which she

was entitled to compile and present evidence of her son's rehabilitation, NYCHA's purported denial of her 2004 request to add Carlos to her household was not supported by substantial evidence.

However, on the extant record, we cannot ascertain whether this almost 60-year-old, psychologically disabled man, who presented evidence of continuing psychiatric and substance abuse counseling, presently poses a threat to the other tenants. Accordingly, we remand to NYCHA for reconsideration of that narrow issue.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8925 Manuel Angeles, Index 100091/09
Plaintiff-Respondent,

-against-

Jeffrey A. Aronsky,
Defendant-Appellant.

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Kaufman, Borgeest & Ryan LLP, New York (Edward J. Guardaro of counsel), for appellant.

Sullivan, Papain, Block, McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 3, 2012, which denied defendant's motion for summary judgment dismissing the complaint alleging legal malpractice and breach of contract, unanimously modified, on the law, to grant the motion as to the cause of action for breach of contract, and otherwise affirmed, without costs.

Plaintiff Manuel Angeles commenced this legal malpractice and breach of contract action against defendant Jeffrey A. Aronsky alleging that defendant negligently represented plaintiff in his underlying premises liability action arising from an attack on plaintiff in the lobby of an apartment building. Plaintiff also asserts that defendant breached the retainer agreement.

On December 7, 2007, at approximately 3:15 p.m., plaintiff entered the front entrance of the apartment building where he lived and, immediately upon reaching the lobby, was hit in the jaw. Although there were no witnesses to the actual attack, a neighbor, Teresa Luna, who was standing outside the building around the time of the incident, saw three men run out the front entrance. Two of the men were holding baseball bats. Luna, who had lived in the building for about five years, did not recognize any of the men. Plaintiff also did not recognize the men, whom he observed briefly before he lost consciousness following the assault.

On the day of the incident, plaintiff admits that the door locked behind him when he left the building around 2:55 p.m. and that he had to unlock it with his key when he returned a short time later. On the side of the building there is a door to the laundry room, which is located in the basement. This door remains unlocked between 9:00 a.m. and 6:00 p.m. From the laundry room, a person can access the lobby without a key by using the elevator.

Shortly after the attack, plaintiff retained defendant to represent him in a potential personal injury case. According to defendant, an investigator from his office initially interviewed

plaintiff at the hospital. Defendant asserts that he later spoke with plaintiff over the phone to review the information plaintiff had given the investigator. Plaintiff told defendant that the front door was locking properly on the day he received his injuries and mentioned no other entrances. Defendant accepted plaintiff's statements concerning the security of the building, and did not send an investigator to inspect the premises or visit the premises himself. Also, he did not interview the superintendent.

Although a settlement agreement was reached with the owner of the building prior to the commencement of any personal injury action, plaintiff commenced a legal malpractice action against defendant, alleging, inter alia, that he negligently investigated plaintiff's premises liability claim. Defendant moved for summary judgment dismissing plaintiff's complaint and the motion court denied the motion.

For a claim for legal malpractice to be successful, "a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the

attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citation omitted]). A client is not barred from a legal malpractice action where there is a signed "settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011] [internal quotation marks omitted], quoting *Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]).

Plaintiff, a waiter with a sixth grade education, retained defendant to represent him in a premises liability claim, relying on defendant's expertise as a personal injury attorney to evaluate his claim and provide advice on the case. Plaintiff asserts that defendant only contacted him once after being retained, and only to ask him to go into defendant's office to sign paperwork for the case. Plaintiff, an unsophisticated client with no legal experience, states that defendant did not explain to him the strengths and weaknesses of his claim and did not do a proper investigation. Defendant does not dispute that he never went to the building or spoke to the superintendent, but argues that he fulfilled his obligation by conveying the settlement offer to plaintiff and that plaintiff never told him

about any entrance other than the front door.

In this specific case, given plaintiff's lack of sophistication and his limited education, defendant's statement that he never conducted any investigation, except for speaking to plaintiff for a very limited time, raises a question of fact as to whether defendant adequately informed himself about the facts of the case before he conveyed the settlement offer. Furthermore, defendant says he told plaintiff, when he conveyed the settlement offer, that it was a "difficult liability case." It is difficult to understand, on the record before us, how he made that assessment without going to the building, or speaking to the superintendent. Because the evidence on a defendant's summary judgment motion must be viewed in the light most favorable to plaintiff (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), we find there are questions of fact as to whether the attorney failed to exercise the ordinary reasonable skill appropriate under the circumstances.

The motion court properly found that plaintiff raised a question of fact as to whether the underlying action would have succeeded. To prevail on a premises liability claim, a plaintiff does not have "to exclude every other possible" explanation as to how the assailants entered the building, but only present

"evidence [that] renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]). In *Bello v Campus Realty, LLC* (99 AD3d 638, 639 [1st Dept 2012]), this Court found an issue of fact as to how the assailants entered the building where the plaintiff did not recognize her attackers as fellow tenants and the men were dressed as police officers. Similarly, in *Chunn v New York City Hous. Auth.* (83 AD3d 416, 417 [1st Dept 2011]), a factual issue was presented as to whether it was more likely than not that plaintiff's assailants were intruders where the men made no attempt to conceal their faces.

Here, plaintiff did not recognize his assailants. Further, a neighbor, Teresa Luna, who had lived in the building for several years, saw three men she did not recognize running out of the building holding bats around the time of the attack.[2] The men made no attempt to hide their faces during or after the attack. Thus, the record contains sufficient facts to support a reasonable conclusion that plaintiff was assaulted by intruders

[2]Luna conveyed the information to plaintiff's girlfriend, but the girlfriend did not disclose it to defendant before the case was settled.

(*see Bello*, 99 AD3d at 639; *Chunn*, 83 AD3d at 417).

The breach of contract claim should have been dismissed as duplicative of the legal malpractice claim (*see Lusk v Weinstein*, 85 AD3d 445, 445-446 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Richter, Gische, JJ.

9426 One Twelve, Inc., et al., Index 650762/11
Plaintiffs-Appellants,

-against-

Sirius XM Radio Inc.,
Defendant-Respondent.

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Hughes Hubbard & Reed, LLP, New York (Seth D. Rothman of counsel), for appellants.

Kramer Levin Naftalis & Frankel, LLP, New York (Gary P. Naftalis of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 16, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

We agree with the motion court that plaintiffs are not entitled to additional performance-based compensation under the unambiguous agreement between plaintiffs and defendant's predecessor, Sirius Satellite Radio Inc. Looking solely to the plain language used by the parties within the four corners of the agreement (*see Kass v Kass*, 91 NY2d 554, 566 [1998]), the

disputed term "Sirius subscribers," by which plaintiffs' performance-based compensation was measured, did not include subscribers to XM Radio, a wholly owned subsidiary which defendant acquired by merger, even though the merger had been anticipated within the agreement.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9757 In re Aurea Ortiz, Index 113043/11
Petitioner,

-against-

Gladys Carrión, etc., et al.,
Respondents.

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Susan Pepitone, Forest Hills, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for Gladys Carrion, respondent.

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Determination of respondent Office of Children and Family Services, which, after a fair hearing, affirmed the determination of respondent Administration for Children's Services denying petitioner's application for exceptional foster care benefits pursuant to 18 NYCRR 427.6 retroactive from June 29, 2008 to April 8, 2010, or for special foster care benefits pursuant to 18 NYCRR 427.6 retroactive from June 29, 2008 to April 23, 2009, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered March 22, 2012, dismissed, without costs.

The determination to deny petitioner's application is supported by substantial evidence (*see generally 300 Gramatan*

Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181 [1978]). The record shows that petitioner failed to meet the requisite standards for the enhanced benefits for the relevant time periods (*see* 18 NYCRR 427.6). Petitioner's arguments, that the two fair hearings were conducted in a manner that denied her due process rights and in violation of the procedural requirements of 18 NYCRR 358-5.6(b), were not raised at the administrative level or in Supreme Court, and thus, they are unpreserved for review by this Court (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Green v New York City Police Dept.*, 34 AD3d 262 [1st Dept 2006]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9758 In re April G.,
Petitioner-Respondent,

-against-

Duane M.,
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about May 16, 2012, which affirmed the Support Magistrate's finding of willfulness, and sentenced respondent-appellant father to incarceration for a period not to exceed four months with a purge amount set at $5,000.00, unanimously affirmed, without costs.

Although the father has paid the purge amount and completed his sentence, this appeal "is not academic, in light of the enduring consequences which might flow from the finding that he violated the order of support" (*Matter of Saintime v Saint Surin*, 40 AD3d 1103, 1104 [2d Dept 2007]).

The father, however, failed to rebut the prima facie evidence of his willful violation of the order of support (*see* Family Ct Act § 454[3][a]). Indeed, the father failed to present credible evidence that his medical condition renders him unable

to provide support for the subject child, or that he is financially unable to pay (*compare Matter of Ferrara v Ferrara*, 52 AD3d 599, 600 [2d Dept 2008], *lv denied* 11 NY3d 706 [2008], *with Matter of John T. v Olethea P.*, 64 AD3d 484, 485 [1st Dept 2009]).

To the extent the father argues that the court failed to settle the record on appeal, he has failed to show that evidence exists to remedy the deficiencies in his proof.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9759 Jhofre Reinoso, Index 7504/07
Plaintiff-Appellant,

-against-

Denise Biordi, et al.,
Defendants,

Biordi Construction Corp.,
Defendant-Respondent.

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Pollack Pollack Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Camacho Mauro Mulholland, LLP, New York (Murad X. Agi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 18, 2012, which, inter alia, granted the motion of defendant Biordi Construction Corp. (BCC) for summary judgment dismissing the Labor Law and common-law negligence claims asserted against it, unanimously modified, on the law, the motion denied as to the Labor Law § 240 and § 241(6) claims, and otherwise affirmed, without costs.

The record demonstrates that dismissal of the Labor Law § 240 and § 241(6) claims was not warranted. Although the subject property is a single-family home subject to the exemption for "owners of one and two-family dwellings who contract for but

do not direct or control the work" (Labor Law § 240(1); *see Affri v Basch*, 13 NY3d 592, 595 [2009] ["(a) similar homeowner's exemption is found in Labor Law 241(6)"]), that exemption does not apply to those homeowner's agents or general contractors who have authority to control the work on behalf of the owner (*see Kopacz v Airco Carbon, Div. of Airco, Inc.*, 104 AD2d 722, 723 [4th Dept 1984]; *Weisner v Builders Sq.*, 164 Misc 2d 623, 625-626 [Sup Ct, Erie County 1995]). Here, there is evidence that BCC, and not Frank Biordi, hired plaintiff's employer inasmuch as plaintiff's employer stated that it was hired by BCC and that it was paid by checks bearing BCC's address. There was also a dumpster at the worksite bearing BCC's name. Such evidence, when taken together, raises triable issues as to whether BCC was acting as an agent of the homeowners (the Biordis). The lack of evidence that BCC directed or controlled work at the site, is not determinative because "direct control and supervision is not a prerequisite to incurring liability under section 240. Rather, it is the authority to supervise or co-ordinate the work that is essential" (*Parsolano v County of Nassau*, 93 AD2d 815, 817 [2d Dept 1983] [internal citations omitted]).

Plaintiff's claims under Labor Law § 200 and common-law negligence against BCC were properly dismissed. Liability under

Labor Law § 200 or for common-law negligence arises where the injury derives from the method or manner of work, and the owner/contractor directed or controlled the work, or from a dangerous condition at the worksite, of which the owner/ contractor had notice (*see generally Rizzuto v L.A. Wegner Contr. Co.*, 91 NY2d 343, 352-353 [1998]).

Here, Frank Biordi and his brother testified that they only performed work on the home on weekends, while the tradesmen normally worked Monday through Friday. In addition, plaintiff testified that he first began working at the site on a Monday; that he only received directions from, and reported to his employer, nonparty Goros Construction; that he and his fellow employees were the only workers present from the day he started until two days later, when his accident occurred; and that they had assembled the scaffolding from which he fell. Thus, there

was no evidence that BCC controlled the method or manner of work nor that BCC could have known about any dangerous condition created by Goros between the day they commenced work, and the day of plaintiff's accident.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9760 Vivian Kleinerman, et al., Index 604135/07
Plaintiffs-Respondents,

-against-

245 East 87 Tenants Corp., et al.
Defendants-Appellants.

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Braverman & Associates, P.C., New York (Scott S. Greenspun of counsel), for appellants.

Brian M. Levy, New York, for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 27, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the causes of action for breach of fiduciary duty, aiding and abetting such breach, injunction as against defendants other than the cooperative corporation insofar as it is related to relocating plaintiffs' gas line, and unjust enrichment, and the claims for punitive damages and attorneys' fees, unanimously modified, on the law, to grant the motion with respect to the cause of action for breach of fiduciary duty as against the cooperative corporation and the injunction as against all defendants other than the cooperative corporation, and otherwise affirmed, without costs.

Plaintiffs, cooperative shareholders seeking to renovate their unit, allege that the cooperative corporation and its individual board members condoned the superintendent's solicitation of kickbacks by improperly stopping certain renovations in the face of plaintiffs' accusations against him. Issues of fact exist, including whether the board members had knowledge of the superintendent's alleged conduct, whether the coop corporation stopped plaintiffs' renovations in good faith based on the interests of the coop, and whether plaintiffs were accorded disparate treatment (*see Bryan v West 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]). As to the unjust enrichment cause of action, there is an issue of fact whether the superintendent solicited kickbacks or merely accepted gratuitous payments. The punitive damages claim is viable in light of the tort cause of action for breach of fiduciary duty; a public wrong is not required (*see Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401 [1st Dept 2009]). Dismissal of the claim for attorneys' fee would be premature under the circumstances.

However, a corporation does not owe a fiduciary duty to its shareholders (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 54 [1st Dept 2012]; *Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012]). As to the injunction cause of action, only the

coop corporation, as the "Lessor," is authorized under the proprietary lease to consent to plaintiffs' proposed renovations (*see Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 57-58 [1st Dept 2012]).

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

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9761- Index 110757/10
9762
9763 William Carroll, etc.,
Plaintiff-Appellant,

-against-

Mahir Radoniqi, et al.,
Defendants-Respondents.

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Danzig Fishman & Decea, White Plains (Thomas B. Decea of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Gil M. Coogler of counsel), for Mahir Radoniqi, respondent.

Braverman & Associates, P.C., New York (Tracy Peterson of counsel), for The Charles House Condominium, respondent.

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Order, Supreme Court, New York County (Judith J. Gische J.), entered October 25, 2011, which granted defendant Charles House Condominium's motion for summary judgment dismissing the breach of duty of loyalty claim brought on behalf of the condominium, and denied plaintiff's motion to compel discovery, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 19, 2012, which, upon reargument of the condominium's motion, adhered to the original determination, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered September 12, 2012, which granted

defendant Mahir Radoniqi's motion for summary judgment dismissing the private nuisance cause of action against him, and denied plaintiff's motion to compel discovery, unanimously affirmed, with costs.

The condominium made a prima facie showing that its board of directors' decisions and actions related to the allegations of misconduct on the part of its employee, Radoniqi, were within the scope of its authority and were made in good faith, and therefore are entitled to deference under the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). Plaintiff failed to raise a triable issue of fact, as he failed to submit any evidence to substantiate his allegations of bad faith (*compare Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 36-37 [1st Dept 1999], *with Louis & Anne Abrons Found. v 29 E. 64th St. Corp.*, 297 AD2d 258 [1st Dept 2002]).

Radoniqi made a prima facie showing that his renovation work at the premises abutting plaintiff's unit did not amount to a private nuisance, and plaintiff failed to raise a triable issue of fact. Plaintiff had no personal knowledge of the specific types of work Radoniqi performed, and his remaining allegations were simply too speculative and conclusory to have merit (*see*

Cedar & Wash. Assoc., LLC v Bovis Lend Lease LMB, Inc., 95 AD3d 448, 449 [1st Dept 2012]). Moreover, plaintiff never presented evidence or "pleaded facts sufficient to demonstrate the diminution of value or use of the property, which is necessary for a measurement of damages" on a claim for nuisance (*see Board of Mgrs. of Waterford Assn., Inc. v Samii*, 73 AD3d 617, 618 [1st Dept 2010]).

The court properly decided the motions for summary judgment, despite plaintiff's claimed need for further discovery, since plaintiff offered only an unsubstantiated hope of discovering information relevant to his claims (*see* CPLR 3212[f]; *Leonard v Gateway II, LLC*, 68 AD3d 408, 410 [1st Dept 2009]).

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 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9764 The People of the State of New York, Ind. 5738/10
Respondent,

-against-

Tyrone Hunter,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Richard D. Carruthers, J.), rendered on or about February 27, 2012,

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

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

ENTERED: APRIL 11, 2013

CLERK

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

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9765 Allstate Insurance Company, etc., Index 108876/07
Plaintiff-Respondent, 104883/07
604023/07
-against- 150069/08

8 West 65th Street
Condominium Corp., et al.,
Defendants-Appellants,

Epic Building Restoration, Inc., et al.,
Defendants.
- - - - -
Gregory S. Oyen, et al.,
Plaintiffs-Respondents,

-against-

Epic Restoration & Renovation, Inc., et al.,
Defendants,

Board of Managers of the 8
West 65th Condominium,
Defendant-Appellant.
- - - - -
Boris Komarov,
Plaintiff-Respondent,

-against-

Gregory S. Oyen, et al.,
Defendants,

The 8 West 65th Street
Condominium, et al.,
Defendants-Appellants.

[And Another Action]

_____

Rebore, Thorpe & Pisarello, P.C., Farmingdale (Timothy J. Dunn, III of counsel), for appellants.

Feldman, Rudy, Kirby & Farquharson, P.C., Jericho (Brian R. Rudy of counsel), for Allstate Insurance Company, respondent.

Daniel J. Hansen, New York, for Gregory S. Oyen and Julie Oyen, respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 27, 2012, which denied the condominium defendants' motion to vacate Boris Komarov's note of issue and direct further discovery in his action, and denied the condominium defendants' motion to renew a prior order, same court and Justice, entered June 28, 2011, which, inter alia, denied their summary judgment motion insofar as it sought dismissal of Allstate Insurance Co.'s second cause of action, and of Gregory and Julie Oyen's third cause of action, unanimously modified, on the law, to vacate Komarov's note of issue and permit further discovery, and otherwise affirmed, without costs.

The Oyens' third cause of action, which was also sustained by the June 28, 2011 order, was no different from Allstate's second cause of action that was sustained by the order appealed. The Oyens' third cause of action alleged negligence by the condominium defendants in, among other things, failing to maintain, operate, and inspect the property, including in failing to ensure that the roof was in "suitable condition and repair to

prevent rain and the outside elements to intrude into the Premises" that caused the "development of mold." Both were properly sustained.

Rule 202.21(e) of 22 NYCRR permits the court to vacate the note of issue where good cause is shown. Good cause existed here, insofar as Komarov only first put the condominium on notice of certain damages that he allegedly incurred when he submitted opposition to the condominium's initial motion to dismiss after his note of issue was filed and discovery was essentially concluded (*see Cruz v City of New York*, 81 AD3d 505 [1st Dept 2011]; *Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177 [1st Dept 2001]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9766 Aleksandr Palatkevich, Index 651358/11
Plaintiff-Respondent,

-against-

Stanacard, LLC,
Defendant-Appellant.

_____

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Law Offices of Eileen T. Rohan, Hudson (Eileen T. Rohan of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 18, 2012, which granted plaintiff's oral application on the record seeking leave to voluntarily discontinue the action, without prejudice, pursuant to CPLR 3217(b), and in accordance with a notice of discontinuance filed with the court, dated June 13, 2012, unanimously affirmed, with costs.

Although defendant argues the court should have directed plaintiff to file a formal motion seeking a discontinuance, the record reveals that defendant had ample notice of plaintiff's intent to seek a discontinuance if, as transpired, plaintiff's application for removal of the action to federal court was unsuccessful. The record also demonstrates that defendant's

arguments below for severance of its counterclaim for a declaratory judgment in the event of a grant of the discontinuance application reflected not only an opportunity by defendant to be heard on the application, but defendant's thorough understanding of the potential merits of its severance request (*see generally Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99 [1st Dept 2009]). The court correctly declined to sever defendant's counterclaim, as there was no necessity for the court to consider the counterclaim, inasmuch as it, in essence, sought a declaration that certain legal defenses were viable, and such defenses would be entertained in the new federal action (*see generally James v Alderton Dock Yards*, 256 NY 298 [1931]; *Slowmach Realty Corp. v Leopold*, 236 App Div 330 [1st Dept 1932]; *Piedmont Hotel Co. v Nettleton Co.*, 241 App Div 562 [4th Dept 1934]).

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 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9767-
9767A Index 651030/10

Artur Zaytsev,
Plaintiff-Respondent,

-against-

Stanacard, LLC,
Defendant-Appellant.

_____

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Law Offices of Eileen T. Rohan, Hudson (Eileen T. Rohan of counsel), for respondent.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered January 25, 2011, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Order, same court (O. Peter Sherwood, J.), entered June 18, 2012, which granted plaintiff's oral application on the record, seeking leave to voluntarily discontinue the action, without prejudice, pursuant to CPLR 3217(b), and in accordance with a notice of discontinuance filed with the court, dated June 13, 2012, unanimously affirmed, with costs.

When viewing the evidence and construing all reasonable inferences in favor of the nonmovant, as is required on a summary judgment motion (*see Dabbagh v Newmark Knight Frank Global Mgt.*

Servs., LLC, 99 AD3d 448 [1st Dept 2012]), the documentary evidence in the form of, inter alia, a partially executed 2008 "Joinder Agreement," December 2009 emails from defendant's officers and plaintiff's own averments, raises triable issues of fact whether plaintiff reasonably believed that defendant's lone principal was authorized to procure for plaintiff a 10% membership interest in defendant limited liability company.

Although defendant argues the court should have directed plaintiff to file a formal motion seeking a discontinuance, the record reveals that defendant had ample notice of plaintiff's intent to seek a discontinuance if, as transpired, plaintiff's application for removal of the action to federal court was unsuccessful. The record also demonstrates that defendant's arguments below for severance of its counterclaim for a declaratory judgment in the event of a grant of the discontinuance application reflected not only an opportunity by defendant to be heard on the application, but defendant's thorough understanding of the potential merits of its severance request (*see generally Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99 [1st Dept 2009]). The court correctly declined to sever defendant's counterclaim, as there was no necessity for the court to consider the counterclaim, inasmuch as it, in essence, sought

a declaration that certain legal defenses were viable, and such defenses would be entertained in the new federal action (*see generally James v Alderton Dock Yards*, 256 NY 298 [1931]; *Slowmach Realty Corp. v Leopold*, 236 App Div 330 [1st Dept 1932]; *Piedmont Hotel Co. v A.E. Nettleton Co.*, 241 App Div 562 [4th Dept 1934]).

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 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9768 The People of the State of New York, Ind. 6206/01
Respondent,

-against-

Robert Brown, also known as Robert Milton,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered April 20, 2011, as amended April 21, 2011, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9769-
9769A-
9769B In re Jaquan Tieran B., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Latoya B.,
Respondent-Appellant,

Edwin Gould Services for Children and
Families, et al.,
Petitioners-Respondents.

_____

Daniel R. Katz, New York, for appellant.

John R. Eyerman, New York, for respondents.

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

_____

Orders of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about December 20, 2011, which, upon fact-finding determinations that respondent-appellant mother had permanently neglected the subject children, terminated her parental rights to the children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of the Administration of Children's Services for the purpose of adoption, unanimously affirmed as to the fact-finding determinations, and the appeal therefrom otherwise dismissed,

without costs.

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, scheduling visitation and providing the mother with referrals for services, and that, despite these efforts, the mother failed to attend individual therapy, complete a second domestic violence program, obtain suitable housing and maintain a stable income (*see* Social Services Law § 384-b[7][a], [f]; *Matter of Aniya Evelyn R. [Yolanda R.]*, 77 AD3d 593, 593-594 [1st Dept 2010]; *Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

No appeal lies from the dispositional portion of the orders since they were entered upon the mother's default at the dispositional hearing (*see Matter of Aniya*, 77 AD3d at 594). The court properly deemed the mother to be in default, given that her counsel did not state that she wished to proceed in the mother's

absence or that she was authorized to do so (*cf. Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9770-
9770A In re Stanley S. Lasdon, File 703A/93
703B/93
Deceased.
- - - - -
In re Jeffrey S. Lasdon,
Petitioner-Appellant-Respondent,

Michael B. Abrams, et al.,
Objectants-Respondents-Appellants.

_____

Melvin S. Hirshowitz, New York, for appellant-respondent.

Llorca & Hahn LLP, New York (Richard E. Hahn of counsel), for respondents-appellants.

_____

Decrees, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about June 8, 2012, which, to the extent appealed from as limited by the briefs, imposed a surcharge of $230,256.57 plus interest on petitioner Jeffrey S. Lasdon as trustee with respect to a trust for objectant Daniel A. Abrams, imposed a surcharge of $397,893 plus interest on petitioner with respect to a trust for objectant Michael B. Abrams, awarded petitioner commissions, legal fees, and costs, and denied objectants' applications for legal fees and costs, unanimously modified, on the law, to eliminate the surcharges and interest, and otherwise affirmed, without costs.

Objectants Michael Abrams and Daniel Abrams, the

beneficiaries of two trusts, asked the trustees (including petitioner) to distribute their trusts in kind in 2004 and 2007, respectively. There was a lengthy delay in distribution during which objectants did not ask the trustees to sell stocks held by the trusts. During the delay, objectants each received income from their respective trusts. As a result, the beneficiaries' position is the same as if they had received their stocks back in 2004 and 2007: they own the number of shares to which they are entitled. To be sure, the beneficiaries were deprived of the ability to do what they wanted with the stocks during the period of delay in distribution. However, they did not show that the measure of damages for this deprivation is the difference in the value of the stocks between the date the beneficiaries received them and the date they should have received them; rather, that measure of damages assumes that the beneficiaries would have sold the stocks. Thus, they failed to demonstrate that the imposition of a surcharge (the difference in the value of the stocks on the date they should have been distributed and the date they were actually distributed) is warranted (*see Matter of Bankers Trust Co. [Siegmund]*, 219 AD2d 266, 272 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]; *Matter of Rothko*, 84 Misc 2d 830, 872 [Sur Ct, NY County 1975] [where there is a breach of duty of

fiduciaries of a trust, beneficiaries are entitled to be put in position they would have occupied if no breach was committed], *mod on other grounds* 56 AD2d 499 [1st Dept 1977], *affd* 43 NY2d 305 [1977]; *Matter of Jacobs*, 152 Misc 139, 143 [Sur Ct, Delaware County 1934] [trustee must account to beneficiary in cash for market value of securities in which trust was invested at date of termination of trust unless beneficiary elects to accept trust corpus in kind]).

It was not an improvident exercise of the Surrogate's discretion (*see Matter of Bushe*, 227 NY 85, 90 [1919]) to award petitioner commissions. Petitioner did not engage in fraud, gross neglect of duty, intentional harm to the trust, sheer indifference to the rights of others or disloyalty (*see Matter of Armstead v Morgan Guar. Trust Co. of N.Y.*, 13 AD3d 294, 295 [1st Dept 2004]; *see also Matter of Saxton*, 274 AD2d 110, 121 [3d Dept 2000]). Petitioner's failure to keep records of objectants' trusts does not warrant denial of commissions; there is no evidence that this failure resulted in pecuniary loss (*see Matter of Miller*, 116 AD2d 580, 581 [2d Dept 1986], *lv dismissed* 67 NY2d 609 [1986]).

Objectants' contention that the Surrogate should not have awarded petitioner attorneys' fees due to his misconduct is

unavailing (*see Matter of Ducker*, 3 AD2d 852 [2d Dept 1957] [attorneys' fees paid out of trust where trustee delayed in distributing assets to beneficiary]; *Matter of Dubens*, NYLJ, Oct. 28, 1974, at 18, col 4 [Sur Ct, NY County 1974] [same]). In any event, the Surrogate reduced the fees requested (*see Matter of Hawwa A.*, 9 AD3d 362, 365 [2d Dept 2004]).

Objectants contend that petitioner is not entitled to annual commissions pursuant to Surrogate's Court Procedure Act § 2309(2) because he failed to render the annual statements required by SCPA 2309(4). With respect to the two-thirds of the commission payable from principal (*see* SCPA 2309[3]), this argument is unavailing (*see* SCPA 2309[4] ["A trustee shall not be deemed to have waived any commission by reason of his failure to retain them at the time when he becomes entitled thereto; provided however that commissions payable from income from any given trust year shall be allowed and retained only from income derived from the trust during that year ..."]; *see also Margaret V. Turano*, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2309).

The Surrogate properly denied objectants' request for reimbursement of their legal fees. As noted above, petitioner did not act maliciously or in bad faith (*see Saxton*, 274 AD2d at

121; *see also Matter of McDonald [Luppino]*, 100 AD3d 1349, 1352 [4th Dept 2012]). Moreover, the fact that we have eliminated the surcharge is an additional reason not to require petitioner to pay objectants' legal fees (*see Matter of Goldstick*, 177 AD2d 225, 247 [1st Dept 1992], *mod on other grounds* 183 AD2d 684 [1st Dept 1992]).

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

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9771-
9772 Elba Negron, etc.,
Plaintiff-Respondent,

-against-

St. Barnabas Nursing Home, et al.,
Defendants-Appellants.

Index 300429/08

_____

Garbarini & Scher, PC, New York (William D. Buckley of counsel), for appellants.

Langsam Law, LLP, New York (Elise Hagouel Langsam of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 9, 2012, which, to the extent appealed from as limited by the briefs, upon reargument, denied defendant nursing home's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against the nursing home.

In this medical malpractice and negligence action, defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting, among other things, their expert affirmation and medical records (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The medical records

support defendants' expert's opinion that decedent's chronic skin ulcers, gangrene and above-the-knee amputations, were the unavoidable result of his preexisting, chronic conditions, as well as other risk factors.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted the conclusory and speculative affirmation of an unnamed expert who failed to identify specific departures made by the nursing home, when other actions should have been taken by the nursing home and by whom, and how the results would have been different had those actions been taken (*see Alvarez*, 68 NY2d at 327; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]). These failures are especially troublesome, given plaintiff's expert's concession that decedent's preexisting conditions placed him at an increased risk for the conditions at issue. Moreover, the expert failed to address the evidence supporting vascular involvement and failed to establish that the nursing home's negligence, and not the natural progress of

decedent's diseases and conditions, was a substantial factor in producing the injury (*see Aparicio v Goldberg*, 94 AD3d 502, 503 [1st Dept 2012]; *Mortensen v Memorial Hosp.*, 105 AD2d 151, 158 [1st Dept 1984]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9773 The People of the State of New York, Ind. 4289/08
Respondent,

-against-

Marc Seck,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret Knight of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (David S. Yellin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J. at initial plea of guilty; Ronald A. Zweibel, J. at second plea of guilty and sentencing), rendered May 19, 2011, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of one year, unanimously affirmed.

When defendant entered a second guilty plea and accepted the new sentence provided under that plea agreement, defendant waived his claim that he was entitled to specific performance of his initial plea agreement (*see People v Jimenez*, 227 AD2d 356 [1st Dept 1996], *lv denied* 88 NY2d 987 [1996]). As an alternate holding, we reject defendant's claim.

The sentencing court, which had presided over this case nearly from its outset, had repeatedly rejected defendant's requests for a disposition involving youthful offender treatment. However, another Justice who briefly presided over the case accepted a plea, over the People's objection, that would have entitled defendant to YO treatment and probation if he met certain conditions. When that Justice retired a few months later, the case returned to the original Justice for sentencing. The court vacated the plea, and defendant ultimately agreed to a new disposition.

The sentencing court properly exercised its discretion in vacating the original plea, since it retained discretion to set an appropriate sentence up until the time of sentencing, and it "sufficiently demonstrated in the record that proper sentencing criteria counseled imposition of a different sanction than that agreed to initially" (*People v Schultz*, 73 NY2d 757, 758 [1988]) by the other Justice. The fact that defendant took part in a rehabilitation program was not the type of detrimental reliance that would entitle him to specific performance of the original plea bargain as a matter of fairness (*see People v Danny G.*, 61 NY2d 169 [1984] [testifying for prosecution]; *People v McConnell*, 49 NY2d 340 [1980] [same]).

We perceive no basis for granting youthful offender treatment as a matter of discretion in the interest of justice.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9774 John Francescon, Index 114399/01
Plaintiff-Appellant-Respondent, 590019/02
590139/06
590372/06

-against-

Gucci America, Inc., etc., et al.,
Defendants-Respondents-Appellants.

- - - - -

[And A Third-Party Action]

- - - - -

Gucci America, Inc., etc., et al.,
Second Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Flooring Solutions, Inc.,
Second Third-Party
Defendant-Respondent-Appellant.

- - - - -

Flooring Solutions, Inc.,
Fourth Third-Party
Plaintiff-Respondent-Appellant,

-against-

Consolidated Carpet Trade
Workroom, Inc., et al.,
Fourth Third-Party
Defendants-Respondents.

_____

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato of counsel), for appellant-respondent.

Barry McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Gucci America, Inc., and Structure Tone, Inc., respondents-appellants.

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for Flooring Solutions, Inc., respondent-appellant.

Connors & Connors, P.C., Staten Island (Robert J. Pfuhler of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 17, 2012, which granted the branch of the motions of fourth-party defendants (Consolidated) and second third-party defendant (Flooring), and the cross motion of defendants, that sought dismissal of plaintiff's Labor Law § 241(6) claims based on alleged violations of 12 NYCRR 23-1.7(b)(1)(i) and (ii), and 12 NYCRR 23-1.7(f), and denied that branch of the motions and cross motion that sought dismissal of plaintiff's Labor Law 241(6) claim predicated on alleged violations of 12 NYCRR 23-1.7(d), unanimously modified, on the law, to grant the motion and cross motions to the extent of dismissing the Labor Law § 241(6) claim insofar as predicated on an alleged violation of 12 NYCRR 23-1.7(d), and otherwise affirmed, without costs.

In a prior order, entered January 22, 2009, the motion court granted the plaintiff's motion for leave to amend his bill of particulars to alleged new Industrial Code violations. Further, the court denied the branches of the summary judgment motions of defendants Flooring and Consolidated that sought dismissal of plaintiff's Labor Law § 241(6) claims based on violations of 12

NYCRR 23-1.7 and 12 NYCRR 23-2.7, with leave to renew after completion of discovery. This Court, on a prior appeal, affirmed those aspects of the motion court's order, and noted that liability under Labor Law § 241(6), predicated on the newly-alleged Industrial Code provisions, "has yet to be determined" (*see Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]). Accordingly, this Court's earlier determination does not preclude review of the subsequent motions for summary judgment (*see James v R & G Hacking Corp.*, 39 AD3d 385, 386 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]). Further, the renewed motions for summary judgment were based on "new facts" (CPLR 2221[e][2]) — namely, plaintiff's deposition testimony, which was given after the motion court's prior order.

Industrial Code (12 NYCRR) § 23-1.7(b)(1) is inapplicable. The record indicates that plaintiff was injured after he stepped off the edge of the work area to the subfloor 12 to 15 inches below, which is not considered a "hazardous opening" within the meaning of 12 NYCRR 23-1.7(b) (*see Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 [1st Dept 2009]; *Pope v Safety & Quality Plus, Inc.*, 74 AD3d 1040 [2d Dept 2010], *lv dismissed* 15 NY3d 862 [2010]).

12 NYCRR 23-1.7(f) is also inapplicable. There is no basis in the record for any claim that the "[s]tairways, ramps or

runways" identified in section 23-1.7(f) were required, given plaintiff's testimony that the subfloor was only approximately 12 to 15 inches below the first floor from which he fell (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 601-602 [1st Dept 2009, Andrias, J., concurring in part and dissenting in part]).

Finally, even if plaintiff's corrections to his deposition testimony would otherwise raise a credibility issue, the record establishes that plaintiff's accident was not connected to any slippery condition within the purview of 12 NYCRR 23-1.7(d).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9775 The People of the State of New York, Ind. 370/11
Respondent,

-against-

Roberto Ingles,
Defendant-appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered November 3, 2011, convicting defendant, after a jury trial, of grand larceny in the fourth degree (two counts) and jostling, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly declined to submit attempted grand larceny as a lesser included offense, since there was no reasonable view of the evidence, when viewed in the light most favorable to defendant (*see generally People v James*, 11 NY3d 886 [2008]), to support the conclusion that defendant's conduct

failed to satisfy the asportation requirement discussed in *Harrison v People* (50 NY 518 [1872]). Even when viewed favorably to defendant, the surveillance videotape tends to confirm, rather than contradict, the victim's testimony that her wallet landed on the floor during the incident.

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9776 Eldrid Sequeira, Index 350086/08
Plaintiff-Appellant,

-against-

Rachel Sequeira,
Defendant-Respondent.

_____

Eldrid Sequeira, appellant pro se.

Stein & Ott, LLP, New York (Lara Ott of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori Sattler, J.), entered October 23, 2012, which awarded defendant mother temporary decision-making authority with respect to the parties' son's education, unanimously affirmed, without costs.

The motion court properly exercised its discretion in determining that it is in the child's best interest to award defendant mother temporary decision-making authority with respect to the issue of the child's education (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The parties agreed to joint legal custody, which their agreement defined as including equal input with respect to all major decisions, including education. They did not, however, provide for a situation, such as the one presented, where they cannot agree on where their child should attend school. Thus, there is a change in circumstances requiring

modification of the agreement to protect the best interests of the child (*see Linda R. v Ari Z.*, 71 AD3d 465, 466 [1st Dept 2010]; *Sporacio v Fitzgerald*, 73 AD3d 790 [2d Dept 2010]) and the record supports the temporary award of educational decision-making to defendant.

Plaintiff father's due process rights were not violated. He was afforded a fair hearing, was permitted to cross-examine defendant, testify on his own behalf, and argue his case. To the extent he argues that he was denied an opportunity to hire an attorney, he never made a request to do so.

There is also no merit to plaintiff's claim that the court was barred from deciding the issue by the doctrine of res judicata. No prior request for temporary education decision-making was made. In any event, as noted above, in custody and matrimonial matters, changed circumstances warrant the

reconsideration of prior orders as do the best interest of a child (*id.*).

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 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9777 The People of the State of New York, Ind. 857/10
Respondent,

-against-

Kasien Adderley,
Defendant-Appellant.

_____

Darius Wadia, L.L.C., New York (Julia E. Burke of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered September 12, 2011, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's motion to suppress money he discarded while fleeing from the police. When the observing officer communicated to the arresting officer that someone was running in the latter's direction, the only reasonable inference, given the surrounding context, was that the running person had just participated in a drug transaction (*see*

People v Vestal, 270 AD2d 92 [1st Dept 2000], *lv denied* 95 NY2d 805 [2000]; *People v Fisher*, 270 AD2d 90 [1st Dept 2000], *lv denied* 95 NY2d 796 [2000]). Accordingly, the arresting officer, who had positioned himself to apprehend anyone who ran from the scene, properly acted under the fellow officer rule when he pursued defendant, who was the only person running.

The People provided reasonable assurances as to the identity and unchanged condition of the drugs seized from a codefendant, and the absence of testimony from the chemist who initially tested the drugs went only to the weight to be accorded the evidence, not its admissibility (*see People v Miller*, 209 AD2d 187, 188 [1st Dept 1994], *affd* 85 NY2d 962 [1995]). Any discrepancies as to the color, form or weight measurement of the drugs were insignificant or were sufficiently explained by the chemist who retested the drugs, and these discrepancies likewise went to weight rather than admissibility (*see People v Julian*, 41 NY2d 340 [1977]; *People v White*, 40 NY2d 797, 799-800 [1976]).

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

ENTERED: APRIL 11, 2013

CLERK

Gonzalez, P.J., Friedman, Abdus-Salaam, Román, Clark, JJ.

9778N In re Lawrence A. Goldstein, et al., Index 652824/12
Petitioners-Appellants,

-against-

12 Broadway Realty LLC,
Respondent-Respondent.

_____

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (David C. Burger of counsel), for appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 25, 2012, which denied petitioners' motion to, among other things, vacate an arbitration appraisal of real property, unanimously affirmed, without costs.

Respondent's appraiser notified petitioners' appraiser of a real estate transaction involving principals of respondent and the proposed neutral third appraiser's firm and offered petitioners' appraiser the opportunity to follow up with the neutral third appraiser to obtain additional information. Petitioners, however, did not inquire further. Instead, petitioners retained the third appraiser and proceeded with the arbitration. Accordingly, the court properly determined that petitioners waived any objections they had in connection with the

alleged relationship between the third appraiser and respondent (*see Matter of Namdar [Mirzoeff]*, 161 AD2d 348 [1st Dept 1990], *lv denied* 77 NY2d 802 [1991], *cert denied* 501 US 1251 [1991]).

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

ENTERED: APRIL 11, 2013

CLERK

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

8170 Gloria Rosenthal, etc., Index 116974/06
Plaintiff-Respondent-Appellant,

-against-

Quadriga Art, Inc.,
Defendant-Appellant-Respondent.

_____

Graubard Miller, New York (Edward H. Pomeranz of counsel), for appellant-respondent.

Marin Goodman L.L.P., Harrison (Dean L. Jarmel of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 22, 2011, which, insofar as appealed from as limited by the briefs, granted defendant Quadriga Art, Inc.'s motion for summary judgment dismissing the second cause of action to the extent it sought to recover unpaid commissions for the years 2000, 2001, and 2003; denied Quadriga's motion for summary judgment dismissing the second cause of action to the extent of declining to address Quadriga's defense that the Estate of Alfred J. Rosenthal was entitled to commissions only on orders actually taken by decedent Rosenthal and that the amount of those commissions was not required to be 10 percent; and denied that branch of the same motion seeking dismissal of the second cause of action as to unpaid commissions for the year 2002, unanimously

modified, on the law, to deny defendant's motion for summary judgment with respect to plaintiff's second cause of action completely and otherwise affirmed, without costs.

The motion court properly declined to grant defendant's motion for summary judgment regarding the amount of commissions due to the decedent's estate. The record shows that decedent occasionally was paid commissions on orders that he did not personally write up or service, including some accounts that he brought to defendant but were subsequently converted to "house accounts." Moreover, there are factual and credibility issues regarding whether defendant always paid decedent commissions of 10 percent, as well as whether defendant "gifted" certain amounts to decedent in various years, including some years for which defendant asserts accord and satisfaction as a defense to the Estate's claims. Resolution of these issues is more appropriate for the finder of fact (*see Martin v Citibank, N.A.*, 64 AD3d 477, 478 [1st Dept 2009]).

Contrary to the motion court's finding, the estate's claim for commissions for the years 2000, 2001, and 2003 is not barred by the principle of accord and satisfaction. Accord and satisfaction requires the existence of an actual dispute, manifested by a specific demand by the alleged creditor and an

express, good-faith disagreement with that demand by the debtor (*see Matter of Leckie*, 54 AD2d 205, 214-15 [4th Dept 1976]). Here, as noted, there are a number of factual disputes as to which accounts would form the basis of decedent's commissions, the amount due on those accounts and whether the final yearly tally contained amounts constituting "gifts." Indeed, the motion court properly found that there was no evidence of an accord and satisfaction for commissions payable during the year 2002 based upon the conflicting claims for that year. Although the checks issued by defendant to decedent for commissions bore the notation "settlement," the doctrine requires a "clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim" (*Nationwide Registry & Sec. v B&R Consultants*, 4 AD3d 298, 300 [1st Dept 2004]; *Manley v Pandick Press*, 72 AD2d 452, 454 [1st Dept 1980], *appeal dismissed* 49 NY2d 981 [1980]). For the purposes of a summary judgment motion, such

a finding is precluded by the conflicting factual claims on this record.

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

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

ENTERED: APRIL 11, 2013

CLERK

Friedman, J.P., Moskowitz, Freedman, Richter, Abdus-Salaam, JJ.

8325 Thomas A. Sharon, Index 602958/99
Plaintiff-Respondent,

-against-

American Health Providers,
Defendant,

Arthur Wheeler,
Defendant-Appellant.

_____

Lowell B. Davis, Carle Place, for appellant.

Mangan Ginsberg LLP, New York (Michael P. Mangan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, JHO), entered March 14, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff commenced this action in 1999 to collect on a promissory note that defendant American Health Providers (AHP) issued to him and to enforce the note's guarantee by defendant Arthur Wheeler, AHP's principal. The note states that AHP issued it in consideration of plaintiff's transfer to that entity of all outstanding shares of a corporation named Nurses Station of America, Inc. (NSOA). The court entered a default judgment

against both AHP and Wheeler in 2000. In 2009, after Wheeler moved for relief from his default, the parties stipulated to vacatur of the judgment as against him. Thereafter, plaintiff moved for summary judgment on the merits of his claim against Wheeler as guarantor of the note. The court denied the motion on the ground that it was supported only by a copy of the affidavit plaintiff had submitted in opposition to the motion to vacate the default. After the close of discovery, plaintiff made a second motion for summary judgment, this time supported by a new affidavit, and the court granted this motion. Wheeler appeals.

Although sufficient cause existed to entertain the second summary judgment motion on the merits (*see Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]), we hold that, on the merits, the motion should have been denied. Assuming the truth of Wheeler's allegations (which plaintiff strenuously denies) and drawing all reasonable inferences in his favor, as we must, Wheeler's opposition affidavit raises triable issues as to certain defenses to the enforcement of his guarantee of the note, including failure of consideration and failure of a condition precedent (*see Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963] ["the guarantor is not liable unless the principal is bound"]). Among other things, Wheeler denies that plaintiff ever

transferred the NSOA stock to AHP, denies that NSOA had the value that the promissory note attributed to it, and claims that the parties did not intend the note to become effective until a license was obtained. Should Wheeler succeed in proving his allegations, it would follow that plaintiff took the note with notice of these defenses and, therefore, that he is not a holder in due course (*see* UCC 3-302[1]). In that event, the defenses that Wheeler asserts would defeat plaintiff's claim to enforce Wheeler's guarantee of the note (*see* UCC 3-306 [b], [c]; UCC 3-408; *American Realty Corp. of NY v Sukhu*, 90 AD3d 792 [2d Dept 2011]; *Manufacturers Hanover Trust Co. v L.N. Props.*, 174 AD2d 383 [1st Dept 1991]; *Mansion Carpets v Marinoff*, 24 AD2d 947 [1st Dept 1965]). The parol evidence rule does not bar the admission of evidence tending to prove the particular asserted defenses (*see Long Is. Trust Co. v International Inst. for Packaging Educ.*, 38 NY2d 493, 496 [1976]; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 258 [1970]; *Amirana v Howland*, 202 AD2d 783, 784 [3d Dept 1994]; *Pan Atl. Group v Isacsen*, 114 AD2d 1022 [2d Dept 1985]). Significantly, the note does not contain a merger clause. Moreover, plaintiff has not

offered documentary evidence dispositive of Wheeler's asserted defenses. Accordingly, further proceedings are required to determine whether plaintiff is entitled to enforce Wheeler's guarantee of the note.

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

ENTERED: APRIL 11, 2013

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8878 Standard Realty Associates, Inc., Index 105917/10
Plaintiff-Appellant,

-against-

Chelsea Gardens Corp., et al.,
Defendants-Respondents.

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Hauser & Associates, PC, New York (Seth A. Hauser of counsel), for appellant.

Schechter & Brucker, P.C., New York (Kenneth H. Amorello of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 27, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion with respect to the causes of action for trespass and unjust enrichment, and otherwise affirmed, without costs.

Defendants' submissions show that the western wall of defendant Chelsea's building was leased to a nonparty for the purpose of posting an advertising sign, which protruded into plaintiff's airspace without plaintiff's consent or permission. While the encroachment of the four-inch bolts and the advertising sign is small, it remains a trespass where defendants are liable for the use of plaintiff's property rights (*cf. Sakele Bros. V*

Safdie, 302 AD2d 20, 27 [1st Dept 2002]; *Salesion Soc., Inc. V Village of Ellenville*, 121 AD2d 823, 824 [3d Dept 1986]). We reject defendants' contention that dismissal of the trespass claim was warranted because the encroachment of four inches was minimal. An invasion of another's property or airspace need not be more than de minimis in order to constitute a trespass (*cf. Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511, 512 [1st Dept 2006]; *Wing Ming Props. (U.S.A.) v Mott Operating Corp.*, 172 AD2d 301 [1st Dept 1991], *affd* 79 NY2d 1021 [1992]).

The motion court properly dismissed the portion of plaintiff's claim based on the temporary use of airspace to hang scaffolding while installing signs in the past as de minimis. Defendants could have sought a license for the use of airspace during the installation of each sign (see RPAPL § 881). At that time, if appropriate, plaintiff could have requested injunctive relief. Notwithstanding, the relief of an injunction is a drastic remedy "granted [only] in a clear case, reasonably free from doubt" (*116 East 57th Street Inc v Gould*, 273 AD 1000 [1st Dept 1948], *lv denied* 274 AD 782 [1948]), and plaintiff has not asserted damage to its property interest that required injunctive relief.

Issues of fact exist as to plaintiff's unjust enrichment

claim since plaintiff alleged that defendants earned income through the use of its airspace rights, for which it should be compensated. Moreover, defendants have not shown that the unjust enrichment claim is time-barred. The lease defendants submitted in support of their motion shows that plaintiff commenced the action well within the six-year statute of limitations (*see* CPLR 213[1]). Further, defendants have not submitted any other leases or evidence showing that the claim is time-barred.

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

ENTERED: APRIL 11, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9590 In re Lilliam A.,
Petitioner-Respondent,

-against-

Juan V.,
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

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

Israel P. Inyama, New York, attorney for the children.

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Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 15, 2012, which denied respondent-appellant's motion to vacate an order of filiation entered upon default, unanimously affirmed, without costs.

The court providently exercised its discretion in denying respondent's motion to vacate his default, as he failed to demonstrate that he has a meritorious defense. Initially, his affidavit fails to challenge the allegation that he was in a sexual relationship with the mother during the relevant periods of the children's conception (*see Matter of A.C.S. Child Support Litig. Unit v David S.*, 32 AD3d 724, 724-725 [1st Dept 2006]). Moreover, respondent does not dispute that the children were

traveling from Rhode Island to New York in order to have yearly visits with him and his family, including the paternal grandparents, and that he purchased gifts for them on various occasions including three Christmases since their birth. Further, he fails to demonstrate that the children do not consider him to be their father as a result of his fostering a parent-child relationship with them (*see Matter of Alexis T. v Vanessa C.-L.*, 101 AD3d 436 [1st Dept 2012]; *see Matter of Enrique G. v Lisbet E.*, 2 AD3d 288, 288-289 [1st Dept 2003]).

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

ENTERED: APRIL 11, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9596 In re Andy Z.,

A Child Under Eighteen
Years of Age, etc.,

Hong Lai Z.,
Respondent-Appellant.,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Elana E. Roffman of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 8, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent father had neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed as against the father.

The Family Court's findings of neglect against the father, based on two incidents, are not supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The statutory

test for neglect is "'minimum degree of care' -- not maximum, not best, not ideal -- and the failure [to exercise that degree of care] must be actual, not threatened" (*Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]). Here, the father's conduct during a sequence of events that resulted in the child being left home alone overnight, while not ideal, did not fall below the statutory minimum degree of care.

Regarding the second incident, an alleged domestic violence dispute between the parents, as the court noted, it is unclear what the child witnessed. In any event, this single incident, while unfortunate, was not, standing alone, so egregious as to support a finding of neglect (*compare Matter of Eustace B. [Shondella M.]*, 76 AD3d 428 [1st Dept 2010], *with Matter of Jeaniya W. [Jean W.]*, 96 AD3d 622 [1st Dept 2012]).

The Decision and Order of this Court entered herein on April 9, 2013 is hereby recalled and vacated.

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

ENTERED: APRIL 11, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9623 Strauss Painting, Inc., Index 103588/09
Plaintiff-Respondent-Appellant,

-against-

Mt. Hawley Insurance Company,
Defendant-Appellant-Respondent,

Metropolitan Opera Association, Inc.,
Defendant-Respondent-Appellant.

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Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for appellant-respondent.

Richard Janowitz, Mineola, for Strauss Painting, Inc., respondent-appellant.

Ahmuty, Demers & McManus, Albertson (William J. Mitchell of counsel), for Metropolitan Opera Association, Inc., respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered November 4, 2011, which granted Mt. Hawley Insurance Company's (Mt. Hawley) motion for summary judgment declaring that it has no obligation to defend or indemnify plaintiff in the underlying personal injury action, granted defendant Metropolitan Opera Association, Inc.'s (the Met) motion for summary judgment declaring that Mt. Hawley is obligated to defend and indemnify the Met in an underlying personal injury action, denied Mt. Hawley's cross motion for

summary judgment declaring that it is not obligated to defend or indemnify the Met in the underlying action, and dismissed the Met's second and third cross claims against Mt. Hawley on the basis that they were abandoned; as amended by the order, same court and Justice, entered October 16, 2012, upon reargument, reinstating the Met's second and third cross claims on the basis that they were not abandoned; as further amended by order, same court and Justice, entered October 16, 2012, upon reargument, declaring that Mt. Hawley's duty to defend and indemnify is conditioned upon a finding of negligence by plaintiff or those acting on plaintiff's behalf, unanimously modified, on the law, to 1) deny Mt. Hawley's motion for the dismissal of the complaint as against it upon the declaration that Mt. Hawley has no duty to defend and indemnify plaintiff, 2) to dismiss the Met's third cross claim against Mt. Hawley for expenses incurred in this action, 3) to delete that portion of the court's October 16, 2012 order upon reargument that conditioned Mt. Hawley's duty to defend and indemnify the Met upon a finding of negligence by plaintiff in the underlying action and to declare that Mt. Hawley's duty to defend the Met shall arise and be conditioned upon a finding of an act or omission by plaintiff or one acting on plaintiff's behalf, and otherwise affirmed, without costs.

The court properly determined that Mt. Hawley is obligated to defend and indemnify the Met in the underlying personal injury action. It is undisputed that there was a contract between plaintiff and the Met and that the contract required plaintiff to purchase insurance coverage naming the Met as an additional insured. It is also undisputed that plaintiff's commercial general liability (CGL) policy from Mt. Hawley contained an additional insured endorsement. The court correctly rejected Mt. Hawley's interpretation of the contract language, as it would be inconsistent with the terms of the contract and the policy (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 87 AD3d 65, 70 [1st Dept 2011]).

The court also properly rejected Mt. Hawley's argument that it timely disclaimed coverage to the Met on the basis of late notice. The only letters sent by Mt. Hawley to the Met were those intended to preserve its right to disclaim. These letters were insufficient to actually disclaim coverage (*see Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]).

The wording of the court's declaration that the Met is entitled to defense and indemnity in the underlying action must be altered, however, to exclude the necessity of a finding of negligence by plaintiff in the underlying action. The additional

insured endorsement speaks in terms of "acts or omissions," not negligence. Thus, in the unlikely event that it would be found that some nonnegligent act by plaintiff caused the accident, the Met would still be entitled to coverage under the additional insured endorsement (*see Admiral Ins. Co. v Joy Contrs., Inc.*, 81 AD3d 521, 523 [1st Dept 2011], *mod on other grounds* 19 NY3d 448 [2012]).

The Met is not entitled to reimbursement of expenses incurred in this action (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]).

The court properly found that Mt. Hawley is not required to defend and indemnify plaintiff in the underlying action. Plaintiff's notice of the accident to Mt. Hawley was untimely as a matter of law, and Mt. Hawley timely disclaimed coverage on that ground. Plaintiff's notice to its broker did not provide timely notice to Mt. Hawley. There is no indication that plaintiff's broker acted as an agent for Mt. Hawley or that the CGL policy listed plaintiff's broker as its agent (*cf. Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979]). Nor was plaintiff's alleged belief of nonliability reasonable under the circumstances (*see Hermitage Ins. Co. v JDG Lexington Corp.*, 99

AD3d 428 [1st Dept 2012]). Mt. Hawley was entitled to a declaration in its favor, but the complaint should not have been dismissed as against it (*see Lanza v Wagner*, 11 NY2d 317, 334, 340 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, JJ.

9780-
9781-
9181A In re Lenea'jah F., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Makeba T.S.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about April 13, 2012, which denied respondent's motion to vacate orders of disposition entered on or about April 2, 2012, upon her default, terminating her parental rights to the subject children on the ground of permanent neglect, and committing the custody and guardianship of the children to the Commissioner of Social Services of the City of New York and petitioner agency for the purpose of adoption, unanimously affirmed, without costs. Appeal from aforesaid orders of

disposition, unanimously dismissed, without costs, as taken from nonappealable papers.

Respondent failed to demonstrate a reasonable excuse for her absence from the proceeding and a meritorious defense to the allegation of permanent neglect (*see Matter of Alexander John B. [Cynthia A.]*, 87 AD3d 927 [2011], *lv dismissed in part, denied in part* 18 NY3d 917 [2012]). Her sole submission was an affirmation by her counsel, who did not have personal knowledge of the facts. Counsel stated that respondent did not have the money to pay for transportation to the hearing, but she did not explain respondent's failure to notify either her attorney or the court that she was unable to appear (*see Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 975 [2012]).

Counsel stated that respondent would have testified that she lacked medical insurance and financial resources to plan for the children (*see* Social Services Law § 384-b[7][a]). This general, unsubstantiated statement is insufficient to establish a meritorious defense. Respondent failed to show that petitioner made no effort to help her with her drug addiction, or that she remained drug-free, cooperated with drug testing or regularly attended therapy (*see* Social Services Law § 384-b[7][c]; *Matter*

of Destiny S. [Hilda S.], 79 AD3d 666 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]).

Contrary to respondent's contention, her attorney's refusal to participate in the fact-finding hearing in her absence did not deprive her of effective representation; it preserved her opportunity to seek to open the default (*see Matter of Male J.*, 214 AD2d 417, 417 [1st Dept 1995]).

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9782 30 E. 33rd St. Realty LLC, Index 652633/11
Plaintiff-Appellant,

-against-

PPF Off Two Park Avenue Owner, LLC,
Defendant-Respondent.

_____

Smith & Shapiro, New York (Harry Shapiro of counsel), for appellant.

Jones Hirsch Connors Miller & Bull, P.C., New York (William E. Bell of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 3, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

In 1927, defendant's predecessor in interest built a taller building on property adjoining plaintiff's building. Defendant's predecessor in interest also extended plaintiff's chimney, in order to bring plaintiff's existing chimney into compliance with the height requirements of the then applicable Building Code. In 1968, the Building Code was amended and, for the first time, required the owner of a taller, later-built building, not only to extend the height of any chimneys in adjoining buildings to conform to Code requirements, but also to maintain and repair the chimney extensions. Accordingly, plaintiff alleges that

defendant is responsible, pursuant to the 1968 Building Code of the City of New York (Administrative Code of City of NY) § 27-860(f)(4), to repair the chimney on its property. Plaintiff's arguments are unavailing.

It "has long been a primary rule of statutory construction that a new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]). Here, Administrative Code § 27-860 does not contain any language indicating an intent that it be given retroactive effect. Further, there is no common-law duty to maintain or repair a chimney extension constructed under any of the New York City Building Codes. Indeed, an owner's "responsibility to alter the chimneys of [adjoining properties] to conform to height requirements (§ 27-860[a]), and to maintain and repair them (§ 27-860[f][4]), is clearly imposed by statute and did not exist at common law" (*Mindel v Phoenix Owners Corp.*, 17 AD3d 227, 228 [1st Dept 2005]; *see also Bondoc v Zervoudis*, 270 AD2d 105, 106 [1st Dept 2000]). The two older cases relied on by plaintiff are neither controlling nor persuasive (*see People v Siegal*, 62 Misc 2d 921 [Crim Ct, NY County 1970]; *Grau v McNulty & Sons Holding Co.*,

Inc., 170 Misc 1 [App Term 1939], *revg* 168 Misc 165 [New York City Ct 1938]).

Given the foregoing determination, we need not reach the parties' arguments regarding the statute of limitations.

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9783 The People of the State of New York, Ind. 7685/00
Respondent,

-against-

Mitchell Texidor, etc.,
Defendant-Appellant.

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

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

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered June 3, 2010, resentencing defendant to an aggregate term of 14 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9784 Allied Irish Banks, P.L.C., etc., Index 652967/11
Plaintiff-Respondent,

-against-

Young Men's Christian
Association of Greenwich,
Defendant-Appellant.

_____

Whitman Breed Abbott & Morgan, White Plains (John T. Shaban of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Mark A. Slama of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 13, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint only as to liability, unanimously affirmed, with costs.

We agree with the motion court's ruling that the parties' interest rate swap agreement, as set forth in the agreement, constituted "an instrument for the payment of money only" (CPLR 3213). We also agree that defendant failed to raise triable issues of fact as to novation, waiver, and alleged breach of the covenant of good faith and fair dealing. Defendant also claims that plaintiff is estopped from relying on CPLR 3213 because defendant changed its position (by entering into commitments to

third parties), believing - based on plaintiff's statements - that plaintiff would not enforce the strict letter of the parties' agreement. Although defendant's CEO stated that plaintiff's "apparent willingness to work with us" after it defaulted on a number of payments caused it to enter into agreements with others, this claim is unsubstantiated as no evidence of separate agreements is furnished. Since the underlying agreement requires modifications to be in writing, these claims are too vague to constitute an estoppel.

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9785 The People of the State of New York, Ind. 148/04
Respondent,

-against-

Malik Brown,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Ruth Pickholz, J.), entered on or about March 16, 2011,

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 order so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 11, 2013

CLERK

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

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9788 Ronit D. Appel, Index 101923/10
Plaintiff-Appellant,

-against-

Howard Goldberg, etc.,
Defendant-Respondent,

Paul M. Giddins, etc., et al.,
Defendants.

_____

Ronit D. Appel, New York, appellant pro se.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 2, 2012, which, to the extent appealed from, denied so much of plaintiff's motion as sought an order directing defendant Goldberg to pay her the full amount of her contract deposit, plus statutory interest, less any monies returned to her by the Clerk of the Court, unanimously affirmed, without costs.

By prior order of a different justice, the court granted plaintiff's motion to dismiss defendant Goldberg's counterclaim, permitted defendant law firm to deposit the escrowed funds with the court, and dismissed the claims asserted against the law firm defendants. In that context, the court's finding that plaintiff was entitled to her contract deposit was not a determination of her breach of contract claim, which was not then before the

court. Thus, the court dispelled any confusion that may have existed as to whether the prior order had determined plaintiff's breach of contract claim. Plaintiff is not without remedy; she may still pursue her breach of contract claim against Goldberg.

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 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9789 In re Ruth Marie Pollack, Index 18716/11
Petitioner-Respondent,

-against-

Clerk of the Court Matthew G. Kiernan, etc., et al.,
Respondents-Appellants.

_____

John W. McConnell, New York (Shawn Kerby of counsel), for appellants.

Ruth Marie Pollack, Riverhead, respondent pro se.

_____

Order, Supreme Court, Kings County (Herbert Kramer, J.), entered on or about November 17, 2011, which granted the petition brought pursuant to CPLR article 78 to the extent of directing the Appellate Division, Second Department, to forward certain documents in petitioner's disciplinary file to Supreme Court for in camera review, unanimously reversed, on the law, without costs, and the petition denied, and the proceeding dismissed.

Judiciary Law § 90(10) provides that the Appellate Division

has the jurisdiction to permit documents pertaining to an attorney disciplinary proceeding to be divulged. Therefore, Supreme Court lacked the authority to order disclosure of such documents.

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9791 The People of the State of New York, Ind. 4431/10
Respondent,

-against-

Xavier Santos,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 10, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9792 Devendra Chatoorang, Index 308668/09
Plaintiff-Appellant,

-against-

G.C. Navarrete-Duque,
Defendant-Respondent.

_____

Hoberman & Trepp, P.C., Bronx (Howard Trepp of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 7, 2012, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish that plaintiff's claimed dental injury, consisting of a fracture of a front tooth, was not caused by the accident or did not constitute a serious injury within the "fracture" category of Insurance Law § 5102(d) (*see Newman v Datta*, 72 AD3d 537 [1st Dept 2010]). In any event, in opposition to the motion, plaintiff raised a triable issue of fact. Plaintiff submitted an affirmation of his dentist averring

that plaintiff underwent dental treatment for his fractured central incisors, that the fracture was causally related to the accident, and that he would be required to undergo ongoing dental treatment (*see Newman* at 537; *Kennedy v Anthony*, 195 AD2d 942 [3d Dept 1993]).

In view of the foregoing finding that the injuries to plaintiff's teeth meet the no-fault threshold, "it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (*Linton v Nawaz*, 14 NY3d 821, 822 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9794 Sarah Whitney, Index 309066/09
Plaintiff-Respondent,

-against-

Argentina Valentin, doing business as La Esquina Restaurant,
Defendant-Respondent,

Roma Realty, LLC, et al.,
Defendants-Appellants.

_____

Wade Clark Mulcahy, New York (Cheryl D. Fuchs of counsel), for appellants.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for Sarah Whitney, respondent.

Law Offices James J. Toomey, New York (Eric P. Tosca of counsel), for Argentina Valentin, respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about October 3, 2012, which, insofar as appealed from, denied defendants Roma Realty, LLC and PNC Enterprises, LLC's motion for summary judgment dismissing the complaint as against them and on their cross claim for contractual indemnification against defendant Valentin, unanimously affirmed, without costs.

Roma Realty's witness testified that, after purchasing the property, Roma replaced the cellar doors over which plaintiff

subsequently fell, and that he knew that the doors were not equipped "with strong railings," as required by Administrative Code of City of NY § 19-119. Defendants' argument that Administrative Code of City of NY § 19-119 is not applicable to the subject cellar doors is unavailing (*see Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 519 [1st Dept 2008]). Given Roma's witness's undisputed testimony as to the violation of a specific statute, Roma, as an out-of-possession landlord with the right to reenter the premises to inspect and repair, is charged with constructive notice of the defective condition (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 [1987]; *Landy v 6902 13th Ave. Realty Corp.*, 70 AD3d 649 [2d Dept 2010]). The testimony also raises an issue of fact whether Roma created or had actual notice of the condition that allegedly caused plaintiff's fall.

Issues of fact also exist as to the scope of PNC's duties as Roma's managing agent and therefore whether PNC may be held liable for plaintiff's injuries.

Since, contrary to defendants' argument, the record does not demonstrate conclusively that Valentin proximately caused plaintiff's injuries, defendants are not entitled to summary

judgment on their cross claim for contractual indemnification against her.

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 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9795 In re Peter Licata, Index 110705/11
Petitioner-Appellant,

-against-

The Department of Citywide
Administrative Services, et al.,
Respondents-Respondents.

_____

Law Offices of Gregory T. Chillino, New York (Christopher M. Slowik of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered February 21, 2012, denying the petition seeking to annul the determination of respondent Department of Buildings (DOB), which denied petitioner's application for a master plumber's license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DOB's determination that petitioner failed to supply satisfactory proof of at least seven years of experience "in the design and installation of plumbing systems" was rationally based (Administrative Code of City of NY former § 26-146[a][1]; *see Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]). DOB's policy of considering, among other

things, plumbing permits in determining whether the applicant had the requisite experience was not "irrational or unreasonable" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *see Rasole*, 83 AD3d at 509). Moreover, petitioner's contention that he was arbitrarily denied the opportunity to appear before the agency to offer testimony is unavailing (*see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 97-98 [1997], *cert denied* 523 US 1074 [1998]).

We have considered and rejected petitioner's remaining arguments.

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9796N Kasowitz, Benson, Torres & Friedman, LLP, Plaintiff-Respondent, Index 113329/08

-against-

Shelly Cao, Defendant-Appellant,

1 Funding Center, Inc., Defendant.

Shelly Cao, appellant pro se.

Kasowitz, Benson, Torres & Friedman LLP, New York (Joshua A. Siegel of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered June 27, 2011, which denied the motion of defendant Shelly Cao to vacate a default judgment against her, unanimously reversed, on the law, without costs, and the motion granted to the extent of remanding the matter for a traverse hearing to determine whether the court had jurisdiction to render the default judgment.

Cao's sworn, nonconclusory claim that the building at which she was allegedly served was not her actual dwelling place or usual place of abode raised an issue of fact as to whether plaintiff validly served her with process pursuant to CPLR 308(4)

so as to vest the court with jurisdiction to render the default judgment. Accordingly, a traverse hearing must be held to determine whether Cao is entitled to relief from the judgment pursuant to CPLR 5015(a)(4) (*see Cordova v Thessalonica Ct. Assoc.*, 35 AD3d 256 [1st Dept 2006]; *see also Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 538-539 [1st Dept 2009]).

If, after the traverse hearing, the court finds that the summons was not affixed to Cao's dwelling place or usual place of abode, then it must grant that branch of Cao's motion seeking to vacate the default judgment pursuant to CPLR 5015(a)(4) and dismiss the action. If, however, the court determines that service was proper under CPLR 308(4), then it must make a factual determination as to whether Cao personally received notice of the summons in time to defend pursuant to CPLR 317. If the court finds that Cao did not personally receive notice of the summons in time to defend, then she would be entitled to relief pursuant to CPLR 317 because she moved to vacate the default judgment within a year after she obtained knowledge of entry of the

judgment and because she established a potential meritorious defense — namely, that she is not personally liable for the defendant corporation's unpaid legal fees (*see e.g. T.D. Bank, N.A. v Halcyon Jets, Inc.*, 99 AD3d 431 [1st Dept 2012]).

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

ENTERED: APRIL 11, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9797N Yitzchak M. Hirsch, etc., et al., Plaintiffs-Appellants, Index 103504/10

-against-

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

Devorah Hirsch, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 15, 2011, which denied plaintiffs' motion for a default judgment and granted defendants' cross motion to compel plaintiffs to accept their untimely answer and to dismiss the complaint as against defendant James Secreto, unanimously affirmed, without costs.

The motion court properly exercised its discretion in granting the cross motion to compel plaintiff to accept service of the late answer (*see* CPLR 3012[d]). The City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them (*see Silverio v City of New York*, 266 AD2d 129 [1st Dept 1999]; General Municipal Law 50-k[2]). Moreover, there is

no indication that plaintiffs were prejudiced by the short delay, and defendants were not required to set forth a meritorious defense because no default judgment had been entered. (*see Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]).

Dismissal of the complaint as against defendant Secreto was proper, in light of plaintiffs' failure to personally serve him (*see* CPLR 308[2]).

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

ENTERED: APRIL 11, 2013

CLERK