SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 5, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Moskowitz, DeGrasse JJ.

2606 Siegmund Strauss, Inc., Index 601991/06
Plaintiff-Respondent,

-against-

East 149th Realty Corp.,
Defendant,

Windsor Brands, Ltd., et al.,
Defendants-Appellants.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Epstein Becker & Green, P.C., New York (Ralph Berman of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (20 NY3d 37 [2012]), judgment, Supreme Court, New York County (Bernard J. Fried, J), entered April 7, 2009, declaring plaintiff Siegmund Strauss to be the lawful tenant of the subject premises, and bringing up for review an order (same court and Justice), entered August 6, 2007, which granted plaintiff's motion to dismiss the amended answer of defendants Windsor Brands, Ltd., Twinkle Import Co., Inc., Teresa Rodriguez and Robert Rodriguez (defendants)

which asserted counterclaims and a third-party complaint, unanimously modified, on the law, to the extent of denying plaintiff's CPLR 3211 motion, finding viable claims for breach of contract, and otherwise affirmed, without costs.

The parties to this appeal negotiated to merge their corporations and operate out of a building at 520 Exterior Street in the Bronx. At the time, the building was leased by defendant Windsor. Plaintiff and the individual defendants – who owned and operated defendant corporations - drafted, but did not execute a written merger agreement. It is undisputed that all of the parties began to perform under that agreement, which included a provision that contemplated Windsor helping Strauss to negotiate a new lease for the premises with 149th Street Realty, the landlord. However, after plaintiff moved into the subject premises, the parties' relationship quickly soured, and plaintiff Strauss sought to buy out the appealing defendants. The offer was rejected, and plaintiff removed the individual defendants from the merged corporation's payroll and changed the locks on the premises.

Plaintiff commenced this action seeking, among other things, a declaratory judgment that it was the tenant entitled to possession of the property. In their answer, defendants asserted counterclaims and a third party complaint against the Strauss

principals, alleging fraud, conversion, and tortious interference with a contractual relationship. The amended answer did not assert a claim for breach of contract.

Strauss and its principals moved, pursuant to CPLR 3211(a)(7), to dismiss the counterclaims and third-party complaint. By order entered August 7, 2007, the court granted the motion, finding that the factual allegations underlying the counterclaims and third-party complaint supported claims for breach of contract, but not the alleged torts. Defendants moved for clarification/modification and reargument, requesting permission to amend their counterclaims to assert a cause of action for breach of contract. By order entered December 10, 2007, the court denied the motion.

Defendants subsequently moved to amend their complaint to assert a claim for breach of contract. This motion was denied by order entered February 25, 2008.[1] A bench trial ensued, and the court declared plaintiff the lawful tenant of the premises. Defendants appealed from the final judgment, seeking review of the August 2007 and February 2008 interlocutory orders pursuant to CPLR 5501(a)(1).

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[1]Defendants filed a notice of appeal from the February 2008 order, but did not perfect and subsequently withdrew their appeal.

We affirmed, holding that the appeal did not bring up for review either of the interlocutory orders because neither "necessarily affected" the final judgment awarding plaintiff possession of the property (*Strauss v East 149th Realty Corp*, 81 AD3d 260 [1st Dept 2010]). We concluded that the judgment declaring that Strauss was entitled to possession would still stand regardless of whether defendants were permitted to pursue a claim for breach of contract (*id.* at 265).

The Court of Appeals granted leave,[2] modified, and remitted for our review of the motion court's determination in its August 2007 order, which the Court of Appeals found "necessarily affected" the final judgment (20 NY3d at 43 [2012]).

Given that the remand order permits review of the motion court's 2007 order, we find error in the grant of plaintiff's CPLR 3211 motion to dismiss the counterclaims and third party complaint. It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) "must be denied if from the pleadings' four corners factual allegations are discerned which taken together

[2]The Court of Appeals granted leave to appeal from that part of our order that affirmed the judgment and otherwise dismissed defendant's motion for leave to appeal from the remaining portion of our order on the ground that it did not finally determine the action (17 NY3d 936 [2008]).

manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal quotation marks omitted]). The pleading is to be liberally construed (*id.*). The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, "the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[T]he criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*id.* at 88 [emphasis added] [internal quotation marks omitted]).

Here, as the motion court recognized, defendants' answer and third-party complaint sufficiently alleged contract-based claims. Defendants asserted that plaintiff negotiated the merger agreement with them, and subsequently took the entirety of their food distribution business, including inventory, leased premises, clientele, and employees without making any payments therefor. Plaintiff's assertions in support of its 3211 motion did not

refute defendants' allegations. Accordingly, we find that defendants have alleged facts sufficient to support contract-based claims, subject to challenge by plaintiff, and remand for further proceedings thereupon.

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

ENTERED: MARCH 5, 2013

CLERK

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

9417 The People of the State of New York, Respondent, Ind. 3983/06

-against-

Hector Perez, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about October 19, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. The court properly assessed 20 points for sexual misconduct while confined, based on defendant's prison disciplinary record.

Defendant argues that since a disciplinary disposition may be based on a standard of substantial evidence, it does not satisfy the requirement that risk factors be established under a standard of clear and convincing evidence. It is unnecessary to

decide whether a disciplinary determination automatically provides clear and convincing evidence of the underlying facts, since in this case the totality of the information presented at the sex offender hearing, including defendant's admissions to repeated instances of prohibited sexual activity in prison, amply supported this risk factor.

Defendant also argues that since his consensual sexual activity would have been lawful, as well as being constitutionally protected (*see Lawrence v Texas*, 539 US 558 [2003]), had it not occurred in a prison setting, it did not indicate a potential for unlawful sexual activity. However, the conduct at issue undisputedly violated prison rules, and "defendant's inability to refrain from forbidden sexual conduct . . . was relevant to his potential for sexual recidivism" (*People v Salley*, 67 AD3d 525, 526 [1st Dept 2009], *lv denied* 14 NY3d 703 [2010]).

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

ENTERED: MARCH 5, 2013

CLERK

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

9418 Howard Warehouse Inc., Index 109135/10
Plaintiff-Respondent,

-against-

Loyaltex Fashion Inc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered on or about June 21, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 13, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 5, 2013

CLERK

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

9420 In re Julio J.,

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

_____

Carol Kahn, New York, for appellant.

Michael A, Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 12, 2012, which, upon appellant's admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, adjudicated him a juvenile delinquent, and placed him with the Office of Child and Family Services for a period of 18 months, unanimously affirmed, without costs.

The placement, which constituted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection, was a proper exercise of the court's discretion (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The disposition was justified by the seriousness of appellant's current offense, as well as his prior and subsequent

offenses. In addition, appellant was noncompliant with treatment, and his academic performance, attendance and behavior at school were very poor.

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

ENTERED: MARCH 5, 2013

CLERK

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

9424 In re Victor S., etc.,
Petitioner-Respondent,

-against-

Kareem J.S.,
Respondent-Appellant.

_____

The Reiniger Law Firm, New York (Douglas H. Reinger of counsel), for appellant.

Daniel R. Katz, New York, for respondent.

_____

Appeal from order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about January 23, 2012, which after a hearing, determined that appellant had committed acts that constituted aggravated harassment in the second degree (Penal Law § 240.30), and granted petitioner a one-year order of protection directing appellant to, inter alia, stay away from and cease communication with him and his daughter, unanimously dismissed, without costs, as moot.

Because the order of protection has expired, this appeal is moot (*see Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv dismissed* 14 NY3d 854 [2010]).

Were we to reach the merits, we would find that a fair preponderance of the evidence (Family Ct Act § 832), supports the referee's finding that appellant committed acts constituting the

family offense of aggravated harassment in the second degree (*see* Penal Law § 240.30), warranting the issuance of an order of protection (*see* Family Ct Act § 812[1]). Indeed, "making a telephone call will constitute aggravated harassment in the second degree when it is made with intent to harass, annoy, threaten or alarm another person and is made either in a manner likely to cause annoyance or alarm or with no purpose of legitimate communication" (*Matter of Wendy Q. v Jason Q.*, 94 AD3d 1371, 1373 [3d Dept 2012] [internal quotation marks omitted]). Contrary to appellant' contention, his intent to alarm or annoy petitioner was inferable from his statements about petitioner's daughter, because they constituted a threat that specifically referred to placing the safety of the child in jeopardy (*see People v Wilson*, 59 AD3d 153, 154 [1st Dept 2009], *affd* 14 NY3d 895 [2010]).

Appellant set forth no basis to disturb the court's credibility determinations (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

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

ENTERED: MARCH 5, 2013

CLERK

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

9425 Rebar Lathing Corp., etc., Index 116502/10
Plaintiff-Respondent,

-against-

Century Maxim Construction Corp., et al.,
Defendants,

Mid-Carlisle Construction Corp., et al.,
Defendants-Appellants.

_____

Duane Morris LLP, New York (Jose A. Aquino of counsel), for appellants.

Zisholtz & Zisholtz, LLP, Mineola (Joseph McMahon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 13, 2011, which, insofar as appealed from as limited by the briefs, denied that branch of defendants-appellants' motion to dismiss plaintiff's fourth cause of action as against defendant owner, unanimously affirmed, with costs.

Plaintiff subcontractor filed a valid mechanic's lien against the premises, which, given the absence of any contractual privity, provides a basis for its claim against the owner for

trust violations under article 3-A of the Lien Law (*see* Lien Law § 71[3][a]; *see Quantum Corporate Funding v L.P.G. Assoc.*, 246 AD2d 320, 322 [1st Dept 1998], *lv denied* 91 NY2d 814 [1998]; *see also Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 [2d Dept 2009]; *Weber v Welch*, 246 AD2d 782, 784 [3d Dept 1998]).

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

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

ENTERED: MARCH 5, 2013

CLERK

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

9427 Linda Dauria, et al., Index 302708/11
Plaintiffs-Respondents,

-against-

CastlePoint Insurance Company,
Defendant-Appellant,

Frank Campo, et al.,
Defendants.

_____

Law Office of Max W. Gershweir, New York (Jennifer Kotlyarsky of counsel), for appellant.

Aboulafia Law Firm, LLC, New York (Matthew S. Aboulafia of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about February 7, 2012, which, to the extent appealed from, granted plaintiffs' motion for summary judgment and denied defendant CastlePoint Insurance Company's cross motion for summary judgment, unanimously reversed, on the law, without costs, plaintiff's motion denied, the cross motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this action arising out of defendant CastlePoint's rescission of a homeowner's insurance policy after a fire at plaintiffs' residence, based on its determination that the premises contained a basement apartment rendering it a "three

family" dwelling as opposed to the "two family" designation that was listed on the insurance application, plaintiffs' argument that they did not misrepresent the premises as a two family dwelling is contrary to this Court's recent decision in *Hermitage Ins. Co. v LaFleur* (100 AD3d 426 [1st Dept 2012]). There, we held that the only reasonable interpretation of the question "# Families" on an insurance application is that it seeks the number of separate dwelling units in the building.

Plaintiffs maintain that their response of "2" to this question was correct because all of the residents of the premises lived together as one "family" or "household." However, based on plaintiffs' interpretation, the logical answer would have been "1." Thus, even if, as plaintiffs claim, all the residents of the premises shared a single "household" in the sense of living together, the premises is a three family dwelling because of its structural configuration, i.e., three separate units, each with its own kitchen, bathroom and separate entrance.

The motion court erred in finding that CastlePoint failed to establish the materiality of the misrepresentation because three family dwellings are not included among the "unacceptable exposures" listed in its underwriting guidelines. Three family dwellings are not listed in the "eligibility" section of the policy because CastlePoint does not issue policies to cover such

dwellings. That the underwriting guidelines do not specifically exclude them does not indicate otherwise and does not raise an issue of fact to defeat summary judgment.

Nor is there any ambiguity in the policy term "residence premises" which, as relevant here, is defined as "a two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations.'" When read in context, as the rules of policy interpretation require (*Harris v Allstate Ins. Co.*, 309 NY 72, 75-76 [1955]), the reference to "family units" makes clear that the named insured need only reside in one of the two "family units" that, by definition, constitute a two family dwelling. The term "family," as used in "family units," "one family dwelling" and "two family dwelling," necessarily relates to an entire self-contained dwelling unit (*see LaFleur*, 100 AD3d at 427). Since

the premises here consists of three dwelling units, it is a three family dwelling and does not fit within the policy definition of a covered "residence premises."

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

ENTERED: MARCH 5, 2013

CLERK

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

9428 Javier Martinez, et al., Index 16403/03
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant,

The New York City Transit Authority,
Defendant-Respondent.

_____

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

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

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered March 22, 2012, which granted defendant New York City Transit Authority's (NYCTA) motion for summary judgment dismissing the complaint for failure to file a notice of claim and denied plaintiffs' cross motion for leave to serve a late notice of claim, unanimously affirmed, without costs.

In this personal injury action, plaintiffs filed a notice of claim against the City of New York and initially commenced the action against the City. The complaint was subsequently amended to add NYCTA as a defendant, but plaintiffs did not file a notice of claim against NYCTA. After asserting, as an affirmative defense, plaintiffs' failure to timely file the notice, NYCTA

moved to dismiss the complaint on this ground. In response, plaintiffs cross-moved for leave to file a late notice of claim *nunc pro tunc*. The motion court lacked the authority to grant plaintiffs' cross motion since it was made beyond the one-year-and-90-day statute of limitations period (*see* General Municipal Law §§ 50-e[5], 50-1[c]; *see Bobko v City of New York*, 100 AD3d 439 [1st Dept 2012]).

Unlike the unusual factual scenarios presented in *Bender v New York City Health & Hosps. Corp.* (38 NY2d 662 [1976]) and *Matter of Hartsdale Fire Dist.* (65 AD3d 1345 [2d Dept 2009], *lv denied* 14 NY3d 701 [2010]), relied on by plaintiffs, NYCTA neither engaged in misleading conduct nor induced plaintiffs' inaction. That NYCTA proceeded with the litigation and failed to serve a bill of particulars with respect to the affirmative

defense does not invoke the doctrine of equitable estoppel (*see Rodriguez v City of New York*, 169 AD2d 532 [1st Dept 1991]; *see also Hamptons Hospital & Medical Center, Inc. v Moore*, 52 NY2d 88 [1981]).

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

ENTERED: MARCH 5, 2013

CLERK

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

9432 Danny Yacoub, Index 306115/09
Plaintiff-Respondent,

-against-

1540 Wallco, Inc.,
Defendant-Appellant.

_____

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for appellant.

Decolator, Cohen & DiPrisco, Garden City (Carolyn M. Canzoneri of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 18, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing plaintiff's negligence claim, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

"Absent a hazardous condition or other circumstance giving rise to an obligation to provide exterior lighting for a particular area, landowners are generally not required 'to illuminate their property during all hours of darkness'" (*Miller v Consolidated Rail Corp.*, 9 NY3d 973, 974 [2007], quoting *Peralta v Henriquez,* 100 NY2d 139, 145 [2003]). However, providing outside lighting may be a reasonable response by a private landowner who knows or should have known that someone

visiting the property will confront a hazard that would be reasonably avoided by illumination (*see Peralta* at 144).

The fact that defendant enrolled its building in the "Clean Halls" program of the New York City Police Department is insufficient to raise a triable issue of fact as to its alleged negligence in failing to light the fire escape where plaintiff fell.

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

ENTERED: MARCH 5, 2013

CLERK

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

9433 The People of the State of New York, Ind. 138/11
Respondent,

-against-

Donald Horne,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Gregory Carro, J.), rendered on or about April 27, 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 judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 5, 2013

CLERK

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

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

9434 Frank Agresti, et al., Index 115311/08
Plaintiffs-Respondents,

-against-

Silverstein Properties, Inc.,
Defendant,

1 World Trade Center LLC, et al.,
Defendants-Appellants.

_____

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 14, 2012, which granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) cause of action as against defendants 1 World Trade Center LLC and Tishman Construction Corporation, unanimously affirmed, without costs.

Plaintiff was injured when an improvised scaffold being used by two workers between two and five feet above plaintiff's head collapsed causing a wooden plank to fall and strike plaintiff in the head. Partial summary judgment in favor of plaintiff on his Labor Law § 240(1) claim was proper since an enumerated safety device, namely, the makeshift scaffold, proved inadequate to

shield plaintiff from "the harm flow[ing] directly from the application of the force of gravity" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). Moreover, the lack of certainty as to exactly what preceded the accident or the fact that plaintiff failed to point to a specific defect in the scaffold does not require denial of the motion (*see Rich v West 31st St. Assoc., LLC*, 92 AD3d 433 [1st Dept 2012]).

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

ENTERED: MARCH 5, 2013

CLERK

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

9435 Kenneth Rodriquez, et al., Index 304349/08
Plaintiffs-Respondents,

-against-

Concourse Village Inc.,
Defendant-Appellant.

_____

Richard C. Rubinstein , New York, for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (William P. Hepner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about August 3, 2012, which, in this personal injury action arising from a fall in defendant's building, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff raised issues of fact as to whether defendant complied with its inspection schedule on the day of the accident, and when the area was last inspected before the accident (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]; *Deluna-Cole v Tonali, Inc.*, 303 AD2d 186, 186 [1st Dept 2003]).

According summary judgment is precluded.

In the light of the foregoing we need not reach the other issues raised.

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

ENTERED: MARCH 5, 2013

CLERK

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

9436- Index 402711/10
9437 The City of New York,
Plaintiff,

-against-

Nova Casualty Company, et al.
Defendants.
- - - - -
Nova Casualty Company,
Third-Party Plaintiff-
Respondent,

-against-

Harleysville Worchester Insurance Company,
Third-Party Defendant-
Appellant.

_____

Gallo Vitucci & Klar, LLP,New York (Daniel P. Mevorach of counsel), for appellant.

Melito & Adolfsen, P.C., New York (Michael F. Panayotou of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered October 5, 2011, to the extent appealed from, declaring that third-party defendant Harleysville Worchester Insurance Company is obligated to defend the City of New York in an underlying personal injury action under a policy it issued to nonparty Bruno Grgas, Inc., and order and judgment (one paper), same court and Justice, entered May 1, 2012, upon reargument, to the extent appealed from, declaring

that Harleysville is obligated to defend the City under both the Grgas policy and a policy it issued to nonparty Coastal Sheet Metal Corp., unanimously reversed, on the law, without costs, and it is declared that Harleysville has no obligation to defend the City under either policy.

The terms of the additional insurance clauses in the Harleysville policies require that the insured and the organization seeking coverage have agreed in writing that the insured will add the organization as an additional insured. The record contains no such freestanding agreement between the City and either Grgas or Coastal. The language in Grgas's and Coastal's subcontracts incorporating by reference the terms of the prime contract, which required the contractor to add the City as an additional insured under its policies, is insufficient to

create that obligation (*see e.g. AB Green Gansevoort, LLC v Peter Scalamandre & Sons., Inc.*, ___ AD3d ___, 2013 NY Slip Op 00031 [1st Dept January 8, 2013]).

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

ENTERED: MARCH 5, 2013

CLERK

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

9438N Mia Henderson-Jones, etc., et al., Index 115360/06
Plaintiffs-Appellants,

-against-

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

_____

Lowell D. Willinger, New York (Warren J. Willinger of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Arthur Engoron, J.), entered on or about October 16, 2012, which, insofar as appealed from, granted defendants' motion to compel plaintiff Mia Henderson-Jones to submit to an independent medical examination, unanimously affirmed, without costs.

On May 30, 2012, Supreme Court so-ordered a stipulation which provided that defendants are to designate an independent medical examination within 30 days, and to conduct it within 30 days thereafter, or defendants would be deemed to have waived the examination. On June 27, 2012, defendants served a demand designating a "Dr. Michael Aronson," but failing to designate a time for the examination. We reject plaintiffs' argument that defendants' misspelling of the doctor's name and failure to "specify the time" constitutes a waiver of the examination

because it violates CPLR 3121(a) and 22 NYCRR 202.17(a). Here, "the examination was directed by court order, thus the formalities of a party serving notice of a physical or mental examination are not in issue" (*Paris v Waterman S.S. Corp.*, 218 AD2d 561, 563 [1st Dept 1995], *lv dismissed* 96 NY2d 937 [2001]). Ultimately, defendants were able to secure an examination on August 14, 2012, and it was not an improvident exercise of discretion for Supreme Court to have granted defendants' motion given this short delay (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]).

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: MARCH 5, 2013

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische JJ.

7650N JP Morgan Chase Bank, National Association, Plaintiff-Respondent, Index 107099/09

-against-

Saadia Shapiro, Defendant-Appellant,

JPMorgan Chase Bank, National Association Successor in Interest to Washington Mutual Bank, et al., Defendants.

_____

Shapiro & Associates, Attorneys at Law, PLLC, Brooklyn (Robert J. Stone, Jr., of counsel), for appellant.

Parker Ibrahim & Berg LLC, New York (Scott W. Parker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol E. Huff, J.), entered August 11, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff submitted proof of the existence of a mortgage and of default. This constituted a prima facie showing of entitlement to summary judgment in this foreclosure action (*see Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443 [1st Dept 2011]; *Bank Leumi Trust Co. of N.Y. v Lightning Park*, 215 AD2d 246, 247 [1st Dept 1995]). The underlying mortgage and note were originally held by Washington Mutual Bank, FA (WAMU). Plaintiff

submitted the affidavit of an employee who identified herself as having personal knowledge of, inter alia, plaintiff's status as successor-in-interest to WAMU and defendant Saadia Shapiro's default. This was based upon her review of plaintiff's books and records and its account records regarding Shapiro's delinquent account (*see* CPLR 3212[b]). In opposition, Shapiro failed to raise a triable issue of fact.

Indeed, this Court recently recognized plaintiff's status as WAMU's successor-in-interest for all of its loans and loan commitments, with standing to foreclose on mortgages formerly held by WAMU (*see JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d 546, 547 [1st Dept 2012], *lv dismissed* 19 NY3d 1017 [2012]).

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

ENTERED: MARCH 5, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, DeGrasse, JJ.

8125 Phyllis Muriel Stepper, Index 115721/10
Plaintiff-Appellant,

-against-

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

_____

Law Offices of Stewart Lee Karlin, New York (Stewart Lee Karlin of counsel), for appellant.

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

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 27, 2011, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion with respect to the 2008-2009 rating of "unsatisfactory," and otherwise affirmed, without costs.

The motion court correctly determined that the City of New York was an improper party to the action (*see e.g. Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]). The motion court also correctly determined that to the extent plaintiff challenged the unsatisfactory rating she received following the 2007-2008 school year, those allegations were time-barred (Education Law § 3813[2-b]). However, plaintiff's claim related to her unsatisfactory rating for the

2008-2009 school year did not accrue until she received a final decision affirming the rating, on June 28, 2010, from the Interim Acting Director (*see Matter of Nash v Board of Educ. of the City School Dist. of the City of N.Y.*, 82 AD3d 470, 471 [1st Dept 2011], *affd* 18 NY3d 457 [2012]; *Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008]). Plaintiff commenced the action within one year of that date, thus satisfying the statute of limitations (*see* Education Law § 3813[2-b]). Further, plaintiff filed a notice of claim within three months of June 28, 2010. Accordingly, we reject the Department of Education's position that, to the extent plaintiff sought to challenge the unsatisfactory rating she received in 2009, those allegations are barred as a result of her failure to file a timely notice of claim (Education Law § 3813[1]).

The Decision and Order of this Court entered herein on September 27, 2012 is hereby recalled and vacated (*see* M—5115 decided simultaneously herewith).

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

ENTERED: MARCH 5, 2013

CLERK

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

8603 The People of the State of New York, Respondent, Ind. 1443/10

-against-

Donell Dinkins, Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 6, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously reversed, on the law, the plea vacated, the indictment dismissed, and leave granted to the People to apply for an order permitting re-submission of charges to another grand jury.

On March 12, 2010, police officers arrested defendant as part of a team that on that day stole several wallets and other items from restaurant patrons. Later that month, the People presented to a grand jury evidence against defendant of four counts of fourth degree grand larceny, and five counts of jostling. After a four-day presentation, the grand jury indicted

defendant for the jostling counts but failed to muster a vote either to indict defendant for the grand larceny counts or to dismiss those counts.

In April 2010, defendant applied for a bail reduction because the grand jury had only indicted him on the misdemeanor jostling counts. At a hearing later that month, the prosecutor opposed a reduction because the grand jury had not dismissed the felony counts but had instead taken "no affirmative action" with respect to them, and stated that he planned to re-present the grand larceny charges to another grand jury. The prosecutor did not seek the court's authorization for this re-presentation. The court then reduced defendant's bail.

Three days later, the prosecutor presented the case to a second grand jury and asked it to indict defendant on the four grand larceny counts and also on three of the five jostling counts that the first grand jury had considered. After the re-presentation, the second grand jury returned a superseding indictment on all seven counts.

In June 2010, defendant pleaded guilty to one count of fourth degree larceny, in full satisfaction of the charges in the outstanding indictment. He also pleaded guilty to two other pending charges.

On appeal, defendant contends that the People violated

CPL 190.75(3) by re-presenting the felony grand larceny counts in the indictment to a second grand jury without the court's permission. Accordingly, defendant argues, he is entitled to the vacatur of his guilty plea and the dismissal of the second indictment.

Under CPL 190.75(3), the People may not re-present a charge that a grand jury has dismissed unless the court in its discretion authorizes or directs re-submission. Even without a formal grand jury vote, a charge can be deemed "dismissed" within the meaning of CPL 190.75(3) when the prosecutor "prematurely takes the charge away from the grand jury" (*People v Credle*, 17 NY3d 556, 558 [2011]; *People v Smith*, __ AD3d __, 2013 NY Slip Op 00790 [1st Dept 2013]). In *Credle*, after the prosecution presented drug felony charges against the defendant to a grand jury, it unsuccessfully tried to muster sufficient votes to indict or dismiss, and then offered the grand jury the option of voting "no affirmative action" on the charges 17 NY3d at 558). After the grand jury accepted that option, the People, without seeking the court's permission, terminated the proceedings and re-submitted the charges to a second grand jury, which indicted the defendant (*id.*). The Court of Appeals dismissed the drug charges, explaining that when a prosecutor terminates a grand jury's deliberations before it has disposed of the matter in one

of the five ways permitted by CPL 190.60,[1] the critical question as to whether a dismissal was effected was "'the extent to which the [g]rand [j]ury considered the evidence and the charge'" (17 NY3d at 560, quoting *People v Wilkins*, 68 NY2d 269, 274 [1986]). In *Credle*, the prosecutor terminated the first grand jury proceedings after it had made a complete presentation and directed the jury to deliberate over the charges; accordingly the withdrawal was deemed a dismissal (17 NY3d at 560).

As this Court recently found in *Smith* under virtually identical circumstances, the People's attempt to distinguish this case from *Credle* on the ground that here the prosecutor did not formally "withdraw" the charges against defendant from the first grand jury, but instead allowed its term to expire, is unavailing (*Smith*, __ AD3d at __, 2013 NY Slip Op 00790, *2). The critical question is whether the grand jury failed to indict after a full presentation of the case.

Defendant's guilty plea does not preclude his claim, and his failure to preserve it does not preclude our review, because the prosecution's noncompliance with CPL 190.75(3) is a

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[1]Under the statute, the grand jury's options with respect to a charge are limited to indicting (*see* CPL 190.65), dismissing (*see* CPL 190.75), directing the district attorney to file either a prosecutor's information with a criminal court (*see* CPL 190.70) or a request for removal to the family court (*see* CPL 190.71), or submitting a grand jury report (*see* CPL 190.85).

jurisdictional defect (*see People v Hansen*, 95 NY2d 227, 230-232 [2000] [holding a defendant's "right to be prosecuted on a jurisdictionally valid indictment survive[s] [a] guilty plea"]). The prosecution's failure to adhere to the statutory procedure "affect[ed] the jurisdiction of the court, and as such appellate review thereof was neither waived nor forfeited by the defendant" (*People v Jackson*, 212 AD2d 732, 732 [2d Dept 1995], *affd* 87 NY2d 782 [1996] [where the prosecutor, without first obtaining the court's authorization pursuant to CPL 210.20(6)(b), re-submitted charges that were the subject of a reduction order more than 30 days after the order's entry, the defendant's guilty plea did not preclude his challenge on appeal]; *see also Smith*, __ AD3d at __, 2013 NY Slip Op 00790, *2).

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

ENTERED: MARCH 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8655 In re Christopher Asch, Index 108528/10
Petitioner-Respondent,

-against-

The New York City Board/
Department of Education,
Respondent-Appellant.

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

Frederic H. Aaron, Plainview, for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 21, 2011, which granted the petition to vacate an arbitration award ordering petitioner suspended without pay for six months, restored petitioner's employment status with back pay, and denied respondent Department of Education's cross motion to dismiss the petition, unanimously reversed, on the law, without costs, the petition denied, the cross motion granted, and the arbitration award reinstated.

Petitioner is a tenured school librarian/media specialist with over 20 years of service. His record was unblemished until charges were filed against him by respondent Department of Education (DOE) in 2008 as the result of two separate investigations into incidents alleged to have occurred during school years 2005/2006, 2006/2007 and 2007/2008. The first

investigation involved allegations of petitioner's failure to obtain proper school or parental permission before taking students on a field trip to Boston. The second investigation involved claims that he inappropriately touched several students.

At the conclusion of these investigations, petitioner was charged with nine specifications. Seven alleged that petitioner inappropriately touched several male students by rubbing their backs, shoulders and spines; whispering into one student's ear; striking two male students on the buttocks with a rolled up newspaper; running his fingers through a student's hair; grabbing and squeezing another male student's stomach after being told "[d]on't [t]ouch [m]e"; and lifting and rubbing the leg of a male student while saying words to the effect of "Insert foot! Open mouth." The two remaining specifications charged that he took seven students on a trip to Boston without proper school or parental permission.

A disciplinary hearing was held pursuant to Education Law § 3020-a(3). It was conducted over a period of 12 days from November 23, 2009 through April 2010. The relevant hearing testimony revealed the following:

Assistant Principal Eric Grossman testified that in February 2008, he was approached by student I.F., who told him that petitioner had "been touching the students in a way that

made them feel uncomfortable for some time." I.F. showed Grossman a sheet of paper with several emails that had been cut and pasted as corroboration of these allegations. Grossman admitted that he did not request to see the original documents. Significantly, Grossman testified that I.F. did not appear to be vindictive toward petitioner in reporting these allegations. Grossman took the paper to Principal Stanley Teitel and gave him a verbal account of his conversation with I.F.

I.F., now graduated, testified that starting in the 2005/2006 school year, he noticed that petitioner, in order to get a noisy student's attention in the library, would rub his hands over the student's back in a circular motion, stroke the student's hair or run two fingers down the student's back. He didn't initially think anything of it until he saw petitioner standing behind and stroking student M.M.'s hair. M.M., who was playing a video game, was apparently not aware of petitioner's actions on this occasion. I.F. further testified that in December 2007, he saw petitioner coming toward him and said, "Don't touch me." According to I.F., petitioner smiled at him and reached down and squeezed I.F.'s belly. While he was disturbed over this incident, I.F. did not report it, stating it was his senior year and he thought he could "st[i]ck it out."

Finally, I.F. stated that on Super Tuesday, 2008, he, F.N.

and R.H. were having a political discussion in the back of the library. F.N. made a "politically incorrect" comment and petitioner grabbed F.N.'s leg, "lifted it up and sort of rubbed it up and down while saying open mouth, insert foot." I.F. then went about soliciting email recollections from other students about any inappropriate touching involving petitioner and turned them over to Assistant Principal Grossman. He also stated that some students he approached requesting information about any touching incidents involving petitioner refused to provide any information and were hostile to his requests.

M.M. testified that over three years at the school, petitioner touched him inappropriately approximately once every other week, but he did not report the incidents until I.F. asked him to write up a statement. M.M. stated he did not know who to go to about the incidents and was very uncomfortable with it. Several other students testified concerning petitioner's actions, none of which were reported prior to I.F.'s requests for emails.

Petitioner called a number of former students to testify, all of whom stated that any touching by petitioner was not viewed as sexual by them or made them feel uncomfortable. He also called Delisa Brown-Guc, another librarian who worked at the school. She testified that when she needed students to be quiet, she would walk over to them, smile, sometimes put her hand on

their forearm and sometimes lean over and speak quietly to them. Significantly, she also stated that she never touched a student's hair, squeezed a student's shoulder, or ran her fingers down a student's spine. She further stated that such conduct is inappropriate and, had she seen it, would have reported it immediately to school supervisors.

Petitioner testified in his own behalf. He stated that, because of the configuration of the computers in the library, standing behind a student was often the only way to get that student's attention. He stated that he would try various methods of getting a noisy student's attention, such as trying to catch their eye, stand behind them and whisper or speak softly to them, tap them on the shoulder or, if that did not work, "give them a little squeeze on the shoulder." He also acknowledged that if that failed to get the student's attention, "I might run my finger a little bit down their" necks, (demonstrating this technique on his counsel). He denied touching any student's hair as well as striking any student with a rolled up newspaper. He also denied squeezing I.F.'s stomach.

With respect to the Super Tuesday incident, petitioner testified that F.N. and several other students were sitting on the floor "having a picnic" and being very loud. He told them, in a "friendly exchange" to lower their voices and put the food

away. He recalled F.N. saying something that sounded like an admission that he had been eating. Another student said "why don't you put your foot in your mouth, and so I [petitioner] grabbed his ankle and I attempted to try to put his foot in his mouth and I said open mouth, insert foot, chew well." Petitioner stated everyone laughed except I.F., who said, "[T]hat's creepy."

With respect to the Boston trip, petitioner admitted that he was told by D.Y.'s mother that D.Y. did not have permission to go with the Quiz Bowl club to Boston. When D.Y. appeared in Boston and stated that he had obtained his parents' permission to attend the tournament, petitioner did not contact the parents of D.Y. either to verify D.Y.'s story or to let them know he was in Boston.

The hearing officer found that petitioner was not involved in sexual misconduct, and dismissed the specifications alleging that he struck two students on the buttocks with a rolled up newspaper and squeezed I.F.'s stomach. Stating "this case is about boundaries," the hearing officer sustained all or parts of the remaining specifications charging inappropriate touching. Regarding the Boston trip, the hearing officer found that, although petitioner was a last minute substitute for a parent-chaperone, he was still under a duty to obtain appropriate

parental consent and to call D.Y.'s parents to ensure that he had permission to attend the tournament.

Rejecting DOE's recommendation of termination, the hearing officer concluded that a six-month suspension without pay and mandatory counseling and/or training regarding appropriate physical boundaries between petitioner and students was an appropriate penalty, given petitioner's long record of employment, lack of prior disciplinary history and the likelihood that petitioner's inappropriate behavior would be corrected.

Our analysis begins with a review of well-established principles. Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. A hearing officer's determination may only be vacated on a showing of "misconduct, bias, excess of power or procedural defects" (*Austin v Board of Educ. of City School Dis. of City of N.Y.*, 280 AD2d 365, 365 [1st Dept 2001]). However, "where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration" (*Lackow v Deptment of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). Because the arbitration at issue was compulsory, "[t]he determination must be in accord with due process and supported by adequate evidence, and must

also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*id.*). The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159 [1976]).

Moreover, "[a]rbitration awards may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Wicks Constr. [Green]*, 295 AD2d 527, 528 [2d Dept 2002]).

A "court's authority to overturn an arbitration award on public policy grounds is considered a narrow exception to the general rule that arbitrators have broad power to determine all disputes submitted to them pursuant to the parties' agreement" (*Board of Educ. of City of N.Y. v Hershkowitz*, 308 AD2d 334, 336 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]). To invoke this exception, a reviewing court must be able to examine an arbitration award on its face, and conclude that public policy considerations, embodied in either statute or decisional law, prohibit (1) arbitration on the particular matters to be decided, or (2) certain relief granted (*id.*).

Applying these principles to the facts of this case, we

discern no basis on which the motion court should have disturbed the hearing officer's determination.

It is beyond question that Executive Law § 296(1)(a) prohibits discrimination based upon "age, race, creed, color, national origin [or] sexual orientation." The motion court determined that the hearing officer "may not have intended to discriminate against the petitioner, [an openly gay male] but the opinion and award has that effect." This determination was based upon the erroneous conclusion by the motion court that petitioner's conduct was "the same as the heterosexual female librarian" who was not disciplined for such conduct. The flaw in this reasoning, however, is that there is absolutely nothing in the record to support this conclusion. While it is true that all three librarians testified that they would use similar techniques to get a noisy student's attentions (e.g., stand next to or whisper to the student and in extreme cases touch the student's shoulder or forearm), the female librarians categorically denied ever squeezing a student's shoulder, touching a student's hair, or running their finger down a student's spine. In fact, as noted, one of the female librarians testified unequivocally that such conduct is not only inappropriate but would be something she would immediately report to school administrators. Petitioner testified that he did, on a number of occasions, squeeze a

student's shoulder or run his finger down a student's spine to get the student's attention, demonstrating the latter technique at the hearing. Moreover, the testimony of some of the witnesses confirmed that petitioner was the only librarian who engaged in this latter type of conduct.

We also note that, despite petitioner's contention, the record is devoid of any anti-gay animus on the part of the witnesses called by respondent. The hearing officer specifically found that petitioner's inappropriate touching of the students was of a non-sexual nature and involved a question of crossing "boundaries." While it is true that I.F. was alleged to have used an anti-gay slur, Assistant Principal Grossman testified that he did not demonstrate any vindictive motive in reporting what he believed was inappropriate touching. In fact, some of the students testified that the touching made them uncomfortable while others were not offended by it.

In short, the record is completely devoid of any indicia that either the charges or the penalty imposed were motivated in whole or in part by petitioner's sexual orientation. As a result, the motion court improperly substituted its judgment for that of the hearing officer and thus erroneously applied the narrow public policy exception to invalidate the hearing

officers' determination (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 450 [1st Dept 2010], *affd* 17 NY3d 917 [2011]).

We also reject the motion court's finding that the hearing officer demonstrated bias, whether intentional or not, in evaluating the testimony and credibility of the witnesses who testified at the hearing.

"A hearing officer's determinations of credibility . . . are largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures – all the nuances of speech and manner that combine to form an impression of either candor or deception'" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d at 568, quoting *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

Here, the hearing officer's decision demonstrates that he carefully weighed the evidence presented by both parties. He certainly did not accept all of respondent's evidence and testimony at face value, In fact, several specifications were dismissed either in whole or in part, including I.F.'s claim that petitioner squeezed his belly after being told by I.F. not to touch him, as well as the specifications that petitioner struck two students with rolled up newspapers. By the same token, the

record contains sufficient credible evidence to support the specifications that the hearing officer did sustain. The record as a whole simply does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law or that their testimony was animated by bias. Indeed, "where reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected" or "where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]" (*Berenhaus* at 443- 444[internal quotation marks omitted]). It was therefore improper for the motion court to substitute its view of the credibility of the witnesses for that of the hearing officer (*Lackow* 51 AD3d at 568).

Finally, we decline to disturb the penalty imposed by the hearing officer. In reviewing a disciplinary penalty under Education Law § 3020-a, a court must consider whether the penalty imposed is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness"

(*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotations marks omitted]; *see* 51 AD3d at 569).

The record clearly demonstrates that the hearing officer carefully took into account the seriousness of the charges, as well as petitioner's lack of prior disciplinary history during his 20-year career with the DOE and the likelihood that petitioner would correct his inappropriate behavior. Having seen and heard the witnesses, he was in a far superior position than the motion court to make a determination as to an appropriate penalty to impose (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d at 452; *Whitten v Martinez*, 24 AD3d 285, 286 [1st Dept 2005]). Thus, it cannot be said that, under all of the circumstances here, the penalty imposed is either shocking to the conscience or arbitrary and capricious as petitioner contends

(*see Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792, 793 [1st Dept 2012]; *Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543, 544 [1st Dept 2011]).

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

ENTERED: MARCH 5, 2013

CLERK

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9133 In re Wright Mortgage Bankers, Inc., Index 15776/10
Petitioner-Appellant,

-against-

The State of New York Banking Department,
Respondent-Respondent.

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Gerald Gardner Wright, P.C. & Associates, Freeport (Gerald G. Wright of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered September 8, 2011, denying the petition to annul the determination of respondent that revoked petitioner's mortgage banking license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to revoke petitioner's mortgage banking license was not arbitrary and capricious since petitioner no longer had access to the requisite line of credit (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see* 3 NYCRR 410.1[b][2]). Although petitioner failed to appear at the hearing without having obtained a postponement or adjournment, and, when moving to reopen the

hearing, offered no valid excuse for its failure to appear, rather than refuse to consent, the better practice would have been for respondent to agree to an adjournment, especially since petitioner's principal was recovering from surgery, petitioner had communicated its intention to seek an additional adjournment, and respondent was still processing petitioner's FOIL request when the Christmas Eve hearing took place.

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

ENTERED: MARCH 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

7847 & M-2259 — Index 401178/11

In re Luz Solla,
Petitioner-Appellant,

-against-

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

- - - - -

Peter Vollmer,
Amicus Curiae.

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John C. Gray, South Brooklyn Legal Services, Brooklyn (Peter A. Kempner of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for State respondent.

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

Law Office of Peter Vollmer, Sea Cliff (Peter Vollmer of counsel), for amicus curiae.

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Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 18, 2011, reversed, on the law, without costs, the application granted, and the matter remanded for a hearing on the appropriate amount of counsel fees to be awarded to petitioner.

M-2259 - Motion to file amicus curiae brief granted.

Opinion by Mazzarelli, J.P. All concur except Sweeny J., who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Rosalyn H. Richter, JJ.

7847 &
M-2259
Index 401178/11

_____x

In re Luz Solla,
Petitioner-Appellant,

-against-

Elizabeth Berlin, etc., et al.,
Respondents-Respondents.
- - - - -
Peter Vollmer,
Amicus Curiae.

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Petitioner appeals from the order and judgment (one paper) of the Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 18, 2011, which dismissed as moot the petition brought in a hybrid CPLR article 78/declaratory judgment proceeding, and denied petitioner's application for counsel fees pursuant to CPLR article 86.

South Brooklyn Legal Services, Brooklyn (Peter A. Kempner and John C. Gray of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan and Michael S. Belohlavek of counsel), for State respondent.

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

Law Office of Peter Vollmer, Sea Cliff (Peter Vollmer of counsel), for amicus curiae.

MAZZARELLI, J.P.

Eleven years ago, in *Matter of Auguste v Hammons* (285 AD2d 417 [1st Dept 2001]), this Court held that when a person commences an action or proceeding against the State, and the State moots the action by voluntarily granting the relief sought, the State Equal Access to Justice Act (State EAJA) (CPLR 8600 *et seq.*) does not entitle the person to recover attorneys' fees under the theory that the lawsuit was the "catalyst" for the favorable State action. The holding was wholly based on *Buckhannon Bd. & Care Home v West Virginia Dept. of Health & Human Resources* (532 US 598 [2001]), which was decided by the United States Supreme Court after *Auguste* had been argued to this Court. In *Buckhannon*, the Court was not interpreting the State EAJA, or even its federal counterpart, the Federal Equal Access to Justice Act (Federal EAJA) (28 USC 2412[d]). Rather, it was reviewing fee-shifting provisions in two antidiscrimination statutes, and it held that an award of attorneys' fees may not be made under the "catalyst theory," because for a party to be considered a "prevailing party" the recovery must have been judicially sanctioned. This holding upended decisions of virtually all of the federal circuit courts, which had long applied the catalyst theory in awarding attorneys' fees.

Because *Auguste* was briefed and argued to this Court before

Buckhannon was decided, the parties assumed that the catalyst theory applied to the State EAJA. As a result, and as suggested by the lack of discussion of the issue in our short memorandum decision, it appears that this Court was not focused on the qualitative differences between the two statutes. Relying on the fact that the State EAJA was explicitly intended to be "similar" to the Federal EAJA (CPLR 8600), this Court strictly applied the *Buckhannon* holding. Since *Auguste* was decided, this Court has only had occasion to cite it once, in *Matter of Wittlinger v Wing* (289 AD2d 171 [1st Dept 2001], *affd* 99 NY2d 425 [2003]). However, in *Wittlinger*, unlike in the instant case, this Court also found that the State's position was substantially justified, so an award of attorneys' fees would have been denied regardless. Notably, in affirming *Wittlinger*, the Court of Appeals, although presented with the opportunity to declare that, in light of *Buckhannon*, the State EAJA does not embrace the catalyst theory expressly declined to do so, stating that "we neither endorse nor repudiate" the theory (99 NY2d at 433).

Now we are once again presented with the opportunity to determine whether *Buckhannon* controls the State EAJA. After careful analysis and consideration, we decline to follow *Auguste*. There is no evidence to suggest that the New York State Legislature, in enacting the State EAJA, ever intended to

eliminate attorneys' fee awards under the catalyst theory. In fact, ample evidence supports the contrary conclusion. The Legislature intended the statute to be applied as the federal law was interpreted at the time the State EAJA was enacted, and, in any event, the application of the Federal EAJA to the State EAJA was not meant to be all encompassing.

In this case, on September 16, 2010, the City respondents issued a Notice of Decision to petitioner, a disabled person, reducing the amount of the "[r]estricted shelter payment" component of petitioner's public assistance benefits by approximately $200 per month. Petitioner requested a fair hearing before the New York State Office of Temporary and Disability Assistance (OTDA) to challenge this reduction. At the hearing, the Human Resources Administration stipulated to withdraw its Notice of Decision and to restore any lost benefits. OTDA thereafter issued a Decision After Fair Hearing (DAFH) ordering the City respondents to withdraw the September 16, 2010 Notice of Decision and restore petitioner's benefits, retroactive to the date of the action reducing the benefits. However, the City respondents failed to comply with the DAFH.

Thus, petitioner commenced this article 78 proceeding seeking enforcement of the DAFH and attorneys' fees under the State EAJA. Two weeks later, the City respondents complied with

the DAFH and retroactively restored petitioner's shelter allowance benefits. Respondents then moved to dismiss the proceeding on mootness grounds.

The article 78 court dismissed the petition as moot. It also denied petitioner's application for attorneys' fees. Noting that she had not obtained an enforceable judgment, the court rejected petitioner's assertion that she was a prevailing party under the catalyst theory. While the court found that petitioner's article 78 proceeding was "undoubtedly" the catalyst for respondents' eventual compliance with the DAFH, that respondents' delay was arbitrary, and that the petition "was the only way left for [petitioner] to get their attention after being ignored for months," it held that this did not make petitioner a prevailing party under New York law in light of *Auguste*.

CPLR 8600 provides as follows:

> "It is the intent of this article, which may hereafter be known and cited as the 'New York State Equal Access to Justice Act', to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the State of New York, similar to the provisions of federal law contained in 28 U.S.C. § 2412(d) and the significant body of case law that has evolved thereunder" [footnote omitted].

CPLR 8601, the operative section of the statute, provides as follows:

"Fees and other expenses in certain actions against the state

"(a) When awarded. In addition to costs, disbursements and additional allowances awarded pursuant to sections eight thousand two hundred one through eight thousand two hundred four and eight thousand three hundred one through eight thousand three hundred three of this chapter, and except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action. Fees shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

"(b) Application for fees. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which sets forth (1) the facts supporting the claim that the party is a prevailing party and is eligible to receive an award under this section, (2) the amount sought, and (3) an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and other expenses are claimed."

The term "prevailing party" is defined as "a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues" (CPLR 8602[f]). "'Final judgment' means a judgment that is final and not appealable, and settlement" (CPLR 8602[c]).

When interpreting any statute, this Court is required, first and foremost, to give effect to the intent of the Legislature (*see Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). "Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Matter of Sutka v Conners*, 73 NY2d 395, 403 [1989]). The "spirit and purpose" of the State EAJA are clear. The Legislature desired to level the playing field for those without the necessary resources to challenge State action through litigation. Indeed, the sponsoring memorandum stated that the purpose behind the bill was "[t]o encourage individuals, small businesses and not-for-profit corporations to challenge State action when it lacks substantial justification by allowing them to recover fees and litigation expenses" (Sponsor's Mem, Bill Jacket, L 1989, ch 770 at 10, 1989 NY Legis Ann at 334-335). The Governor's approval memorandum referred to the legislation as

"a worthwhile experiment in improving access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification" (1989 NY Legis Ann at 336). Petitioner points out that organizations that advocated for passage of the legislation, such as the New York State Bar Association, viewed the lack of availability of counsel to represent low-income individuals as a veritable crisis at the time. She further claims that the problem is just as bad, if not worse, in today's difficult economic climate, in which, as the Chief Judge stated in announcing his decision to assemble a "Task Force to Expand Access to Civil Legal Services in New York," "a rapidly growing number of litigants -- two million at last count -- have no choice but to go to court without the help of a trained professional who knows the law and how to navigate the court system" (Chief Judge's Law Day 2010 Address, May 3, 2010, http://www.nycourts.gov/ctapps/LD10Transcript.pdf at 16).

Of course, the State EAJA was also designed to place limits on the availability of fees. Thus, the only parties eligible to apply for attorneys' fees are individuals with a net worth (excluding the value of a principal residence) of $50,000 or less and owners of businesses with 100 employees or less (CPLR 8602[d]). Further, fees are not available if the State can establish that its position was substantially justified or that

other circumstances militated against a fee award (CPLR 8601[a]). These "necessary safeguards" are what persuaded the Governor to declare the State EAJA "different" from similar bills that he had vetoed in the past. The limitations, he noted, would "not deter State agencies from pursuing legitimate goals and [would contain] adequate restraints on the amount of fees awarded" (1989 NY Legis Ann at 336). In this case, we must determine whether the competing goals of expanding access to the courts through the availability of attorneys' fees while maintaining mechanisms to prevent a raid of the State's coffers could not both be accommodated by interpreting the State EAJA as permitting the award of fees under the catalyst theory.

Respondents first argue that the plain language of CPLR 8601(a) prevents the application of the catalyst theory, because, they assert, that section provides that an award of fees may be awarded to a prevailing party "[i]n addition to" costs and disbursements. Because costs and disbursements are dependent on the entry of a judgment, they maintain, a "prevailing party" must be a party that secured a judgment. This argument is unpersuasive. In defining the term "prevailing party," the Legislature did not require the entry of a judgment (CPLR 8602[f]). The specific definition of the term "prevailing party" trumps the general language in 8601(a) that respondents attempt to construe in their favor.

The principal argument offered by respondents, of course, is that the State EAJA was expressly declared to be similar to the Federal EAJA and the federal decisions interpreting the latter. Thus, they assert, regardless of whether federal courts interpreted "prevailing party" to embrace the catalyst theory before May 2001, *Buckhannon* required New York courts to hold, from that point forward, that the catalyst theory was invalid. *Buckhannon* involved fee-shifting provisions in the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. The Court, attempting to discern whether the term "prevailing party" employed in those statutes embraced plaintiffs whose lawsuits were the catalyst for favorable voluntary action by the defendant, interpreted its own precedents as establishing that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (532 US at 604). Although *Buckhannon* did not consider the definition of "prevailing party" in the context of the Federal EAJA, its reasoning has been almost universally extended to that statute (*see e.g. Ma v Chertoff*, 547 F3d 342, 344 [2d Cir 2008]).

The initial problem with this argument is that CPLR 8600 provides that the state EAJA was intended only to be "similar" to

the federal EAJA, not identical. Indeed, in comparing the State EAJA to its federal counterpart, it is obvious that, as the Court of Appeals has noted, "the Legislature departed from the Federal model in certain significant respects" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 353 [1995]). There are at least three substantive differences in the way the two statutes are written. First, the scope of the state statute is far narrower than that of the federal statute. Again, the former limits eligible parties to individuals with a net worth of $50,000 or less and owners of businesses with 100 employees or less, while the latter embraces individuals with a net worth of $2,000,000 or less and businesses with 500 employees or fewer (*compare* CPLR 8602[d] *with* 28 USC §2412[d][1][D][2][B]). Another significant difference between the two statutes is that only the New York statute defines the term "prevailing party." The federal statute defines that term only for eminent domain proceedings (*see* 28 USC §2412[d][1][D][2][H]). Finally, the Federal EAJA defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement" (28 USC §2412[d][1][D][2][G]), but the state EAJA provides that the same term "means a judgment that is final and not appealable, and settlement" (CPLR 8602[c]).

These differences seriously undermine respondents' argument

that the two statutes should be treated identically for all purposes. To the contrary, each of the three differences supports the argument that the Legislature's intention was to follow the Federal EAJA only for limited purposes. Thus, for example, by expressly choosing to narrow the class of plaintiffs and petitioners to whom attorneys fees are available in comparison to the class identified in the Federal EAJA, it can be presumed that the Legislature considered all of the ways in which it could have made the statute more restrictive than the federal law, and incorporated into the new law only those changes that it deemed necessary to satisfy the Governor's desire to place "'adequate restraints on the amount of fees awarded'" (*Kaladjian*, 85 NY2d at 354, quoting 1989 NY Legis Ann at 336). It is a critical fact that, at the time CPLR article 86 was enacted in 1989, the "significant body" of case law across the country and in New York that had interpreted the Federal EAJA routinely applied the catalyst theory (*see Buckhannon*, 532 US at 602, n 3 [citing decisions from Courts of Appeals of 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 10th and 11th Circuits that recognized the theory]; *see e.g. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. of the United States and Canada, Local Union No. 112 v U.S. Dept. of Hous. & Urban Dev.*, 1986 WL 13880 [ND NY 1986]; *Correa v Heckler*, 587 F Supp 1216 [SD

NY 1984]; *Williamson v Secretary of U.S. Dept. of Hous. & Urban Dev.*, 553 F Supp 542 [ED NY 1982]). Where New York State courts had the opportunity to interpret federal fee-shifting statutes, they too recognized the catalyst theory (*see e.g. Jones v Koch*, 117 AD2d 647 [2d Dept 1986], *lv denied* 68 NY2d 608 [1986]). If the Legislature had deemed it necessary to restrict the statute further by eliminating application of the theory, it would have incorporated that into the text.

The second significant difference between the two statutes is that only the State EAJA provides a definition for the term "prevailing party." The absence of any statutory definition in the federal statute made it necessary for the Supreme Court in *Buckhannon* to provide a definition for the term, drawing on its own precedents. However, in the case of the State EAJA, there is no need to search for the meaning of the term, because it is already supplied by the statute. "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn.*, 41 NY2d at 208). In this instance, the term "prevail" is commonly defined as "to be or become effective or effectual" (Merriam-Webster's Collegiate Dictionary [11th ed 2004]). Had the Legislature desired to define the term further so as to clarify that some "judicial imprimatur" was necessary,

again, it knew how to do so. There is no question that petitioner's commencement of an article 78 proceeding against the state in this case was "effective" in causing the state to comply with the DAFH.

Significantly, the Court of Appeals has already drawn clear distinctions between the State EAJA and the Federal EAJA with respect to what it means to "prevail." In *Kaladjian* (85 NY2d at 353-354), the Court set out to determine what the Legislature meant in referring to a party that prevails "in substantial part" (CPLR 8602[f]). The Court noted that

> "[a]lthough the legislative history offers no definitive elucidation regarding which of the two possible meanings of the word 'substantial' the Legislature intended, the Legislature's departure from the Federal EAJA in our view evinces an intent to impose a stricter standard for demonstrating prevailing party status under the State EAJA than under its Federal counterpart" (*id.* at 354).

If the Legislature could depart from the Federal EAJA in determining what it means to prevail, then it was perfectly capable of departing in determining whether the catalyst theory was available.

Respondents argue that the Court of Appeals' observation in *Kaladjian* that the Legislature intended to apply a stricter standard in the State EAJA than its federal counterpart supports their position that the Legislature would not have favored application of the catalyst theory. This is incorrect.

Kaladjian was concerned with the degree of success necessary to warrant an award of attorneys' fees, holding that a plaintiff seeking fees under the State EAJA has to show a greater degree of success than its federal counterpart; it must show that "it succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained" (*id.* at 355). This, the Court observed, was consistent with the Governor's desire to limit the potential economic impact of the legislation. However, awarding fees to a party that, like petitioner, obtains all of its litigation goals by commencing an action or proceeding does not at all conflict with the notion, advanced in *Kaladjian*, that fees should only be awarded where there is a close relationship between the outcome sought and the outcome obtained.

Finally, the third significant difference between the State EAJA and the Federal EAJA is that the latter defines the term "final judgment," the predicate for a fee application in both statutes, as including an "order of settlement," while the New York Legislature provided that "final judgment" can include a mere "settlement." It can be presumed that the Legislature's exclusion of the words "order of" was intentional, and meant to broaden the types of settlements eligible to support an

application for attorneys' fees. Further, the elimination of words that would otherwise imply the need for a judicial imprimatur negates the holding in *Buckhannon* that even a voluntary relinquishment of the State's position must be judicially sanctioned.

In addition to the actual language employed in the State EAJA, the legislative history suggests that the Legislature, in modeling the legislation on the Federal EAJA, did not intend to do so for all purposes. Rather, it strongly appears that by referencing in CPLR 8600 the "significant body" of case law that had interpreted the Federal Equal Access to Justice Act, the Legislature was focused on a narrow range of issues which it intended to be addressed consistently with the manner in which courts had construed the Federal EAJA. This is evident from the sponsoring Assemblywoman's October 4, 1989 letter to the Governor's counsel, which stated:

> "I wanted to clarify the language and legislative intent of A.3313-B, the Equal Access to Justice Act (EAJA), which I sponsored in the Assembly.
>
> "The more appropriate reference to federal law in CPLR 8600, as added by the EAJA, is to 28 U.S.C. 2412(d) rather than 5 U.S.C. 504. It was the Legislature's intention to incorporate into state law the significant body of case law that has construed 28 U.S.C. 2412(d), *including the United States Supreme Court decision in Pierce v. Underwood, 56 U.S.L.W. 1806 (1988).*

"*In particular*, the (substantially justified) standard discussed in the Pierce majority decision should serve as the controlling interpretation of that phrase in the New York EAJA. *In addition, the Supreme Court's discussion of limitations on fee awards should serve as the interpretive standard for the New York EAJA* (see 56 U.S.L.W. at 4811-12).

"For example, *as the Supreme Court confirmed*, multipliers used to enhance fee awards are not appropriate under the EAJA, and we did not contemplate them for the New York EAJA. In addition, factors such as contingent fee arrangements, the novelty of a case, or the result obtained should not be used to increase the amount of the fee awarded. Further, the prevailing market rate for the legal services necessary should serve as the standard for fee awards, not the fees actually charged by the attorneys in a specific case. Thus, if a person hires a high-priced law firm in a successful EAJA action, the fee award should be based on the market rate cost of the legal services offered, not that particular firm's rate unless there was an unusual type of expertise required that only that one firm could supply.

. . .

"The term 'administrative proceeding' contained in the definition of permissible fees (CPLR 8602(b)), was intended to include only those administrative proceedings that occur as a result of the EAJA litigations, including hearings on remand, not the administrative proceedings that may precede a judicial action. *This comports with the federal case law construing 28 U.S.C. 2412(d)"* (Sponsor's Mem, Bill Jacket, L 1989, ch 770 [emphases supplied]).

By making specific reference to *Pierce v Underwood* and other federal case law construing the term "administrative proceeding," the memorandum suggests that the Legislature had specific concerns about the potential scope of the State EAJA and that it agreed with the way those issues had been addressed by the *Pierce* Court and other courts. In light of those very specific concerns, it is not reasonable to assume that the Legislature wished each and every conceivable permutation of the State EAJA, including the availability of the catalyst theory, to be construed consistently with the federal courts' construction. Indeed, the Court of Appeals already recognized this, when it found in *Kaladjian* that the federal courts' interpretation of the term "prevailing party" was inapplicable to the State EAJA.

Because the Federal EAJA only informs the operation of the State EAJA for limited purposes, this Court is required to interpret the statute independently, and not to blindly follow the manner in which the Federal EAJA has been interpreted by *Buckhannon* and its progeny. Respondents argue that if the state statute were considered in its own light, the catalyst theory would still not apply, because it conflicts with the Legislature's intent to limit the State's fee liability. This position of course ignores the Legislature's equally strong desire to expand access to justice, which the catalyst theory

certainly assists in doing. Nothing in the legislative history suggests that one goal outweighed the other.

The dissent's statement that "all of the considerations now raised by the petitioner and majority were available when we unanimously decided *Auguste*" pays little heed to the fact, noted above, that *Buckhannon* was decided after the parties in *Auguste* had submitted their briefs and argued that appeal to this Court. The dissent's contention that this is of no moment because *Buckhannon* "form[ed] the basis of our decision in *Wittlinger* [289 AD2d at 171]" is disingenuous as well, since we relied solely on *Auguste* in deciding *Wittlinger*, and did not perform the searching analysis of the State EAJA and *Buckhannon*'s impact on the statute that we engage in now. In discussing the merits of the catalyst theory, the dissent appears to advocate not only the demise of the theory, but the eradication of the entire fee-shifting statute. The dissent argues for the elimination of the catalyst theory by relying on the Court of Appeals' affirmance of *Wittlinger* (99 NY2d at 425). However, the Court of Appeals in *Wittlinger* expressly declined to take a position on the wisdom of the catalyst theory, instead assuming, without deciding, that it *did* apply and finding that the agency had sufficient justification for the delay in delivering the petitioner's public assistance benefits. Nevertheless, the dissent states that the

Court of Appeals "acknowledged" in *Wittlinger* that "the use of the catalyst theory as a method of determining whether to award attorneys' fees is not the appropriate remedy to punish [agency] delays or to encourage prompt state action." The dissent further states that "[a]lthough the delay in this case exceeds that in *Wittlinger*, the same logic applies, particularly since petitioner has not shown that she suffered any harm from the delay in providing her landlord with the retroactive payments in question."

Initially, it is important to note that respondents do not address on this appeal the issue whether their actions were substantially justified. In any event, nothing in *Wittlinger* suggests, as the dissent would have it, that the Court of Appeals presumed agency delay to have been substantially justified in all but the most egregious cases, thus militating against any use of a catalyst theory. Nor do we believe, as the dissent states, that the reverse presumption exists. That there are no such presumptions was made clear in *Wittlinger*, where the Court stated that "[w]hether prolonged inaction will fail the substantial justification test necessarily depends on the circumstances. . . . [I]n each case a reviewing court must determine how long it should have taken the agency to act, considering the reasons offered by the agency for the delay" (99 NY2d at 432).

If the dissent's interpretation of *Wittlinger* were carried to its logical conclusion, the State EAJA would be eviscerated. That is because the dissent believes that, in a case such as this one, whether a person's grievance is vindicated by judicial fiat or by voluntary state action, the possibility of a fee award creates a perverse incentive to litigate. According to the dissent, "sufficient remedies such as costs and sanctions exist for those cases in which the agency unjustifiably refuses to act pursuant to a settlement or court order." This goes even further than the Supreme Court did in *Buckhannon*. Certainly it directly contradicts the explicitly stated purpose of the State EAJA, which is to encourage litigation against recalcitrant State agencies. The availability of costs and sanctions to a litigant would not alone entice able counsel to take on the cause.

There is no reason to believe that the catalyst theory threatens the Legislature's efforts to ward off an avalanche of fee awards. Certainly the theory does not interfere with the State EAJA's safeguards, such as the limited class of eligible plaintiffs and the safety valve of a demonstration of substantial justification. If anything, preservation of the catalyst theory is critical to achieving the legislative purpose behind the State EAJA. Notably, the dissent does not dispute the legislative history indicating that the Legislature did not intend to march in lockstep with the federal courts in interpreting the State

EAJA, nor does it discuss the qualitative differences between the state law and its federal counterpart. Nothing, including the *Buckhannon* decision, has occurred since the enactment of the State EAJA that compels the conclusion that New York courts should not apply the theory. The dissent's position that nothing in the State EAJA *precludes* this Court from deciding at this time that the catalyst theory is not available conflicts with its other, and more apt, observation that only the Legislature should make such a public policy determination.

As petitioner argues, if respondents' position were upheld, aggrieved but impecunious parties would be hard-pressed to find qualified attorneys to commence cases for them, since they would have no assurance of being compensated. It would be inconsistent with the laudatory goals of the State EAJA to interpret the legislation as depriving plaintiffs of attorneys' fees simply because the State decided to concede its position. Because there is no evidence that the Legislature would have desired such a result, we must conclude that the catalyst theory applies to the State EAJA.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 18, 2011, which dismissed as moot the petition brought in a hybrid CPLR article 78/declaratory judgment proceeding, and denied petitioner's application for counsel fees

pursuant to CPLR article 86, should be reversed, on the law, without costs, the application granted, and the matter remanded for a hearing on the appropriate amount of counsel fees to be awarded to petitioner.

All concur except Sweeny J. who dissents in an Opinion.

SWEENY, J. (dissenting)

The petitioner in this appeal asks us to revisit the issue of the availability of attorneys' fees under the State EAJA and our decision in *Matter of Auguste v Hammons* (285 AD2d 417 [1st Dept 2001]), and adopt the "catalyst theory" as a basis for awarding fees pursuant to the State EAJA. The majority agrees with petitioner's position. For the reasons stated herein, I must dissent.

Petitioner is a recipient of public assistance from the New York City Human Resources Administration (HRA). On September 16, 2010, the City respondents issued a Notice of Decision reducing the amount of the "[r]estricted shelter payment" component of petitioner's public assistance benefits by approximately $200 per month. She requested a fair hearing before the New York State Office of Temporary and Disability Assistance (OTDA) to challenge this reduction in benefits. At the hearing, HRA stipulated to withdraw its Notice of Decision and to restore any lost benefits retroactive to the date of its initial action. On November 29, 2010, OTDA issued a Decision After Fair Hearing (DAFH) ordering the City respondents to comply with the stipulation. The City respondents failed to comply.

On March 28, 2011, petitioner's counsel wrote to OTDA advising that the City respondents were still not in compliance with the DAFH and requested that it direct them to make the

required retroactive payments. By letter dated March 20, 2011, OTDA advised petitioner that it received a report from the City respondents that "the local department of family assistance has taken appropriate action to comply with the decision's directives" and that they considered the matter as "satisfactorily resolved."

Petitioner commenced this article 78 proceeding on May 6, 2011, seeking enforcement of the DAFH and attorneys' fees pursuant to the provisions of CPLR article 8600, known as the Equal Access to Justice Act (EAJA). On May 20, 2011, the City respondents retroactively restored petitioner's shelter allowance benefits. It thereafter moved to dismiss the article 78 proceeding on mootness grounds.

The motion court granted the motion to dismiss. With respect to her application for attorneys' fees, petitioner argued that she was a "prevailing party" under the "catalyst theory"[1] because her petition was not moot when filed, but was only rendered moot by actions taken by respondents as a result of the filing. She argued that she was therefore entitled to fees. The court rejected this argument, relying on our decision in *Matter of Auguste v Hammons* (285 AD2d 417), which expressly rejected the

[1]The "catalyst theory" posits that a private party "prevails" against the State when the State give the party the relief demanded as a result of the party's initiation of a lawsuit.

catalyst theory as a basis for recovering attorneys' fees under the State EAJA.

The majority frames the issue in this case as "whether the competing goals of expanding access to the courts through the availability of attorneys' fees and maintaining mechanisms to prevent a raid of the State's coffers could not both be accommodated by interpreting the State EAJA as permitting the award of fees under the catalyst theory." Unfortunately, by declining to follow *Auguste* and adopting the so-called "catalyst theory" as a basis for awarding such fees, the majority creates the very conditions that will inevitably lead to such raids.

The majority has traced the legislative history of this statute accurately. Where I differ is in the conclusions to be drawn from that history.

Initially, I note that all of the considerations now raised by the petitioner and majority were available when we unanimously decided *Auguste*. Moreover, we revisited the catalyst theory in *Matter of Wittlinger v Wing* (289 AD2d 171 [1st Dept 2001], *affd* 99 NY2d 425 [2003]) and again, relying on *Buckhannon Bd. & Care Home v West Virginia Dept. of Health & Human Resources* (532 US 598 [2001]), categorically rejected it as a basis for awarding counsel fees. Although *Buckhannon* had not been decided at the time of our decision in *Auguste*, it did form the basis of our

decision in *Wittlinger.* Nothing has changed since that time and the majority, although drawing a different conclusion than I from the affirmance of *Wittlinger*, has advanced no compelling reason to overturn either precedent.

I take no issue with the majority's observation that the States EAJA was intended to be, and as enacted is, similar, but not identical, to the Federal EAJA. That being said, nothing in the state EAJA requires that New York courts interpreting it strictly adhere to the federal judiciary's understanding of the Federal EAJA – on which New York's statute was modeled – as of 1989, when the New York counterpart was enacted. At the time of the State statute's adoption, the catalyst theory was a generally accepted standard in evaluating whether to award counsel fees under the Federal EAJA. According to the petitioner, this theory is forever part of the State statute, since it was more or less the rule of interpretation of the model statute (i.e. the Federal EAJA) at the time of the adoption of the State statute and was incorporated into the statute by the language explicitly patterning it on the Federal EAJA "and the significant body of case law that has evolved thereunder" (CPLR 8600). Under petitioner's interpretive theory, the meaning of the State statute remains locked in place, even if the model statute evolves in a different direction.

A plain reading of CPLR 8600 does not support petitioner's

interpretation. So convoluted a construction of the statute could only be justified if the statute contained explicit language to that effect. No such language appears in the statute. Indeed, the plain language of the statute is as consistent with respect for federal case law as it evolves over time as it is with the "frozen in time" interpretation urged by petitioner. To adopt petitioner's argument would not only prevent New York courts from following federal precedents after 1989 if they chose to do so, but would also prevent them from following their own assessment of the statute's intent in favor of a locked-in view of its meaning.

Significantly, the majority's observation that the State EAJA is "similar to" - rather than "identical to" - the Federal statute and related case law gives New York courts the freedom to interpret article 8600. In short, New York courts should not be "locked in" to an interpretation of this statute as of the date of its adoption. The differences between the two statutes do not prevent us from following the United States Supreme Court's 2001 rejection of the catalyst theory as a basis for the award of attorneys' fees under the Federal EAJA (*see Buckhannon*, 532 US at 598).

The majority argues at length that we are not *required* to accept *Buckhannon's* rejection of the catalyst theory. True

enough. By the same token, I fail to see any reason *not* to adopt *Buckhannon's* sound logic.

As noted, the State EAJA brings into play two broad underlying public policies: to facilitate access to the judicial system for the poor and to maintain adequate restraints on the amount of fees awarded. Although the majority concedes that the State statute is intended to be more restrictive on the issue of counsel fees than its federal counterpart (*see Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 355 [1995]), it proceeds to adopt the implementation of the broad and ill defined standard of the catalyst theory as the basis for awarding such fees. In effect, the adoption of the catalyst theory constitutes a policy decision aimed not at harmonizing the competing interests of the EAJA but at giving precedence to an essentially open-ended method of encouraging actions against municipal agencies and their treasuries. This is not the function of the judiciary. As discussed herein, such policy determinations are the province of the Legislature.

The basis of petitioner's request for attorneys' fees in this case squarely falls within the claim that the City respondents delay in complying with the DAFH necessitated the bringing of this action. While I understand and sympathize with the frustration that can result from the often glacial movement

of city and state agencies, and do not in any way condone or excuse delays in governmental action, the use of the catalyst theory as a method of determining whether to award attorneys' fees is not the appropriate remedy to punish such delays or encourage prompt state action. This unfortunate fact of government life was specifically acknowledged by the Court of Appeals in affirming our decision in *Wittlinger* and deserves quoting at length:

> "Agency delays do not automatically give rise to liability for attorneys' fees. While, in theory, the State could have signaled its disapproval of the City DSS's delay by withholding funds from the social services district (*see* Social Services Law § 20[3][e]) or removing or disciplining a local commissioner for dereliction of duty (*see* Social Services Law § 34[4]), the Equal Access to Justice Act does not require either action, at least absent the most exceptional of circumstances. In a perfect world, [petitioner] would have gotten his benefits promptly. . . The Appellate Division concluded in essence, that agency delays are all but unavoidable. . . While this disturbing pattern of failures merits no endorsement, it was not so intolerable as to warrant the award of attorneys' fees as a matter of law" (99 NY2d at 432-433).

Although the delay in this case exceeds that in *Wittlinger*, the same logic applies, particularly since petitioner has not shown that she suffered any harm from the delay in providing her landlord with the retroactive payments in question.

Nor do I read *Wittlinger* as creating a presumption that all

but the most egregious agency delays fall within the "substantial justification" exception to the award of attorneys' fees. On the other hand, the majority's adoption of the catalyst theory creates a presumption that *any* delay will form the basis of an enforcement action leading to attorneys' fees.

Further militating against the concept of using the threat of attorneys' fees to punish an agency for dilatory action is the fact that sufficient remedies such as costs and sanctions exist for those cases in which the agency unjustifiably refuses to act pursuant to a settlement or court order. Despite the majority's contention that my position advocates "the eradication of the entire fee-shifting statute," I certainly agree that, in appropriate cases, attorneys fees may also be properly awarded pursuant to the statute. This, however, is not such a case. There is nothing in the record that indicates the reason for the City respondents delay in complying with the stipulation of settlement. Unlike the Department of Social Services in *Wittlinger*, the City respondents in this case are silent as to the cause of the delays, and we are in no position to speculate whether their positions were "substantially justified" or were merely the result of inattention, excessive caseload or other factors. Likewise, there is nothing to indicate why the commencement of this proceeding was the appropriate remedy under these circumstances. The State respondent was advised at one

point by the petitioner that the City respondents had not complied with the DAFH. It promptly made inquiry and received assurances that the matter was being addressed. Another letter to the State that the City respondents had still not complied may very well have obviated the need for this action. In short, we are simply not in a position to perform the necessary review set forth in *Wittlinger*.

This of course highlights the crux of the problem created by the adoption of the catalyst theory in awarding attorneys' fees under the EAJA. The prevailing party, as defined by statute, can essentially set its own time frame for compliance by the state agency, since there is no time limitation set by statute or regulation. Once the prevailing party puts its application for fees into motion, any compliance by the municipal agency would be the result of the "catalyst" of such application, compliance was already in the works. As the majority acknowledges, *Wittlinger* stated that "[w]hether prolonged inaction will fail the substantial justification test necessarily depends on the circumstances . . . [I]n each case a reviewing court must determine how long it should have taken the agency to act, considering the reasons offered by the agency for the delay" (*id.* 99 NY2d at 432). The agency would therefore have to demonstrate to the satisfaction of a reviewing court, in each case, that any

delay was justifiable. The potential for abuse is patent. This requirement would place an undue burden on an already thinly stretched judiciary and overburdened agency to determine in each case, without any clear statutory or regulatory guidelines, whether the agency's actions were substantially justified, or whether compliance was solely the result of the action commenced by the petitioner. The result would be clearly at odds with the articulated broad public policy of limiting awards of attorneys' fees under the State EAJA, and would inevitably lead to conflicting decisions. This is merely demonstrative of one of the unintended secondary consequences of the adoption of the catalyst theory by the majority.

18 NYCRR 358-6.4(c) provides that, upon a complaint of failure to comply with an order, the commission will secure compliance "by whatever means deemed necessary and appropriate." The regulation does not envision an action commenced by a private petitioner as such a means. Nor does it set forth a penalty for an agency's delayed compliance. By allowing the catalyst theory to form the basis for attorneys' fees, the majority in effect is rewriting the regulation to provide just such a penalty. Indeed, as noted, the Court of Appeals in *Wittlinger* recognized that the State's options to penalize a tardy municipal agency, such as in this case, are realistically limited, as distasteful as that result may be. The majority's decision today, in effect,

mandates a penalty where the agency regulations and State Legislature do not. Re-writing an agency regulation in the guise of statutory construction is not the role of the judiciary.

The majority argues that if the Legislature wanted to preclude application of the catalyst theory it would have done so in the text of the statute. But this is a non sequitur and contradicts the majority's own theory of statutory interpretation. As noted above, the catalyst theory was generally accepted by the federal courts at the time of the State EAJA's adoption in 1989. *Buckhannon*'s rejection of the catalyst theory came in 2001. The Supreme Court's rejection of the theory some 12 years after the enactment of the State EAJA could not have been foreseen by the Legislature and to argue otherwise reads history backwards. The Legislature had no reason in 1989 to believe that the catalyst theory would be rejected. Contrariwise, one could argue with equal justification that, had the Legislature seen fit to enshrine the theory as the basis for attorneys' fees, it could have done so, and would have done so in the 12 years since *Buckhannon* was decided, and the almost 10 years since *Wittlinger* was decided.

The majority's argument in this regard, however, has inadvertently revealed the only proper method of resolving the issue before us.

The majority contends that the Court of Appeals impliedly sanctioned the use of the catalyst theory in its decision in *Wittlinger*. Yet it also acknowledges that the Court affirmatively refused to either endorse or reject it, despite the fact that the issue was squarely before it. Had the Court done so, it would have as the majority does now, made a policy decision elevating one conflicting public policy determination over the other, a decision that, in my view, is the province of, and best left to, the Legislature. Paradoxically, the majority agrees with my "more apt. . . observation that only the Legislature should make such a public policy determination" while simultaneously proceeding to do exactly what the Court of Appeals has declined to do.

I would therefore affirm the order and judgment of Supreme Court.

M-2259 - *In re Solla v Berlin*

Motion to file amicus brief granted.

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

ENTERED: MARCH 5, 2013

CLERK