SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 19, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10613-
10614 3801 Review Realty LLC,
Plaintiff-Appellant,

Index 20098/12E

-against-

Review Realty Company LLC,
Defendant-Respondent.

_____

James R. Anderson, Harrison, for appellant.

Goldberg Weprin Finkel Goldstein, LLP, New York (Eli Raider of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered February 14, 2013, dismissing the complaint and directing that the notice of pendency be cancelled, unanimously modified, on the law, to reinstate the claims for the return of both the escrowed and the released portions of the down payment, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 8, 2013, which granted defendant's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff is not entitled to specific performance of its contract to purchase real estate, because it was unable to demonstrate that it was ready, willing and able to fulfill its contractual obligations at closing (*Gindi v Intertrade Internationale Ltd.*, 50 AD3d 575 [1st Dept 2008]). Plaintiff acknowledged at the closing that it did not have the balance of the purchase price in its possession at closing, and submitted no evidence of its financial ability to pay the balance of the purchase price. The motion court correctly determined that although issues of fact exist as to defendant seller's ability to satisfy its contractual obligations, i.e., to remediate an oil spill prior to closing and to provide sufficient documentation with respect to the property, there is no evidence that defendant frustrated plaintiff's ability to satisfy its own contractual obligations (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]).

Plaintiff's inability to demonstrate that it was ready, willing and able to fulfill its contractual obligations at closing also precludes it from recovering money damages (*see Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 531-532 [2012]). Thus, the claim for $15,000 that defendant allegedly promised to pay plaintiff in the event the parties did not close was correctly

dismissed.

However, plaintiff's claims for the return of its down payment, i.e., the portion that is currently in escrow and the portion that was released to defendant pursuant to the parties' September 14, 2011 "Amendment of Contract," should not have been dismissed. Since the contract of sale conditions defendant's right to retain the down payment in the event of plaintiff's default of its obligations upon defendant's being ready, willing and able to close, and, as indicated, an issue of fact exists as to defendant's ability to satisfy that condition, the record fails to demonstrate conclusively that plaintiff is not entitled to the return of its down payment (*see Gindi*, 50 AD3d at 576). The claim for recovery of the portion in escrow is a claim for the return of the down payment, not a claim for money damages. However, an issue of fact exists whether the claim for the portion that was released to defendant is a claim for the return of the down payment or for money damages. The Amendment of Contract merely states, "$150,000 to be released this Date from Downpayment to Seller or its designee and Purchaser authorizes such release and payment." It cannot be determined on this record whether the release was unconditional or was conditioned on an event that occurred (such as adjourning the closing date)

or an event that may not have occurred (such as defendant's remediation of the oil spill).

The cause of action for specific performance - the only cause of action asserted that could affect title to real property - having correctly been dismissed, the notice of pendency was correctly cancelled (CPLR 6514[a]; *Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10737 Deborah Chestnut, Index 114867/08
Plaintiff-Respondent,

-against-

Aramark Facility Services, LLC,
Defendant,

Village Care of New York, Inc.,
Defendant-Appellant.

_____

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

Miller & Campson, New York (Thomas K. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 3, 2012, which, to the extent appealed from as limited by the briefs, denied defendant Village Care of New York, Inc.'s (VCNY) motion for summary judgment dismissing the complaint and cross claims as against it, unanimously affirmed, without costs.

Triable issues exist as to whether VCNY, the corporate parent to the landowner (a nonparty to the action), assumed a measure of control over the cleaning of the premises, and therefore a duty to maintain the same, by, inter alia, providing staffing for the housecleaning (*see generally Aversano v City of*

New York, 265 AD2d 437 [2d Dept 1999]; *cf. Gibbs v Port Auth. of N.Y.*, 17 AD3d 252 [1st Dept 2005]). Triable issues were also raised whether alleged inadequate weekend staffing of the maintenance crew constituted a proximate cause of plaintiff's slip and fall on a slippery substance. VCNY, as movant for summary judgment, did not establish prima facie entitlement to summary judgment dismissing the complaint, as it failed to set forth evidence indicating actual cleaning and/or inspections at the subject premises, as per contract requirements, in the days leading up to plaintiff's slip and fall (*see e.g. Nugent* v 1235 Concourse Tenants Corp., 83 AD3d 532 [1st Dept 2011]; *Klerman v Fine Fare Supermarket*, 96 AD3d 907 [2d Dept 2012]; *Maldonado v City of New York*, 93 AD3d 407 [1st Dept 2012]).

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

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

10842 60 E. 9th St. Owners Corp., Index 104135/08
Plaintiff-Respondent,

-against-

Albert N. Zihenni,
Defendant-Appellant.

_____

Shaw & Binder P.C., New York (Daniel S. LoPresti and Stuart F. Shaw of counsel), for appellant.

Smith, Buss & Jacobs, LLP, Yonkers (John J. Malley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered September 28, 2012, which denied defendant's motion to vacate an order striking his answer and counterclaims for failure to appear at a scheduled conference, unanimously affirmed, with costs.

By order entered on November 22, 2011, the court granted a motion by defendant's former counsel to be relieved. The court directed service of a copy of the order upon defendant at his last known address by certified mail, return receipt requested. It further provided that defendant was to appear with new counsel for a status conference to be held on January 18, 2012 at 2:30 p.m. According to former counsel's affidavit of service, he served defendant on December 9, 2011 with a copy of the order and

a notice directing defendant to select substitute counsel and appear at the courtroom with said substitute counsel "on January 18, 2011 [*sic*] at 2:30 p. m." The affidavit states that the order and notice were served, as directed, upon defendant by certified mail, return receipt requested and regular mail, in addition. This appeal is from the court's order denying defendant's motion to vacate the January 18, 2012 calendar order striking defendant's answer pursuant to 22 NYCRR 202.27 upon defendant's failure to attend the status conference.

Defendant made the motion pursuant to CPLR 5015(a)(1) on the ground of excusable default. A party seeking relief under CPLR 5015(a)(1) must demonstrate a reasonable excuse for his or her default and a meritorious claim and defense, as the case may be (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.* (67 NY2d 138, 141 [1986]). In denying defendant's motion the court did not discuss the reasonableness of his excuse for missing the January 18, 2012 conference. Instead, the court's decision was based solely on a finding that a meritorious defense to plaintiff's claims was not demonstrated. We address the issue of reasonable excuse at this time in the exercise of the coordinate authority we share with Supreme Court on all questions of law and fact (*see e.g. Matter of State of New York v Ford Motor Co.*, 74 NY2d 495,

501 [1989]).

Former counsel's affidavit of service raises a presumption that on December 9, 2011 defendant was given notice of the January 18, 2012 conference by both certified mail and regular mail (*see Engel v Lichterman*, 62 NY2d 943, 944-945 [1984]). Defendant does not challenge the affidavit of service and, in fact, states that he believes former counsel timely complied with the court's order. Defendant states that he never received notice of the certified mail although he concedes that the envelope in which it was sent contains a notation of a December 12, 2011 delivery. Defendant also acknowledges receipt of first-class mail from former counsel but, without stating what was enclosed, defendant vaguely asserts that "the mail did not contain the materials sent by certified mail." In all, defendant's denial of receipt of former counsel's properly mailed notice is the only excuse he offers for his failure to attend the status conference. Such a denial is insufficient to overcome the presumption of delivery (*see Matter of Futterman v New York State Div. of Hous. & Community Renewal*, 264 AD2d 593, 595 [1st Dept 1999], *lv dismissed,* 94 NY2d 847 [1999]). It is also insufficient as a reasonable excuse as a matter of law (*see Deutsche Bank Natl. Trust Co. v Pietranico,* 102 AD3d 724, 725 [2nd Dept

2013]).[1]

Although we affirm the order entered below, we find that the motion court abused its discretion in denying the motion on the basis of a failure to demonstrate a meritorious defense. On the contrary, defendant's answer, which he verified himself on the basis of personal knowledge, sufficiently sets forth relevant evidentiary facts (*see* CPLR 105[u]; *Salch v Paratore*, 60 NY2d 851, 852-853 [1983]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]).

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

ENTERED: NOVEMBER 19, 2013

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[1]Defendant claims on December 14, 2011, he spoke with former counsel who advised him that he had until January 18, 2012 to get new counsel. On the morning of January 18, 2012, defendant filed a notice of his pro se appearance with a clerk at the IAS Trial Support Office. Defendant does not state whether he asked former counsel or the Trial Support clerk any questions about the status of his case. Such an inquiry would have certainly disclosed that the status conference was scheduled for the afternoon of January 18, 2012.

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11087 The People of the State of New York, SCI 76529C/10
Appellant,

-against-

Zaida Hernandez,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Jennifer L. Colyer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (William L. McGuire, J.), entered on or about April 27, 2012, which granted defendant's motion to dismiss the information in furtherance of justice pursuant to CPL 170.30 and 170.40, unanimously affirmed.

The court properly exercised its discretion in entertaining defendant's motion to dismiss in the interest of justice after the 45-day deadline had expired, and in granting the motion (*see* CPL 170.40[1], 255.20[1]). Regardless of the issue involving defendant's immigration status, all of the factors contained in CPL 170.40(1) which were considered by the court below, justified dismissal, including that the sole remaining charge was second-degree harassment, that defendant had been a law-abiding citizen

since entering this country legally when she was eight years old, that the incident resulted from a long-standing dispute between two neighbors, which had led to the complainant's conviction of harassing defendant in a prior incident, and that defendant had since moved out of the neighborhood.

We have considered and rejected the People's remaining arguments.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11088 Khalif Muhammad, etc., Index 108710/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

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

Cullen and Dykman LLP, New York (Joseph Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 5, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion as to plaintiff's claims based on an alleged broken step, and otherwise affirmed, without costs.

Although plaintiff testified at his General Municipal Law § 50-h hearing that his accident might have been caused by an accumulation of ice on an outdoor stairway, he had earlier filed with defendant a notice of claim that indicated that the accident was also caused by a broken step. Indeed, he later testified at his deposition that the accident was caused by the broken step. The inconsistencies between the section 50-h testimony and the deposition raise issues of credibility that should be properly

left for the trier of fact (*see Francis v New York City tr. Auth.*, 295 AD2d 164 [1 st Dept 2002]). We reject the argument that the deposition testimony was an attempt to create a feigned factual issue in the face of a motion for summary judgment. The deposition testimony was given a year before the instant motion for summary judgment was made (*compare Morrissey v New York City Tr. Auth.*, 100 AD3d 464 [1st Dept 2012]). The motion court also erred in imposing upon plaintiff a burden of demonstrating that defendant had notice of the alleged broken step. Defendant, as a moving party, had the prima facie burden of establishing that it lacked actual or constructive notice of a hazardous condition (*see Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). However, in light of the concession in plaintiff's reply brief and by operation of the storm in progress doctrine, we find that defendant was not

negligent in failing to remove any snow and/or ice that was on its premises (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11089-
11090 In re Liarah H.,

A Child Under Eighteen
Years of Age, etc.,

Dora S.,
Respondent-Appellant,

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

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about December 24, 2012, which, upon a fact-finding determination of neglect, placed the child with petitioner until the completion of the next permanency hearing, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, all without costs. Appeal from fact-finding order, same court (Rhoda J. Cohen, J.), entered on or about August 29, 2012, unanimously dismissed, without costs,

as superseded by the appeal from the order of disposition.

The finding of neglect against respondent mother is supported by a preponderance of the evidence. Although referred for substance abuse and mental services, the mother failed to attend, citing a lack of a substance abuse problem, although she admitting to smoking marijuana, but "not all the time" in her daughter's presence, and drinking to the point of black out on a recent occasion. Further, on that occasion, the mother became so intoxicated that she was psychiatrically hospitalized for a "alcohol induced mental disorder." A single incident in which a parent's "judgment was strongly impaired and the child exposed to a risk of substantial harm" can sustain a finding of neglect (*see Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]).

We reject the mother's contention that she did not neglect the child on the occasions when she used drugs or alcohol, because she provided proper supervision by leaving her daughter with others, including her maternal grandmother. However, the record indicates that the child was present on some occasions. Further, the maternal grandmother had a history of yearly psychiatric hospitalizations resulting from failure to take her medications (*see Matter of Messiah T. [Karen S.]*, 94 AD3d 566

[1st Dept 2012]).

The agency also showed, by a preponderance of the evidence, that if the "child were released to the mother there would be a substantial probability of neglect" that would place the child at risk, since the then 18-year-old mother testified that she herself had been diagnosed with bipolar disorder at age 12 or 13 years old, and had ceased taking any medication to treat it. Further, the record establishes that the mother had been hospitalized twice for suicide attempts (*see Matter of Kazmir K.*, 63 AD3d 522 [1st Dept 2009]; *Matter of Messiah T.*, 94 AD3d at 566). Since the consequences of the proceedings are temporary rather than permanent, "the absence of a diagnosed condition does not preclude a finding of neglect," and expert testimony was not required (*see Matter of Danielle M.*, 151 AD2d 240, 243 [1st Dept 1989]; *and see Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539 [1st Dept 2010]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11091 & M-5550 — Index 113729/11

In re Shakeema Johnson,
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Shakeema Johnson, petitioner pro se.

Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent, dated August 10, 2011, which terminated petitioner's public housing tenancy on grounds of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia Kern, J.], entered May 11, 2012), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The evidence showed that during the execution of a search warrant of petitioner's apartment, police recovered, inter alia, marijuana and guns. There exists no basis to disturb the credibility determination of the Hearing Officer

(*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed does not shock our sense of fairness (*see Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]; *Matter of Diaz v Hernandez*, 66 AD3d 525 [1st Dept 2009]).

M-5550 - *In re Johnson v New York City Housing Authority*

Motion seeking stay denied as moot.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11092 The People of the State of New York, ex rel. Ronald L. Kuby, on behalf of Gigi Jordan,
Petitioner-Appellant,

-against-

Rose Agro, etc.,
Respondent-Respondent.

Index 101131/13
Ind. 621/10

Law Offices of Ronald L. Kuby, New York (Alan M. Dershowitz of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

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

Judgment, Supreme Court, New York County (James M. Burke, J.), entered on or about August 15, 2013, denying the petition for a writ of habeas corpus and dismissing the petition, unanimously affirmed, without costs.

This Court affirmed the denial of habeas corpus relating to a prior bail application by petitioner, holding that the bail application court appropriately considered the seriousness of the offense, the strength of the evidence against petitioner, the possible sentence she faced, the flight risk posed by her mental condition, and her weak community ties (*People ex rel. Kuby v Merritt*, 96 AD3d 607 [1st Dept 2012], *lv denied* 19 NY3d 813

[2012]). Petitioner now contends that the continued duration of her pretrial detention required her present bail request to be granted, as she had been incarcerated for 43 months, 34 months of which she attributes to the People's delay. However, the bail application court (Charles Solomon, J.) properly rejected this argument. It found that although some delay resulted from the People's failure to disclose evidence promptly, petitioner either caused, or was concurrently responsible with the People for, most of the delay, particularly because petitioner has repeatedly retained new attorneys who required lengthy delays for trial preparation and reconsideration of strategic steps taken by their predecessors. There is no reason, on the present record, to disturb the bail court's findings.

For the same reasons, we reject petitioner's argument that the length of her pretrial detention violated her right to due process. Even were we to apply case law arising out of Federal prosecutions, which does not bind this court, we note that an important factor in determining whether a detention violates due process is "the extent to which the Government bears a significant responsibility for the duration of that detention" (*United States v Gonzales Claudio*, 806 F2d 334, 341 [2d Cir

1986]). Furthermore, petitioner continues to present a serious risk of flight.

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11094 The People of the State of New York, Ind. 5194/00
Respondent,

-against-

Earl Mason,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about June 19, 2012, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11095 In re Liza P.,
Petitioner-Respondent,

-against-

Kevin P.,
Respondent-Appellant.

_____

Iannuzzi and Iannuzzi, New York (John N. Iannuzzi of counsel) for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about February 29, 2012, which granted petitioner mother custody of the subject child, unanimously affirmed, without costs.

The Family Court properly determined that it had jurisdiction over this matter pursuant to Domestic Relations Law § 76(1)(b). Florida could not have jurisdiction because, although it was the child's home state at the time the proceeding commenced, neither the child nor either party resided there. Furthermore, the mother and child resided in New York and had a family network here, and substantial evidence was available in this state regarding the child's care.

Although respondent father commenced a proceeding in Florida

prior to the commencement of the New York proceeding, Family Court correctly found that Florida could not have jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act because neither the child nor the parties were residing there (*see* Domestic Relations Law § 76[1][a]). In any event, having learned of the Florida proceeding, the court fulfilled its obligation pursuant to Domestic Relations Law § 76-e by attempting to communicate with the Florida court (*see Vanneck v Vanneck*, 49 NY2d 602, 610-611 [1980]; *cf. Cynthia Marie S. v Allen Wayne L.*, 228 AD2d 249 [1st Dept 1996]).

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ

11096 The People of the State of New York, Ind. 2134/10
Respondent,

-against-

Julius Willie,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered May 27, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations. Defendant's grand jury testimony tended to corroborate material aspects of the victim's testimony.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11097 Robert Lim, et al., Index 650120/12
Plaintiffs-Appellants,

-against-

Joel Kolk,
Defendant-Respondent,

James J. Cox, et al.,
Defendants.

_____

Eisenberg & Carton, Port Jefferson (Lloyd M. Eisenberg of counsel), for appellants.

Alan C. Fried, Scarsdale, for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 3, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Joel Kolk's motion to dismiss the complaint as against him, unanimously affirmed, without costs.

As the motion court noted, the fraud cause of action accrued in December 2005 when the last allegedly fraudulent check was issued from the deceased's bank account. Plaintiffs, who claim they were unaware of the alleged fraud, were authorized to investigate and obtain the deceased's financial records in May 2007. Thus, with reasonable due diligence, plaintiffs could have uncovered the alleged fraud at that time. Accordingly, the cause

of action for fraud, brought more than two years from the date the alleged fraud could have been discovered and more than six years after the actual fraud occurred, is time barred (*see* CPLR 213[8]; *Gutkin v Siegal*, 85 AD3d 687, 687-688 [1st Dept 2011]). Plaintiffs' breach of fiduciary duty claim, based on allegations of actual fraud, is subject to the six-year limitations period (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Consequently, the court properly found that this claim is also time barred.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11098 Troy Jackson, Index 304361/08
Plaintiff-Respondent, 83918/09

-against-

Manhattan Mall Eat LLC, et al.,
Defendants-Appellants.

- - - - -

Manhattan Mall Eat LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

One Source Facility Services, Inc., et al.,
Third-Party Defendants.

_____

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellants.

Mitchell Dranow, Sea Cliff, for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about August 20, 2012, which, to the extent appealed from, denied Manhattan Mall Eat LLC, Vornado 100 West 33rd Street, LLC and One Source Facility Services, Inc.'s motion for summary judgment dismissing the complaint, and denied Manhattan Mall Eat LLC and Vornado 100 West 33rd Street, LLC's motion for summary judgment on the contractual indemnification and breach of contract claims asserted against KCL Protective Services, Inc. d/b/a Advantage Security, unanimously modified, on

the law, to grant so much of Manhattan Mall Eat LLC and Vornado 100 West 33rd Street, LLC's motion which sought summary judgment on their breach of contract claim, and otherwise affirmed, without costs.

Plaintiff alleges that he sustained personal injuries when, in the course of his employment as a security officer for third-party defendant KCL Protective Services, Inc. d/b/a Advantage Security, he tripped and fell on a gap created by a misaligned grate at a loading dock located on Vornado 100 West 33rd Street, LLC's premises.

Defendants failed to make a prima facie showing of entitlement to summary judgment on the issue of liability. In support of the motion, defendants submitted only testimony concerning customary inspection and cleaning procedures. In the absence of "specific evidence as to their activities on the day of the accident, including evidence indicating the last time the [grates were] inspected, cleaned, or maintained before plaintiff's fall," defendants failed to establish a lack of prior constructive notice (*Cater v Double Down Realty Corp.*, 101 AD3d 506, 506 [1st Dept 2012], citing *Moser v BP/CG Center I, LLC*, 56 AD3d 323 [1st Dept 2008]).

Defendant One Source Facility Services, Inc., the cleaning

contractor retained to provide services at the premises, failed to establish that it did not launch a force or instrument of harm in negligently cleaning the grates on the day before the accident (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002]). One Source did not submit any evidence that either it properly returned the grates after cleaning them the day before the accident or that it had not cleaned the grates at that time. The defense witnesses lacked personal knowledge of the grate cleaning allegedly performed on the day before the accident or the condition of the grates thereafter and One Source did not supplement the deposition testimony with documentary evidence or an affidavit from one with personal knowledge.

As the Vornado defendants failed to establish that they were free from negligence, their motion for contractual indemnification was properly denied (*see All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674, 676 [1st Dept 2012]; *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]). However, in the absence of evidence that third-party

defendant procured the required insurance, summary judgment should have been granted on the breach of contract claim.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11099 Barbara Kulig Hochmuller, Index 103397/12
Plaintiff-Appellant,

-against-

Bellwest Management Corporation, et al.,
Defendants-Respondents.

_____

Barbara Kulig Hochmuller, appellant pro se.

James R. Pigott, Jr., New York, for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 5, 2012, which denied plaintiff's motion for a stay of Housing Court proceedings and for the court to recuse itself, unanimously affirmed, without costs.

The court properly declined to stay proceedings in Housing Court. As noted by the motion court, plaintiff had it within her power to avoid any eviction proceedings by executing a renewal lease for her studio apartment and then pursue her request to be relocated to a renovated one-bedroom apartment in the subject building.

The court did not abuse its discretion in refusing to recuse itself (*see People v Moreno*, 70 NY2d 403 [1987]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11102 The People of the State of New York, Ind. 3407/11
Respondent,

-against-

Denise Harrington,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Teresa T. Lewi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 29, 2012, convicting defendant, after a jury trial, of assault in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing her, as a second violent felony offender, to an aggregate term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348- 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The

evidence supports the conclusion that the victim's arm wound caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), thus satisfying the physical injury element.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11103 Katan Group, LLC, etc., Index 650664/12
Plaintiff-Appellant,

-against-

CPC Resources, et al.,
Defendants-Respondents,

John Does, etc.,
Defendants.

_____

Shapiro Tamir Law Group, PLLC, New York (Mitchell C. Shapiro of counsel), for appellant.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered October 3, 2012, which, inter alia, granted defendants' motion to dismiss the complaint, unanimously dismissed, without costs.

Plaintiff defaulted on defendants' motion to dismiss and for attorneys' fees. When the IAS court allowed plaintiff additional time to put in opposition papers in lieu of a default, plaintiff instead submitted an amended complaint with completely new allegations and claims. The IAS court ruled this a default. Plaintiff may not appeal an order entered on default (*see* CPLR 5511; *Batra v State Farm Fire & Cas. Co.*, 205 AD2d 480 [1st Dept

1994]). Plaintiff took no appeal from the corrected order of the court dated November 9, 2012. This Court may review a subsequent order under CPLR 5517(b); however, because the order appealed from was not appealable as of right, the subsequent November 9 order is not properly before us (*id.*).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11104 The People of the State of New York, Ind. 846/09
Respondent,

-against-

Dewand Smith,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Charles H. Solomon, J.), rendered on or about June 15, 2010,

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

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

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11105 Calogero Candela, et al., Index 117686/00
Plaintiffs-Appellants,

-against-

New York City School Construction Authority, et al.,
Defendants-Respondents.

_____

Kenneth J. Ready & Associates, Mineola (Kenneth J. Ready of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 19, 2013, which, to the extent appealable, denied plaintiffs' motion to renew their posttrial motion for a directed verdict on the issue of liability, unanimously affirmed, without costs.

Plaintiffs interpret this Court's prior decision (97 AD3d 507 [1st Dept 2012]), as making conclusive findings of fact as to existence of a dangerous condition and notice. However, appellate courts do not have the power to make factual findings in weight of the evidence analysis in a jury case (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Thus, plaintiff's reliance on the law of the case

doctrine is unavailing (*see* Siegel, NY Prac § 448 at 781 [5th ed 2011]).

Based on the foregoing, the court declines to consider defendants' contention that plaintiffs' motion could have also been denied on the alternative ground that it was untimely and did not meet the requirements of CPLR 2221.

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

ENTERED: NOVEMBER 19, 2013

CLERK

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

11106 & Index 111966/09
M-5231 Bianca Razzano,
Plaintiff-Appellant,

-against-

Woodstock Owners Corp., et al.,
Defendants-Respondents.
- - - - -
New York Cooperatives & Condominiums,
Amicus Curiae.

_____

David L. Moss & Associates, New York (David L. Moss of counsel), for appellant.

D'Amato & Lynch, LLP, New York (William P. Larsen, III of counsel), for respondents.

Gallet Dreyer & Berkey, LLP, New York (Marc J. Luxemburg of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Paul Wootten, J.), entered October 16, 2012, which, to the extent appealed from as limited by the briefs and at oral argument, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1), and denied plaintiff's cross motion for summary judgment with respect to her claim that defendant Woodstock Owners Corp.'s (Woodstock) sublet policy violates Business Corporation Law § 501(c), unanimously reversed, on the law, without costs, the motion denied and the cross motion granted to the extent of declaring

that Woodstock's sublet policy violates said statute.

In this dispute between plaintiff shareholder and defendant Woodstock, a cooperative corporation, the sublet policy at issue, which allows those who purchased their shares before October 2002 to sublet, while prohibiting those who purchased their shares after that date from subletting, violates the Business Corporation Law § 501(c) (*see e.g. Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204, 205 [1st Dept 2003]; *Krakauer v Stuyvesant Owners*, 301 AD2d 450, 451 [1st Dept 2003]). Because the sublet policy violates the Business Corporation Law, it is not protected by the business judgment rule (*see White v Gilbert*, 2012 NY Slip Op 32042[U], *10 [Sup Ct, NY County]; *see also Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 565 [1985]; *Wirth v Chambers-Greenwich Tenants Corp.*, 87 AD3d 470, 472 [1st Dept 2011]).

On appeal, plaintiff makes no argument with respect to her causes of action that are unrelated to Business Corporation Law § 501(c), such as fraud and negligent misrepresentation; hence, her appeal from the dismissal of those causes of action is deemed abandoned (*see e.g. Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 34 [1st Dept 2005]).

M-5231 - ***Razzano v Woodstock Owners Corp, et al.***

Motion to file amicus curiae brief granted.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11107 Sabrina Ortiz, Index 310525/09
Plaintiff-Respondent,

-against-

Ciolfar Bowl, Inc., doing business as Van Nest Lanes, et al.,
Defendants-Appellants.

_____

Callahan & Fusco, LLC, New York (William A. Sicheri of counsel), for appellants.

Scott J. Zlotolow, Sayville (Anthony J. Bilello of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 3, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell in defendants' bowling alley as she started to throw the ball, because her bowling shoes became wet after she twice walked over a soaking wet carpet near the establishment's entrance. Defendants submitted evidence showing that plaintiff left the bowling alley wearing her bowling shoes, while it was raining outside, and then returned a short time later to resume bowling.

The court properly denied defendants' motion for summary

judgment because the record presents issues of fact, including whether there was a wet carpet by the entrance of the bowling alley, which created a risk that was unique and resulted in a dangerous condition over and above the usual dangers inherent in bowling (*see Allwood v CW Post Coll.*, 190 AD2d 704 [2d Dept 1993]). Although plaintiff testified she had bowled several times before, there is a question as to whether she knew her shoes were wet when she approached the lane and whether she appreciated the heightened risk of bowling with wet shoes (*see Radwaner v USTA Natl. Tennis Ctr.*, 189 AD2d 605 [1st Dept 1993]; *Kremerov v Forest View Nursing Home, Inc.*, 24 AD3d 618 [2d Dept 2005]). Plaintiff's conduct in attempting to bowl while her shoes were wet is merely one factor relevant in the assessment of her culpable conduct (*see* CPLR 1411).

Furthermore, while defendants presented evidence that they had no actual or constructive notice that the carpet was wet since it was observed to be dry shortly before and after the

accident, plaintiff's conflicting testimony concerning the wet condition of the carpet presents a question of fact as to whether defendants had constructive notice of the wet carpet (*see Fundaro v City of New York*, 272 AD2d 516 [1st Dept 2000]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11108N Michele Beaulieu, Index 307415/11
Plaintiff-Respondent,
-against-

Jay Realty Corporation,
Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 26, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel plaintiff to provide authorizations for her medical, employment and insurance records, unanimously affirmed, without costs.

Having defaulted in this action, defendant is not entitled to pursue discovery in preparation for the inquest (*Servais v Silk Nail Corp.*, 96 AD3d 546, 547 [1st Dept 2012]; *Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010]; *Gray v Jaeger*, 57 AD3d 303 [1st Dept 2008]; *Yeboah v Gaines Serv. Leasing*, 250 AD2d 453 [1st Dept 1998]).

We decline defendant's request to grant leave to the Court of Appeals.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11109 The People of the State of New York, Ind. 1786/09
Respondent,

-against-

Felipe Mercado,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about April 19, 2012,

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

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

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11111-
11112 In re Wilda C.,
Petitioner-Appellant,

-against-

Miguel R.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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

_____

Appeals from order, Family Court, New York County (Jane Pearl, J.), entered on or about February 14, 2013, which dismissed two petitions seeking to modify custody on the ground of lack of jurisdiction pursuant to Domestic Relations Law 76-a, held in abeyance, the motion by assigned counsel to be relieved denied without prejudice to renewal, and counsel is directed to communicate with appellant forthwith concerning any issues she may wish to raise, her right to communicate with this Court directly raising any issue she believes to be meritorious, and the possibility of the assignment of new counsel if this Court finds any argument warranting consideration on the merits, consistent with *People v Saunders* (52 AD2d 833 [1st Dept 1976]), and instructing appellant that she has 60 days from the date of

this order to file a pro se supplemental brief, and to cause a complete record to be filed or explain the inability to do so.

Counsel has provided a copy of a letter sent to appellant, and proof of service of the brief seeking to be relieved, but the letter does not meet the requirements of *People v Saunders*, which are applicable in Family Court matters (*see Matter of Perez v Perez*, 78 AD3d 433 [1st Dept 2010]). Moreover, the father's moving papers and appellant's opposition papers have not been provided to the Court as part of the original record, possibly because those papers were filed under a different docket number. A full record is generally needed in order to assess whether any nonfrivolous issues may be raised.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11114 Ninotchka J. Manus, Index 110026/07
Plaintiff-Appellant,

-against-

Leonard N. Flamm,
Defendant-Respondent.

_____

Robert Fierman, New York, and Burton Marcus, Bronx, for appellant.

Leonard N. Flamm, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about June 8, 2012, which, upon reargument, granted defendant's motion for summary judgment dismissing the first, second, and third causes of action, unanimously affirmed, without costs.

The complaint alleges that defendant committed legal malpractice while representing plaintiff in a replevin action brought against her in October 1998 by nonparty Family M. Foundation, Ltd., a Cayman Islands corporation formed by the late Allen Manus, plaintiff's former husband.

The first cause of action, which alleges that defendant was negligent in failing to assert certain defenses or move to dismiss the complaint in the replevin action, is belied by the

seventh and eighth affirmative defenses, which assert that the loan agreement imposed no personal liability on plaintiff.

The second cause of action alleges that plaintiff "felt compelled" to sign the stipulation of settlement in the replevin action, which converted a $1,000,000 obligation from the corporation to her into a $400,000 obligation from her to the corporation. However, plaintiff's obligation arose in the context of the loan agreement she executed, not the stipulation of settlement. The stipulation did not impose personal liability on plaintiff for the debt created under the loan agreement; it merely directed that her shares in her cooperative apartment be substituted for her jewelry as collateral for the loan.

The third cause of action alleges that, but for defendant's insistence that the corporation's president and sole director, Elizabeth (Libby) Manus, had to execute the corporation's release of plaintiff's obligations to it and that Allen Manus's execution of the release would not be sufficient, Allen Manus would have signed the release and plaintiff would have been free of her obligations under the stipulation. However, this Court has found that the action by the corporation to enforce the stipulation upon plaintiff's default was properly maintained under Libby Manus's authority (*see Family M. Found. Ltd. v Manus*, 71 AD3d 598

[1st Dept 2010], *lv dismissed* 15 NY3d 819 [2010]). Even assuming that Allen Manus, who held a power of attorney for the corporation, was authorized to release plaintiff's obligations to the corporation, Libby Manus's refusal to sign the release would have revoked his authority (*see Zaubler v Picone*, 100 AD2d 620, 621 [2d Dept 1984]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11115 The Board of Managers of Bridge Tower Place Condominium, Plaintiff-Respondent, Index 600934/10

-against-

Starr Associates LLP., et al., Defendants-Appellants.

_____

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for appellants.

David Bolton, P.C., Garden City (David Bolton of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about December 12, 2012, which, in an action alleging legal malpractice, granted plaintiff's motion for summary judgment on the issue of liability and dismissing defendants' affirmative defenses of comparative fault, and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

This Court previously held that the stipulation drafted by defendants unambiguously stripped plaintiff of its right to amend its bylaws to attain a specific result in connection with the underlying action *(see Luzzi v Bridge Tower Place Condominium,* 52 AD3d 290 [1st Dept 2008]). Under those circumstances, no expert

testimony was necessary to establish that defendants' conduct fell below the standards of the profession generally (*see S & D Petroleum Co. v Tamsett*, 144 AD2d 849, 850 [3d Dept 1988]). Because the alternative to the stipulation was not, as defendants contend, to litigate the underlying action, but for plaintiff to exercise its right to amend the bylaws immediately, the motion court did not err in finding "but for causation" as a matter of law *(cf. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.,* 10 AD3d 267, 271-272 [1st Dept 2004]).

Furthermore, although plaintiff's president is an attorney, and did see drafts of the stipulation, the record does not raise a triable issue as to whether he arrogated to himself the role of drafting the stipulation, or micro-managed the negotiation. Rather, the record shows that plaintiff relied on counsel to effect the strategy of preserving in the stipulation the right to amend the bylaws. Accordingly, the defenses of comparative fault

were properly dismissed *(see Mandel, Resnik & Kaiser, P.C. v E.I. Elecs., Inc.*, 41 AD3d 386 [1st Dept 2007]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11116 Marie Alexis, Index 401204/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

The New York City Housing Authority,
Defendant.

_____

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

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 19, 2012, which, upon reargument, granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff tripped and fell on a snow-covered sidewalk abutting a property owned by the City. Contrary to the motion court's conclusion, the City, as owner of the abutting property, which is not a building within the exception for one-to-three family residential properties, owed plaintiff a nondelegable duty

to clear the snow from the sidewalk within a reasonable time (*see* Administrative Code of City of NY §§ 7-210[b], [c]; *Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010]).

The conflicting meteorological evidence presented by plaintiff and the City raised triable issues of fact as to whether a reasonable time had elapsed between the cessation of the storm and plaintiff's accident (*see Mosley v General Chauncey M. Hooper Towers Hous. Dev. Fund Co., Inc.*, 48 AD3d 379 [1st Dept 2008]; *Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]; *see also Garricks v City of New York*, 1 NY3d 22 [2003]; *Valentine v City of New York*, 86 AD2d 381 [1st Dept 1982], *affd* 57 NY2d 932 [1982]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11118 In re Dr. Andrea Parris, Index 102401/12
Petitioner-Respondent,

-against-

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

_____

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

Eisenberg & Baum, LLP, New York (Brian Ullman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered November 15, 2012, annulling respondents' determination, dated December 30, 2011, which terminated petitioner as a probationary principal, and directing respondents to return petitioner to her position, with back pay, unanimously reversed, on the law, without costs, the judgment vacated, respondents' determination reinstated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner failed to meet her burden of establishing that she was terminated in bad faith or for an improper or impermissible reason (*see Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763 [1988]). The

record demonstrates that throughout petitioner's years of service the district superintendent had various concerns about her performance, inter alia, with respect to students' academic performance, school budgetary issues, and her leadership abilities. Nevertheless, petitioner was offered extensions of her probationary employment twice. It was after she refused to extend the probationary employment willingly the second time - in particular, she commented in writing on the agreement that she disagreed with numerous clauses and that she was signing the offer "under duress" - that she was terminated.

Respondents were not required, simply because they had done so once, to extend petitioner's probation a second time despite their concerns about her performance.

The petition fails to establish a prima facie case of discrimination or retaliation, based on environmental disability, under the state and city human rights laws (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]; *see also Koester v New York Blood Ctr.*, 55 AD3d 447, 448-449 [1st Dept 2008] [elements of retaliation case]). The only allegation in support of these claims is that there was "temporal proximity" between respondents' discovery of her disability and their termination of

her employment, and, without other evidence, five months is not sufficient to establish the requisite causal connection. In any event, the record demonstrates that by August 2011 respondents had addressed petitioner's environmental concerns by repeated testing of the school and, at the recommendation of a Department of Education (DOE) physician, providing an air purifier for her office, and that petitioner's next communication about a respiratory condition was not until December 22, 2011, the day after she learned of respondents' offer to extend her probationary period for another year.

These facts also undermine the allegation that petitioner was denied a reasonable accommodation (*see Jacobsen v New York City Health & Hosps. Corp.*, 97 AD3d 428, 431 [1st Dept 2012]). Petitioner was not entitled to a transfer under the collective bargaining agreement. However, she was instructed to proceed with an accommodation review by the DOE's Medical Bureau, which, as indicated, resulted in her being provided with an air purifier, and she did not complain again about her condition until after she was offered the second extension of probation, rather than tenure.

Labor Law § 740 is not applicable to petitioner's claims (*see Yan Ping Xu v New York City Dept. of Health*, 77 AD3d 40, 48 n * [1st Dept 2010]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11119 Teneyck, Inc., formerly known as Neill Supply Co., Inc., Plaintiff-Appellant, Index 650853/12

-against-

Robert D. Rosenberg, Defendant-Respondent.

_____

Fox Rothschild LLP, New York (Ernest E. Badway of counsel), for appellant.

Wilentz Goldman & Spitzer, P.A., New York (Willard C. Shih of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 11, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

This action is barred by the doctrine of in pari delicto (*see Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). The parties pleaded guilty in federal court to identical charges stemming from the underlying bribery scheme.

Contrary to plaintiff's contention, the adverse interest

exception does not avail it (*see id.* at 466-467). Apart from plaintiff's guilty plea, the complaint itself demonstrates that plaintiff profited from the bribery scheme.

Plaintiff failed to show that leave to amend the complaint was warranted.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11121 Jordan Kapchan, Dkt 300366/12
Plaintiff-Appellant,

-against-

31 Mt. Hope, LLC, et al.,
Defendants-Respondents.

_____

Jordan W. Kapchan, New York, appellant pro se.

Karp & Kalamotousakis, LLP, New York (David S. Lee of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about July 24, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Defendants hired plaintiff, an attorney, to represent them in conjunction with their purchase of an apartment building. Plaintiff states that because defendants did not have the total amount due at the closing, he loaned defendants $68,091.55. However, plaintiff's evidence, including a handwritten closing statement that he prepared, purporting to show the itemized closing costs, and a series of checks, signed only by defendant Vincent Rosso, to be cashed by plaintiff in the future, is insufficient to substantiate his allegation that he made a loan

to all defendants in the amount of $68,091.55. Plaintiff's argument that, since the loan repayment checks were drawn from the bank accounts of all of the individual defendants, they were parties to the loan transaction, is unpersuasive, since there is no evidence that any defendant other than Vincent Rosso agreed to be bound by the loan agreement.

The record also presents disputed issues of fact as to whether the alleged balance of the loan was indeed $50,000; whether plaintiff improperly inflated the amount of the closing costs; and whether the agreed upon legal fee was $25,000, as plaintiff contends, or $10,000, as defendants maintain. While the parties advance conflicting positions on these points, issue finding, rather than issue determining, is the function of a court on the disposition of a summary judgment motion (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Furthermore, defendants' unpleaded affirmative defense that they were coerced at the closing into taking a loan from plaintiff raises triable issues (*see e.g. Bishop v Maurer*, 106 AD3d 622 [1st Dept 2013]). The court "in examining the pleadings on a motion for summary judgment, may take into account an unpleaded defense" (*Feliciano-Delgado v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 281 AD2d 312, 316

[1st Dept 2001]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11122 Neftali Centeno, Index 303862/10
Plaintiff-Appellant,

-against-

575 E. 137th St. Real Estate, Inc.,
Defendant-Respondent.

_____

Freed & Lerner, New York (Martin A. Lerner of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about October 16, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to show that the trapdoor through which he fell suffered from a structural or design defect in violation of a specific statutory provision, as required to impose liability upon defendant, an out-of-possession landlord (*see Kittay v Moskowitz*, 95 AD3d 451[1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]). The stairway beneath the trapdoor served as a means of providing easy access between the upstairs store room and the basement. There is no evidence that

it provided a means of egress from the building. Accordingly, Administrative Code of City of NY § 27-375 ("Interior Stairs") is not applicable, since "Interior Stair" is defined as "[a] stair within a building, that serves as a required exit" (Administrative Code § 27-232) (*see Cusumano v City of New York*, 15 NY3d 319, 324 [2010]). Administrative Code § 28-301.1, which repeals and re-codifies former sections 27-127 and 27-128 (*see McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 469 [1st Dept 2013]), is also unavailing. Sections 27-127 and 27-128 were merely non-specific safety provisions (*Ram v 64th St.-Third Ave. Assoc., LLC*, 61 AD3d 596, 597 [1st Dept 2009]; *see Kittay*, 95 AD3d at 452).

Similarly unavailing is Administrative Code § 27-126, which was merely a non-specific provision defining certain work as non-minor.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11123 Radhika Singh, Index 307533/09
Plaintiff-Appellant,

-against-

Gayle H. McCrossen, et al.,
Defendants,

Westchester Rockland Newspapers,
Inc., et al.,
Defendants-Respondents.

_____

The Law Office of Thomas J. Lavin, Bronx (John O'Halloran of counsel), for appellant.

McAndrew, Conboy & Prisco, Melville (Mary C. Azzaretto of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 26, 2012, which granted the motion of defendants-respondents (Gannett) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Gannett established entitlement to summary judgment in this action where plaintiff was injured when, while walking to a bus stop on Gannett's property, she was struck by a car driven by her coworker defendant McCrossen as she was leaving work. The motion court properly found that Gannett's failure to provide a sidewalk leading from the front door of its building to a County bus stop

on the property was not a proximate cause of plaintiff's accident as a matter of law (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Instead, the fact that there were no sidewalks in the area of plaintiff's accident merely furnished the occasion for the accident (*see Sheehan v City of New York*, 40 NY2d 496, 503 [1976]).

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11124 Michael Wood, et al., Index 100598/09
Plaintiffs, 590335/09

-against-

Lefrak SBN Limited Partnership,
Defendant-Respondent,

Benihana National Corp.,
Defendant-Appellant.

[And a Third-Party Action]

_____

Cartafalsa, Slattery Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 18, 2012, which, insofar as appealed from as limited by the briefs, granted defendant Lefrak SBN Limited Partnership's motion for summary judgment on its cross claim for contractual indemnification against defendant Benihana National Corp. to the extent of awarding Lefrak conditional summary judgment, unanimously affirmed, with costs.

The unambiguous language of the lease between Lefrak, as landlord, and Benihana, as tenant, requires Benihana to indemnify Lefrak against claims arising from, among other things, the

management of the premises, from any act or omission of Benihana's, or from any condition created by Benihana within the premises. Lefrak established prima facie that plaintiff's accident was caused by Benihana's improperly repaired or maintained floor drains located above the stairway where plaintiff slipped and fell. There is an abundance of evidence that Benihana had actual notice of the defective condition of its drains, including testimony that leaks occurred often and repair invoices showing that Benihana hired plumbers to clear "Grease stoppage in Floor drain" on several occasions, at least two of which were deemed emergencies. Lefrak also submitted an affidavit by an engineer, who opined that the wet condition in the stairway was caused by the clogged drains in Benihana's kitchen.

Benihana failed to raise an issue of fact in opposition. Its arguments focus almost exclusively on whether Lefrak was responsible for maintenance and repair of plumbing lines or pipes, which assumes that the only source of the liquid or water in the stairway was a pipe in the stairwell.

We reject Benihana's argument that Lefrak cannot be awarded conditional summary judgment on its cause of action for contractual indemnification unless it establishes that it is free

from negligence. The order directs Benihana "to indemnify Lefrak for any liability arising out of the accident *that was not the result of Lefrak's own negligence*" (emphasis added) (*see Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11125 The People of the State of New York, Ind. 1450N/05
Respondent,

-against-

Tray Blanding, etc.,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Shiwon Choe of counsel), for appellant.

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

_____

Appeal from judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered June 23, 2006, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, held in abeyance, and the matter remitted to Supreme Court to make new findings with respect to the probable cause issue based upon the evidence presented at the suppression hearing.

During a buy and bust operation, a ghost undercover detective issued a radio transmission identifying defendant as a participant in a drug sale to another undercover officer. Based

on that radio transmission describing defendant and his location, a third officer approached defendant on the sidewalk, identified himself, and asked defendant to put his hands up. When defendant acted "a little resistant," the officer attempted to handcuff him. Defendant then resisted, and the police forcibly handcuffed him.

Defendant moved to suppress on the grounds that his arrest was not based on probable cause. The suppression court denied the motion, ruling that although when the officer stopped the defendant, he did not have probable cause to arrest him based on the information that he had received from the radio transmission, the officer obtained probable cause to arrest defendant after the purchasing undercover officer subsequently radioed his confirmatory identification. By denying the suppression motion while finding that there was no probable cause to arrest defendant until the confirmatory identification, the court implicitly found that the initial apprehension, which preceded that identification, was a proper temporary detention based on reasonable suspicion and that the application of handcuffs on defendant did not transform the detention into a full-scale arrest.

At the outset, we reject the People's argument that

defendant was not under arrest at the point when he was handcuffed. Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest, handcuffing is permissible in such a detention only when justified by the circumstances (*see People v Acevedo*, 179 AD2d 465, 465-66 [1st Dept 1992], *lv denied* 79 NY2d 996 [1992]). In this case, the police had no reason to believe that defendant was either armed or dangerous. Nor was there any indication on the record that defendant offered any resistance prior to the handcuffing, or gave the police any reason to believe that he might flee. The fact that defendant was "a little resistant" when told to put up his hands is not, on its own, sufficient to establish that the officers had any difficulty restraining defendant. Rather, like *Acevedo*, this case presents a situation in which the officers' initial use of handcuffs was not warranted by the threat confronting them (*see People v Allen*, 73 NY2d 378, 380 [1989]; *People v Battaglia*, 56 NY2d 558 [1982]), so that the detention exceeds the proper bounds of an intrusion made on less than probable cause.

However, contrary to the suppression court's finding, it would appear, based on applicable precedents, that the officer did, in fact, have probable cause to arrest defendant, given the

operation of the fellow-officer rule (*see People v Washington*, 87 NY2d 945 [1996]), and the specificity of the description transmitted by the ghost officer, when viewed in light of temporal and spatial proximity (*see e.g. People v Johnson*, 63 AD3d 518 [1st Dept 2009], *lv denied* 13 NY3d 797 [2009]). However, inasmuch as we have no "power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v Concepcion*, 17 NY3d 192, 195 [2011]), we cannot rule on this issue in the first instance. We therefore hold the appeal in abeyance and remit the matter to Supreme Court for reconsideration of the probable cause issue (*see e.g. People v Washington*, 82 AD3d 570 [1st Dept 2011]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11126 In re Frances May Rankin,
Petitioner-Respondent,

-against-

Russell Robert Rankin,
Respondent,

Alexa Mary-Jean Matz,
Respondent-Appellant.

_____

Johnson & Cohen, LLP, Pearl River (Lisa Zeiderman of counsel), for appellant.

Paul W. Matthews, New York, for respondent.

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Order, Family Court, New York County (Carol Goldstein, Court Attorney Referee), entered on or about October 12, 2012, which denied respondent mother's motion to dismiss the petition of paternal grandmother for visitation with the subject child, and scheduled the matter for trial, unanimously affirmed, without costs.

It is undisputed that the child and the mother lived in New York since the child's birth, and that New York was the child's home state at the time of the initial custody order. It is also undisputed that New York remained the child's home state at the time the petition was filed. Thus, the court had jurisdiction to modify its initial custody order, which limited visitation to the

father (*see* DRL § 76[1][a] and 76-a[2]). Moreover, New York retained exclusive continuing jurisdiction because no determination was made that the child, the child and one parent, or the child and a person acting as a parent lacked a significant connection to this state, that substantial evidence was no longer available in this state concerning the child's care, protection, training and personal relationships, or that the child and the parent lived in another state, since the mother and the child did not move to Florida until after the petition was filed (*see* DRL § 76-a[1][a]).

The court properly exercised its discretion to retain jurisdiction over the parties after they moved to other states because the mother failed to sustain her burden of demonstrating that public or private interests militated against the litigation

going forward in this state (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]), where an alternative forum was unavailable to the petitioner grandmother.

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11128 Joseph Cerverizzo, et al., Index 15301/05
Plaintiffs-Appellants, 84731/05
85895/07
-against- 84224/08

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

-against-

J. Blanco Associates, Inc.,
Third-Party Defendant-Respondent,

Delta Installations, Inc.,
Third-Party Defendant.

[And Other Third-Party Actions]

_____

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

Cartafalsa, Slattery Turpin & Lenoff, Tarrytown (Christopher J. Turpin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 13, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 200 claim as against defendant Yonkers Construction Corp. and the Labor Law § 241(6) claim against all defendants, unanimously modified, on the law, to deny the motion

as to the Labor Law § 200 claim, and otherwise affirmed, without costs.

Pursuant to Labor Law § 200, Yonkers failed to establish prima facie that it neither created nor had actual or constructive notice of the dangerous condition, allegedly created by an excavating company, that caused plaintiff Joseph Cerverizzo's injury. Yonkers's own workers performed excavation in the area and were responsible for providing protection from excavation holes. Yonkers's argument that it did not exercise supervisory control over plaintiff's work is inapposite, in light of the evidence that Yonkers created the dangerous condition (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]).

As a predicate for the Labor Law § 241(6) claim, Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i) (hazardous openings) is inapplicable, because the hole that plaintiff stepped into, as he described it, was not large enough for a person to fit through (*see Messina v City of New York*, 300 AD2d 121, 123-124 [1st Dept 2002]). Sections 23-1.7(e)(1) and 23-1.7(d) (tripping hazards and slipping hazards) are inapplicable because plaintiff's only testimony that he both tripped and slipped is contained in his affidavits, which were tailored to avoid the consequences of his

prior deposition testimony that he neither tripped nor slipped (*see Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11129 The People of the State of New York, Ind. 3209/11
Respondent,

-against-

Manuel Rios,
Defendant-Appellant.

_____

Edith Blumberg, New Berlin, for appellant.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about January 24, 2012, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 19, 2013

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, Feinman, JJ.

11130N- Index 450095/12
11130NA In re New York Urban Development Corporation, etc.,
Petitioner-Respondent,

-against-

P.G. Singh Enterprises, LLC, et al.,
Respondents-Appellants.

_____

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (Daniel M. Lehmann of counsel), for appellants.

Carter Ledyard & Milburn LLP, New York (John R. Casolaro of counsel), for respondent.

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Orders, Supreme Court, New York County (Cynthia Kern, J.), entered February 28, 2013, which granted condemnees P.G. Singh Enterprises, LLC's and Parminder Kaur and Amanji Kaur's motions for an extension of time to file appraisal reports, on condition that the interest on their claims cease to accrue, unanimously affirmed, without costs.

The court did not abuse its discretion when it suspended the accrual of interest on the condemnees' claims during the extension of time they sought for the completion of their

appraisal reports (*see e.g. Abele v State of New York*, 39 Misc 3d 1240[A] [Ct Cl 2011]; *see also* Eminent Domain Procedure Law § 514[b]).

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

ENTERED: NOVEMBER 19, 2013

CLERK

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

10604 Extell Belnord LLC, Index 110098/11
Plaintiff-Respondent,

-against-

Jean Seward Uppman, et al.,
Defendants,

Jonathan Vincent,
Defendant-Appellant.

_____

Grimble & LoGuidice, LLC, New York (Roger Grimble of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered June 5, 2013, modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
Rolando T. Acosta
Dianne T. Renwick, JJ.

10604
Index 110098/11

_____x

Extell Belnord LLC,
Plaintiff-Respondent,

-against-

Jean Seward Uppman, et al.,
Defendants,

Jonathan Vincent,
Defendant-Appellant.

_____x

Defendant Jonathan Vincent appeals from the order of the Supreme Court, New York County (Louis B. York, J.), entered June 5, 2013, which granted plaintiff's motion for partial summary judgment to the extent of severing and dismissing said defendant's first counterclaim and sixth affirmative defense, and first and fourth affirmative defenses, denied defendant Jean Seward Uppman's motion to dismiss the complaint as against her, and denied Vincent's motion for, inter alia, summary judgment dismissing the complaint as against him.

Grimble & LoGuidice, LLC, New York (Robert Grimble and Robin LoGuidice of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz and Sherwin Belkin of counsel), for respondent.

MAZZARELLI, J.

Plaintiff is the owner of the building located at 201 West 86th Street, known as the Belnord. In 1994, the previous owner of the Belnord and the tenants' association entered into an agreement resolving various disputes, including, according to an affidavit by plaintiff's property manager, "the disputed rent regulation status of certain apartments." In the agreement the previous owner acknowledged that the tenants were "rent controlled," as that term was defined by applicable regulations. In 2006, the owner and the tenants' association entered into a revised agreement (the New Agreement), which superseded the 1994 agreement. The New Agreement provided, in pertinent part, that the apartments of those tenants who signed the New Agreement were no longer subject to rent regulation. It also provided that tenants who signed the New Agreement would receive new 49-year leases, with an option to continue as month-to-month tenants for those who survived the 49-year term, with succession rights, as well as limits on annual increases in rents. The owner and each tenant who signed the New Agreement were required to jointly submit a copy of the New Agreement to DHCR and request that the

agency issue an order pertaining to the respective apartment that would

> "declare and determine that each [apartment] and all of the tenants, residents, and/or other occupants [thereof], shall be exempt from coverage by and/or applicability of the City Rent Law (a/k/a Rent Control), the Rent and [E]viction Regulations, the Rent Stabilization Law of 1969, as amended, the Emergency [T]enant Protection Act of 1974, as amended, and/or the Rent Stabilization Code . . ."

The New Agreement provided that if DHCR did not issue orders containing the terms described therein within 120 days of the parties' joint submission of the New Agreement to DHCR, the agreement would become void. The New Agreement further stated that

> "neither the [tenants' association], nor any of the signatories to this New Agreement may oppose the application to DHCR, including but not limited to seeking a Petition for Administrative Review. Should the [tenants' association] oppose the application or support any opposition to the application, then [the owner] shall be permitted to declare [tenants' association] in breach of the New Agreement and void the agreement."

The New Agreement separately provided that "[g]randchildren and other descendents who are not children of the Settling Tenant(s) are not successor tenants and have no right of succession . . ., except where the grandchild is a resident of the apartment on the date of the New Agreement, and whose name is

set forth in Exhibit C." Additionally, an otherwise qualified person was only eligible to succeed to an apartment if he or she was "co-occupying the apartment as a joint primary residence with the Settling Tenant for the two years immediately preceding the Settling Tenant's permanent vacatur therefrom." Further, the New Agreement required all tenants to maintain their apartments as their primary residence. The New Agreement specified that a breach of this requirement would entitle the landlord to seek a remedy in court, including "rescission of the future benefits under the New Agreement to the Settling or Successor tenant, and/or recovery of possession of said Settling or Successor Tenant's apartment."

Defendant Jean Seward Uppman, the tenant of apartment 806 in the Belnord, executed the New Agreement. In addition, her grandson, defendant Jonathan Vincent, signed the agreement underneath the words: "The following adult occupants of apartment [806], who may have rights to succession under rent control or rent stabilization rules that are terminated by this Agreement, waive those potential rights and acknowledge this Agreement."

On November 15, 2006, DHCR mailed Uppman a one-page order. The order stated that

> "the parties through tenants' counsel advised that, as anticipated in a meeting with DHCR in January [] 2005 the owners and the

> tenants[’] association finalized an agreement to modify the rents and status of the apartments occupied by the members of the association in return for certain consideration involving limitation on rents and terms of tenancy.”

The order explained:

> “The new agreement anticipated the issuance of orders deregulating the apartments which are subject to the agreement. Each order would reference the agreement and the prior orders specifying that the regulatory status of the unit (most of which are rent controlled) will be terminated as of January 1, 2006 . . . .
>
> “DHCR then opened the above docket number as part of the process for the issuance of the order on the terms and conditions summarized above, issued a Notice of Commencement of Administrative Proceeding and gave the parties twenty (20) days to respond to the notice, after which such orders might be issued. No responses have been received.”

The DHCR order concluded that “this Order of Deregulation is issued and the prior regulatory status of the apartment as Rent Control is terminated effective January 1, 2006, subject to the [a]greement and pursuant to its terms which are incorporated . . . in this Order.”

Accompanying the DHCR order was a “Notice of Right to Administrative Review,” which set forth Uppman’s right to challenge the order and the time limitations for doing so. Neither Uppman nor Vincent ever filed a petition for

administrative review. Indeed, Uppman entered into a new lease with plaintiff for a term of 49 years that incorporated the terms of the New Agreement and noted that the premises are "not subject to rent regulation." Uppman, who allegedly has Alzheimer's disease, moved into a nursing home in November 2009.

Plaintiff commenced this action in 2011, seeking, inter alia, a judgment declaring that Uppman failed to maintain the apartment as her primary residence, and alleging that, upon such judgment, the lease and the New Agreement "shall be deemed to be terminated, all future benefits under the Agreement shall be rescinded, and [Uppman] shall no longer be entitled to continued possession of the Apartment." Plaintiff claims that all the other defendants, including Vincent, are not tenants of record of the apartment, notwithstanding any occupancy by such persons; thus, plaintiff seeks an order enjoining them from occupying the apartment. Plaintiff also seeks an order of ejectment of all persons occupying the apartment, and a judgment awarding it exclusive possession of the apartment.

Vincent's verified answer asserts, as a first affirmative defense, that Uppman is a rent-controlled tenant of the apartment and that Vincent resided with her in the apartment for a period of more than two years before Uppman permanently moved into the nursing home. He admits that during his co-occupancy of the

apartment there were "periods of time during which [he] was absent for educational reasons," but contends that these absences did not "vitiate primary residency." The first defense also claims that Vincent was a rent regulated tenant of the apartment, not only because of his co-occupancy, but also because plaintiff accepted rent subsequent to Uppman's vacatur. Vincent further alleges that he was not a party to any proceeding brought by any agency seeking deregulation, and thus could not be bound by any deregulation order resulting from such a proceeding, and asserts that any purported waiver of rent regulation would be void as against public policy.

Vincent's fourth affirmative defense asserts that plaintiff failed to serve a notice to cure and notice of termination, as required by applicable rent regulations. His combined first counterclaim and sixth affirmative defense seeks a judgment declaring him a rent-regulated tenant of the apartment and compensation for any rent overcharges. In support of this claim, he alleges that at all relevant times, plaintiff has been receiving a J-51 tax abatement, pursuant to Administrative Code of City of NY § 11-243, which disqualifies it from any efforts to deregulate. He also asserts that plaintiff improperly failed to offer him a renewal lease.

Uppman, through an appointed guardian ad litem, moved to

dismiss the complaint as against her, contending that she was mentally incapable of defending against the action, was unable to leave her extended-care facility in Maryland to appear personally in a New York court, and was making no claim to possession of the apartment. Vincent moved for an order dismissing the action against the remaining defendants and for summary judgment dismissing the action as against himself. In support of his motion, Vincent argued that the action should have been commenced in Housing Court and that Supreme Court should decline to exercise jurisdiction. He further argued that the building's current receipt of J-51 benefits precluded it from deregulating apartments, in light of *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) and its progeny. Finally, Vincent stated that plaintiff accepted his rent after Uppman moved, and was thus barred from contesting his tenancy. Vincent submitted an affidavit in support of his motion and appended his deposition transcript. He asserted that, based on his statements regarding when and how often he was present at the apartment, there could be no question that the apartment constituted his primary residence for purposes of either the applicable rent regulations or the New Agreement.

Plaintiff opposed Uppman's motion on the basis that, as the primary tenant on the lease, she was a necessary party to the

action and her presence in the case was crucial to determining Vincent's right to occupy the apartment. Plaintiff opposed Vincent's motion by arguing that discovery was still ongoing with respect to the primary residence issue, and that it hotly contested his position. Plaintiff further asserted that the DHCR order deregulating the apartment was the product of a lengthy negotiation between the previous owner and the tenants' association, involving sophisticated counsel on both sides, and the cooperation of the agency. It further argued that collateral estoppel and the doctrine of administrative finality barred Vincent from relitigating DHCR's order deregulating the apartment, since neither Vincent nor Uppman challenged the order administratively. With respect to the J-51 issue, plaintiff noted that "the Building was receiving J-51 tax benefits at the time of the DHCR Order, and Plaintiff has not received new J-51 benefits since April 2005." Finally, plaintiff defended its decision to commence an action for declaratory relief in Supreme Court, instead of a summary proceeding in Civil Court. It first invoked the broad jurisdictional mandate of Supreme Court, which encompasses disputes between landlords and tenants. It further maintained that a declaration that Uppman breached the terms of the New Agreement was consistent with the agreement, which provides that to regain occupancy plaintiff may terminate future

benefits thereunder. Plaintiff interpreted the New Agreement as permitting it to avoid rescinding the agreement itself, which it asserted it would have to do before it could proceed in Housing Court. Plaintiff incorporated these arguments into a separate motion for partial summary judgment dismissing, as concerns this appeal, Vincent's first counterclaim and sixth affirmative defense, and his first and fourth affirmative defenses.

The motion court granted plaintiff's motion for partial summary judgment only to the extent of severing and dismissing Vincent's first counterclaim and sixth affirmative defense and first and fourth affirmative defenses; denied Uppman's motion to dismiss the complaint as against her; and denied Vincent's motion for summary judgment. With respect to plaintiff's motion, the court agreed with plaintiff that Vincent could not challenge the apartment's rent regulation status, since he had failed to pursue the relevant administrative remedies. The court added that Vincent admitted that he had been paying rent without objection since 2009 and was a signatory to the New Agreement, and thus waived any challenge to the deregulation order. The court also credited plaintiff's argument that because it had not received J-51 benefits in several years, there was no impediment to deregulation. Turning to Vincent's motion, the court found "numerous" issues of fact, including whether Vincent maintained

the apartment as his primary residence during the two years immediately preceding Uppman's departure. The questions identified by the court included whether and when plaintiff knew that Uppman had left the apartment and whether plaintiff gained knowledge of Vincent's presence in the apartment. The court also noted that Vincent was a signatory to the New Agreement and evidently knew that he was a potential successor, but the court found that it was "not clear what impact this knowledge, coupled with plaintiff's knowledge that Ms. Uppman had moved out of the apartment at least temporarily, placed on [plaintiff] to determine Mr. Vincent's status in a more timely basis [*sic*]." The court found that Vincent "was the primary resident . . . for quite some time," and noted that Vincent's tax returns listed the apartment's address as his own, but agreed with plaintiff that none of the above constituted "definitive proof of his primary residence."

With regard to Uppman's motion, the court rejected the argument that the complaint should be dismissed because she had not lived in the apartment for years and was incompetent. The court noted that the guardian ad litem was duly appointed for the purpose of this litigation pursuant to a court order upon a finding of Uppman's incompetence, in accordance with CPLR 1201, which provides for the appointment of a guardian to appear in

court proceedings in which a person is declared incompetent. The court also agreed with plaintiff that to dismiss the complaint against Uppman would be to decide a critical issue regarding the legal rights of Uppman and Vincent with respect to the apartment. Finally, the court rejected Vincent's contention that the action should be litigated in Housing Court, noting that while Housing Court would have been a more appropriate forum, Supreme Court "has general jurisdiction, including over housing matters."

Vincent contends that the court improperly found that the DHCR order had collateral estoppel effect because there is no indication that the agency considered the propriety of deregulating the apartments on the merits. He also argues that the order is a nullity because the New Agreement, on which it is based, is void as against public policy. We address the latter point first, because it is dispositive of the appeal.

In *Drucker v Mauro* (30 AD3d 37, 39 [1st Dept 2006], *appeal dismissed* 7 NY3d 844 [2006]) this Court stated:

> "It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law. Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void (Rent Stabilization Code [9 NYCRR] § 2520.13), and this Court has uniformly thwarted attempts, whether by mutual consent or by contract of adhesion, to

circumvent regulated rent maximums."

Even an agreement that modifies the rent laws in a manner favorable to the tenant is of no effect (*id.* at 41). The New Agreement does not merely modify the rent regulations; it declares them inapplicable to the apartment. Without question, then, the New Agreement is void. We note that, although *Drucker* addressed only agreements to deregulate rent-stabilized apartments, there is no logical reason why the same principle should not apply to the rent-controlled apartment at issue here.

Plaintiff maintains that *Drucker* is inapposite because "it did not involve a docketed DHCR order that has already determined the regulatory status of an apartment." This suggests that DHCR arrived at a decision to deregulate the apartment that was independent from the New Agreement itself. However, there is no evidence to support this notion. It is clear from the plain language of the order that DHCR based its decision to deregulate the apartment on the New Agreement only.

The fact that the New Agreement and the DHCR order are so intertwined negates plaintiff's collateral estoppel argument, which relies on *Gersten v 56 7th Ave. LLC* (88 AD3d 189, 201 [1st Dept 2011]). In *Gersten*, DHCR issued a luxury deregulation order, despite the fact that the landlord was receiving J-51 benefits at the time. After the Court of Appeals handed down

Roberts, which held that J-51 benefits preclude luxury deregulation, the tenant commenced an action seeking retroactive application of its holding. This Court held that *Roberts* did in fact have retroactive effect and that no statute of limitations defense is available on the issue of whether an apartment is regulated (88 AD3d at 198, 200-201). However, this Court found that the tenant's claim had to be dismissed, because the DHCR's deregulation order had collateral estoppel effect. We stated:

> "Three of the elements necessary for the application of collateral estoppel cannot be seriously disputed here because (1) the issue before DHCR, whether the subject apartment was properly removed from rent stabilization by luxury decontrol, is identical to the issue before the motion court and this Court, (2) the issue was fully litigated, and (3) the issue was decided in the DHCR proceeding" (*id.* at 201).

However, *Gersten* is not controlling here, because in this case none of the three elements it requires are found. First, whether the apartment was subject to deregulation was hardly "before" DHCR, since there is no indication that the agency actually addressed the issue whether the apartment was eligible for deregulation. In *Gersten*, it had to determine whether the appropriate luxury decontrol requirements were met. Similarly, it cannot be said that the matter was fully "litigated" or "decided" as it was in *Gersten*, since there was no substantive

issue before DHCR. Indeed, plaintiff does not suggest any basis for the agency's decision to order the apartment deregulated, other than a simple rubber-stamping of the New Agreement.

The New Agreement's requirement that the tenants apply to DHCR for a deregulation order appears to have been an attempt to lend the agreement the agency's imprimatur and avoid its coming undone after the new leases were issued. However, public policy in the realm of rent regulation is strong and clear. Parties simply may not agree to ignore the rent laws, even for the most noble of purposes. Simply put, to condone the New Agreement would be "indefensible," since it would be "in violation of the well-established judicial policy of refusing to enforce agreements that are unlawful or injurious to the public, particularly where an attempt to circumvent the Rent Stabilization Law is concerned" (*Drucker*, 30 AD3d at 42). Because we find that the New Agreement and the resulting order were void ab initio, we need not decide whether any receipt of J-51 benefits by plaintiff or its predecessor(s) barred the deregulation of rents at the Belnord.

This does not end the analysis because, even under rent control, Vincent is only entitled to succeed to the apartment if he can establish that he qualifies by having co-occupied the apartment as his primary residence with Uppman during the two

years immediately preceding Uppman's vacatur (*see* New York City Rent and Eviction Regulations [9 NYCRR] § 2204.6[d]). Generally speaking, "a conflict as to where the primary residence is really should be resolved at trial" (*Coronet Props. Co. v Adelman*, 112 AD2d 100, 100 [1st Dept 1985]). This is especially the case where there is some evidence that the person claiming succession rights had an occupancy interest somewhere else during the relevant time period (*see Regina Metro. Co., LLC v Hartheimer*, 40 Misc3d 127(A) [App Term, 1st Dept 2013]).

Vincent's own deposition testimony and affidavit reveal that during one period in the two years preeceding Uppman's vacatur, he resided in Washington, D.C. three days per week to teach, and during another period had a two-day-per-week job. Vincent acknowledges that he filed tax returns in Washington, and maintained a bank account there. In addition, there is evidence that Vincent received mail at addresses other than the apartment during the subject time period. While we acknowledge that Vincent has possible explanations for these facts and documents that support his position that the apartment was his primary residence, we find that, on this record, it is impossible to determine the issue as a matter of law (*see Kamvan Co. v Rammel*, 132 Misc 2d 909 [App Term, 1st Dept 1986]).

An issue of fact similarly exists regarding whether

plaintiff created a month-to-month tenancy by accepting Victor's rent. Although the record contains a rent check that appears to be a rent payment by Vincent made out to plaintiff, plaintiff asserts that the check was returned to Vincent. Further, there is insufficient evidence to conclude that plaintiff accepted other rent payments, which were initially deposited in an account controlled by Uppman, with knowledge that Vincent was making the payments on his own behalf.

Vincent argues that, because it is undisputed that Uppman has not lived in the apartment for years, plaintiff's claim for judgment declaring that Uppman does not reside in the apartment is moot. However, in the context of a proceeding brought by a landlord seeking to terminate the rights of all existing tenants or licensees, this Court has held that even the death of the tenant of record does not obviate the need to join a representative of the tenant's estate as a necessary party (*see Westway Plaza Assoc. v Doe*, 179 AD2d 408 [1st Dept 1992]). Plaintiff seeks the termination of Uppman's lease on the ground that she breached the lease by failing to maintain the apartment as her primary residence. Accordingly, Uppman is a necessary party.

Finally, although Supreme Court has "discretion . . . to decline to review an action it considers appropriately brought in

Civil Court," it is not required to do so (*see Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]). Moreover, "Supreme Court has unlimited general jurisdiction over all plenary real property actions, including those brought by a landlord against a tenant" (*id.*). Accordingly, this Court has held, in the context of such an action, that "it is for the plaintiff to determine how, and in which court, to plead its case" (*id.*). Here, unlike in *Cox v J.D. Realty Assoc.* (217 AD2d 179 [1st Dept 1995]), which Vincent relies on, a predicate notice had not yet been served, and the lease not yet terminated, when plaintiff commenced this action. Thus, the motion court properly concluded that it had jurisdiction over this matter.

Accordingly, the order of the Supreme Court, New York County (Louis B. York, J.), entered June 5, 2013, which granted plaintiff's motion for partial summary judgment to the extent of severing and dismissing defendant Jonathan Vincent's first counterclaim and sixth affirmative defense, and first and fourth affirmative defenses, denied defendant Jean Seward Uppman's

motion to dismiss the complaint as against her, and denied Vincent's motion for, inter alia, summary judgment dismissing the complaint as against him, should be modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 19, 2013

CLERK