SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 16, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

8936 In re Juanita Lowery, Index 400919/11
Petitioner-Respondent,

-against-

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

First Atlantic Terminal Housing Corp.,
Respondent.

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Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for appellants.

South Brooklyn Legal Services, Inc., Brooklyn (Edward Josephson of counsel), for Juanita Lowery, respondent.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered May 23, 2012, insofar as appealed from as limited by the briefs, granting the petition to annul the determination of respondent New York City Housing Authority (NYCHA), dated November 22, 2011, which found petitioner to be ineligible for an enhanced Section 8 voucher, to the extent of remanding the matter to NYCHA for reconsideration of petitioner's application and for imposition of a lesser penalty, unanimously reversed, on the law,

without costs, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The record shows that prior to filing her application for enhanced Section 8 benefits with NYCHA, petitioner had misrepresented her household income to a different government housing program administered by the United States Department of Housing and Urban Development by failing to disclose more than $100,000 in income between 2005 and 2009 (*see* 24 CFR 982.552[c][1][iv]). Under NYCHA's rules, persons who have misrepresented information affecting eligibility, income, etc., are ineligible for benefits for three years from the date they are declared ineligible. Thus, there was a rational basis for NYCHA's determination that petitioner was ineligible for an enhanced Section 8 voucher (*see generally Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526 [1st Dept 2011]).

Furthermore, in reviewing the denial of Section 8 benefits as a penalty, as urged by petitioner, the denial of housing assistance does not shock our sense of fairness under the

circumstances, especially in light of the "vital public interest underl[ying] the need to enforce income rules pertaining to public housing" (*see Matter of Perez v Rhea*, 20 NY3d 399, [2013]).

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

ENTERED: April 16, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9514 Greater New York Mutual Insurance Co. et al., Plaintiffs-Appellants, Index 109873/11

-against-

Chubb Indemnity Insurance Company, Defendant-Respondent.

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Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Norman H. Dachs of counsel), for appellants.

Goodman & Jacobs, LLP, New York (Judith F. Goodman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered October 2, 2012, which denied plaintiffs' motion for summary judgment and granted defendant's cross motion for summary judgment declaring that defendant has no responsibility to defend or indemnify plaintiffs Eleven Riverside Garage Corp. or Alfonso Parra in an underlying personal injury action, unanimously modified, on the law, to grant the motion and deny the cross motion to the extent of declaring that defendant must defend and indemnify plaintiffs Alfonso Parra and Eleven Riverside Garage Corp. (the garage) in the underlying action, and otherwise affirmed, without costs.

Parra – an employee of the garage – was parking a vehicle

owned by nonparty Ellen Waldron Peress (Waldron) when he ran over nonparty Paul Peress. The vehicle rolled over Peress' body up to his waist or lower back before Parra stopped.

At the time of the accident, the garage and Parra were insured under a commercial general liability policy issued by plaintiff Greater New York Mutual Insurance Company (GNY), and Waldron had an automobile policy issued by defendant. GNY's policy states that, under circumstances such as those involved here, it is excess to other insurance. Defendant's policy defines "covered person" to include "any person using [Waldron's] covered vehicle with permission from" Waldron (i.e., Parra) and "any . . . organization with respect to [its] legal responsibility for acts or omissions of a covered driver" (i.e., the garage). However, defendant's policy also contains the following exclusions: "We do not cover any person while employed or otherwise engaged in the business of . . . storing [or] parking . . . vehicles" (the vehicle-related jobs exclusion) and "We do not cover any person . . . using any vehicle while employed or otherwise engaged in any business or occupation" (the business use exclusion).

Peress sued the garage, Parra, and Waldron. On May 4, 2010, GNY requested that defendant defend and indemnify the garage and

Parra. Defendant did not respond. On July 15, 2011, GNY's lawyer wrote to defendant, again requesting that it defend and indemnify the garage and Parra. On August 12, 2011, defendant rejected GNY's tender. This action followed.

After receiving GNY's May 4, 2010 letter, defendant was required to give timely notice of disclaimer to the mutual insureds (Parra and the garage) but not to GNY (another insurer) pursuant to Insurance Law § 3420(d)(2) (former Insurance Law § 3420[d]) (*see e.g. J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269-271 [1st Dept 2009], *lv dismissed* 13 NY3d 889 [2009]). Defendant's more than 15-month delay in disclaiming is untimely as a matter of law insofar as Parra and the garage are concerned (*see e.g. Industry City Mgt. v Atlantic Mut. Ins. Co.*, 64 AD3d 433, 434 [1st Dept 2009]; *J.T. Magen*, 64 AD3d at 272). The fact that the Peress file was reassigned from one of defendant's employees to another does not excuse defendant's delay in disclaiming (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88-89 [1st Dept 2005]). Therefore, defendant is required to defend and indemnify Parra and the garage in the underlying personal injury action (*see generally Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000] ["disclaimer pursuant to section 3420(d) is necessary when

denial of coverage is based on a policy exclusion"]).

GNY is not the sole real party in interest, such that Insurance Law § 3420(d)(2) would be inapplicable; nor is there a triable issue of fact on this question. Unlike *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA* (92 AD3d 104 [1st Dept 2012]) and *Excelsior Ins. Co. v Antretter Contr. Corp.* (262 AD2d 124 [1st Dept 1999]), there has been no settlement in the underlying action. If the damages in the *Peress* action exceed $1 million (the limit of defendant's policy), the garage and Parra will benefit by being covered by GNY's policy as well as defendant's policy. The antisubrogation rule cases cited by defendant are inapplicable to the instant action.

As noted earlier, defendant had no obligation of prompt disclaimer vis-à-vis GNY. Hence, its disclaimer was timely insofar as GNY is concerned (*see Bovis*, 27 AD3d at 93). The

vehicle-related jobs and business use exclusions apply; therefore, GNY is not entitled to reimbursement of the amounts it has expended thus far in defending Parra and the garage in the underlying action.

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

ENTERED: APRIL 16, 2013

CLERK

Gonzalez, P.J., Sweeny, Renwick, Manzanet-Daniels, Román, JJ.

9633 Carmen Costa, et al., Index 102175/09
Plaintiffs-Respondents,

-against-

Columbia Presbyterian Medical
Center, etc., et al.,
Defendants-Appellants,

Michael G. Kaiser, M.D.,
Defendant.

_____

Martin Clearwater & Bell, LLP, New York (Stewart G. Milch of counsel), for appellants.

Strauss Law Offices, Nanuet (Jeffrey E. Strauss of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered September 20, 2012, which denied defendants Columbia Presbyterian Medical Center a/k/a New York Presbyterian Hospital, Angela Lignelli, M.D. and Alan John Silver, M.D.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In an action premised upon medical malpractice, a defendant doctor establishes prima facie entitlement to summary judgment when he or she demonstrates that in treating the plaintiff either there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries

alleged (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). Once the defendant meets his burden it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff cannot rebut defendant's prima facie showing simply with "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325).

Here, defendant Lignelli seeks summary judgment on the ground that with regard to the cervical CT myelogram performed upon plaintiff, she neither positioned the needle immediately prior to the injection of the dye nor injected the dye, the acts which allegedly caused injury to plaintiff. However, although Lignelli and defendant Silver's testimony support Lignelli's assertion, at plaintiff's deposition - the transcript of which was submitted by Lignelli in support of her motion - plaintiff unequivocally testified that she remained awake during her

procedure and that Lignelli performed the procedure in its entirety. Specifically, when asked, "And are you aware of who inserted that needle," plaintiff responded, "Yes, Dr. Lignelli, and the other doctor was putting the needle in the position." Plaintiff's reference to the "other doctor" was to Dr. Silver, who she said was in another room while the procedure was being performed. Thereafter, plaintiff was asked, "So, after Dr. Lignelli said that she has experience and that she knew what she was doing, what happened then," and plaintiff responded, "She put the dye in." Accordingly, plaintiff's testimony creates a triable issue of fact with respect to whether Lignelli performed the procedure. Therefore Ligenelli fails to establish prima facie entitlement to summary judgment on the ground that she did not perform the acts constituting the malpractice alleged.

To the extent that Carmen Jahre, defendants' expert neuroradiologist, stated that Silver, in performing the cervical CT myelogram upon plaintiff, did not depart from accepted standards of care, Silver established prima facie entitlement to summary judgment. Specifically, within her affidavit Jahre described the appropriate way to perform a cervical CT myelogram and stated that, based on her review of records, including Silver's deposition testimony, Silver followed the proper

procedure and therefore "comported with the acceptable standard of care."

However, the affidavit of Robert Glassberg, plaintiffs' expert neuroradiologist, submitted in opposition to defendants' motion, established that in performing the myelogram upon the plaintiff, Silver departed from good and accepted standards of medical practice. Specifically, Glassberg stated that "the needle was advanced too far and entered the actual cervical spinal cord in which the contrast was injected causing an immediate stroke and damage." Glassberg further stated that "there were several opportunities for the improper positioning [of the needle] to have been recognized in time to avoid the injection of the dye: [specifically] bloody rather than clear [CFS] fluid . . . fluroscopic image-guidance, and tactile sensation." Glassberg thus concludes that Silver departed from good and accepted standards of practice. Accordingly, plaintiff raises an issue of fact with respect to whether Silver committed

malpractice, warranting denial of Silver's motion for summary judgment.

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

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

ENTERED: APRIL 16, 2013

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8109 Cecelia Coley, Index 306519/09
Plaintiff-Appellant,

-against-

Onris R. DeLarosa, et al.,
Defendants-Respondents,

Oscar B. Martinez, et al.,
Defendants.

_____

Law Offices of Eric H. Green & Associates, New York (Marc Gertler of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 15, 2011, which granted defendants' motions for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), reversed, on the law, without costs, and the motions denied.

Defendants made a prima facie showing that plaintiff did not suffer from a permanent or significant limitation as a result of the accident. They submitted the affirmed report of an orthopedist, who opined that plaintiff's left wrist and lumbar spine injuries were degenerative and not caused by the accident.

In reaching these conclusions, the orthopedist indicated that he reviewed the operative report for surgery performed on plaintiff's left wrist less than four months after the accident and found that it describes a "complex tear of the fibro-cartilage" and that such tears "are due to chronic degeneration." As to the lumbar spine, the orthopedist, inter alia, pointed to a report of an MRI taken 17 days after the accident that failed to reveal any nerve root impingement, which he believed meant there was no basis on which to attribute plaintiff's alleged lumbar spine injuries to the accident. Defendants also submitted affirmed radiologist reports, based upon review of three MRIs, all taken within three weeks of the accident, that no traumatic injury had been sustained to the left shoulder, left wrist or lumbar spine (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]; *Paulino v Rodriguez*, 91 AD3d 559 [1st Dept 2012]).

In opposition, plaintiff raised an issue of fact as to her left wrist and left shoulder. Plaintiff submitted affirmed reports of her radiologists stating that her MRIs showed a tear in the wrist and other injuries to her shoulder (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). She also submitted the affirmation of her orthopedic surgeon, who found limited ranges of motion in the left wrist even after surgery, as well as

continuing limits in the range of motion of her shoulder (*see Paulino*, 91 AD3d at 559). The orthopedic surgeon refuted the degenerative findings of defendants' expert and opined that the accident was the cause of plaintiff's injuries (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Pinzon v Gonzalez*, 93 AD3d 615, 616 [1st Dept 2012]). Contrary to defendants' contention, plaintiff adequately explained the gap in treatment (*compare Pommells v Perez*, 4 NY3d 566, 574 [2005], *with Serbia v Mudge*, 95 AD3d 786, 787 [1st Dept 2012]).

Since plaintiff raised an issue of fact with respect to her left wrist and left shoulder, it is unnecessary to address whether her proof with respect to her lumbar spine was sufficient to withstand defendants' motions for summary judgment (*see Linton v Nawaz*, 14 NY3d 821 [2010]).

With regard to the 90/180-day claim, defendants asserted that plaintiff cannot show that she suffered this category of "serious injury" because she testified at her deposition that she was confined to her bed for only a week and to her home for only two weeks, and that she had taken several trips within the United States, as well as abroad, during the pertinent period. Furthermore, the radiologist's reports on the MRIs taken shortly after the accident refuted any accident-related injury, as did

those portions of the orthopedist's report based on the operative report and MRI report prepared within 180 days of the accident.

In order for a plaintiff to establish a serious injury based upon an inability to perform her usual and customary activities for more than 90 of the 180 days following an accident, she "must present objective evidence of 'a medically determined injury or impairment of a non-permanent nature'" (*Toure*, 98 NY2d at 357). Thus, a defendant who submits medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature has met his burden of proof (*Barry v Arias*, 94 AD3d at 500; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]; *Fernandez v Niamou*, 65 AD3d 935 [1st Dept 2009]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [1st Dept 2009]; *Reyes v Esquilin*, 54 AD3d 615 [1st Dept 2008]; *Nelson v Distant*, 308 AD2d 338 [1st Dept 2003]). Defendants, by relying on plaintiff's deposition testimony and the affirmations of an orthopedist and radiologist who claimed that there was no traumatic injury at the time of the accident, met their prima facie burden of showing that plaintiff did not suffer a serious injury under the 90/180 day category.

In opposition to this evidence, plaintiff raised an issue of fact by submitting her affidavit stating that her doctors

regarded her as unable to perform her job duties, an affirmation from her orthopedic surgeon that she was totally disabled and a copy of a check from the Social Security Administration to show that she was receiving disability payments (*see Fuentes v Sanchez*, 91 AD3d 418, 420 [1st Dept 2012]).

We note that cases such as *Steinbergin v Ali* (99 AD3d 609 [1st Dept 2012]), *Singer v Gae Limo Corp.* (91 AD3d 526 [1st Dept 2012]), and *Quinones* v *Ksieniewicz* (80 AD3d 506 [1st Dept 2011]), which rely on the fact that defendants' doctors examined the plaintiff years after the accident, are inapplicable to the situation at bar. In the instant case, defendants' physicians interpreted an operative report and MRIs created shortly after the accident. While defendants' physicians may have written their reports years after the accident, their opinions plainly speak to plaintiff's condition as of the dates of the underlying operative report and MRIs they interpreted, which, to reiterate,

were created well within the period relevant to a 90/180-day claim. Again, the MRIs were all created within three weeks of the accident, and the operative report was based on an operation performed less than four months after the accident.

All concur except Acosta and Manzanet-Daniels, JJ. who concur in a separate memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (concurring)

I am compelled to disagree with the majority's conclusion that defendants made a prima facie case on the 90/180-day claim (*see Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [1st Dept 2011]). The reports of defendant's medical experts were based on examinations conducted more than three years after the accident, and thus cannot speak to plaintiff's condition during the relevant period (*see id.; Steinbergin v Ali*, 99 AD3d 609, 610 [1st Dept 2012]). Defendants failed to refute either the medical evidence showing that plaintiff was disabled following the accident, or plaintiff's testimony that she was confined to bed and home following the accident and missed more than 90 days of work.

Plaintiff in any event raised an issue of fact by submitting her affidavit stating that her doctors regarded her as unable to perform her job duties, an affirmation from her orthopedic

surgeon, and a copy of a check from the Social Security Administration (*see Fuentes v Sanchez*, 91 AD3d 418, 420 [1st Dept 2012]).

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

ENTERED: APRIL 16, 2013

CLERK

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

8147-
8148 Index 403033/10

Nata Bob,
Plaintiff-Respondent,

-against-

Steve Cohen, et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellants.

Nata Bob, respondent pro se.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 11, 2011, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered July 14, 2011, which denied defendants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper. The Clerk is directed to enter judgment dismissing the complaint against defendants.

Defendants' motion to dismiss was not untimely, as found by the motion court, since the parties had stipulated, both orally and in writing, to extend defendants' time to "respond" to the complaint to January 31, 2011, and defendants had served and

filed their motion to dismiss by that date (*see DiIorio v Antonelli*, 240 AD2d 537 [2d Dept 1997]; *Del Valle v Office of Dist. Attorney of Bronx County*, 215 AD2d 258 [1st Dept 1995]; CPLR 320[a]; 3211[e]; *compare McGee v Dunn*, 75 AD3d 624, 625 [2d Dept 2010]). On the merits, defendants were entitled to dismissal of this legal malpractice action commenced by their former client on res judicata grounds. The Workers Compensation Board's award of legal fees to defendants, imposed as a lien against the ultimate award of compensation to plaintiff (*see* Workers' Compensation Law § 24), precludes plaintiff's present claim that defendants represented him negligently, a claim that could have been raised in opposition to defendants' fee application (*see e.g. Lusk v Weinstein*, 85 AD3d 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]; *Zito v Fischbein Badillo Wagner Harding*, 80 AD3d 520 [1st Dept 2011]).

In view of the foregoing, we need not consider defendants' remaining argument.

> The Decision and Order of this Court entered herein on October 2, 2012 is hereby recalled and vacated (*see* M-5183 decided simultaneously herewith).

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

ENTERED: APRIL 16, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8419-
8420 Index 651505/11

I.J. White Corp.,
Plaintiff-Respondent,

-against-

Columbia Casualty Co.,
Defendant-Appellant.

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Colliau Carluccio Keener Morrow Peterson & Parsons, New York (Marian S. Hertz of counsel), for appellant.

Reed Smith LLP, New York (Paul E. Breene of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 10, 2012, which denied defendant's motion for summary judgment dismissing the complaint, and, upon plaintiff's cross motion for partial summary judgment, declared that defendant is obligated to defend it in the underlying action, and order, same court and Justice, entered March 21, 2012, which, to the extent appealable, denied defendant's motion to renew, affirmed, without costs.

Hill Country Bakery, LLC, a nonparty to this appeal, made and distributed baked goods. As part of its baking process, Hill Country froze its products, immediately cut them, and then packaged them for distribution.

In 2006, Hill Country bought a spiral freezer system from plaintiff I.J. White Corp., a manufacturer of spiral processing equipment for use in the food industry. The purpose of the spiral freezer system was to allow freshly baked cakes to be placed on a conveyor belt and frozen within 150 minutes so that they would emerge from the system properly cooled and ready to be cut. Purportedly, however, the freezer system never operated properly. According to Hill Country, when the cakes emerged from the freezer in the allotted time, their temperature was around 20 to 25 degrees Fahrenheit rather than the 0 to 5 degrees Fahrenheit necessary for proper handling, and they were ruined upon cutting.

In 2010, Hill Country commenced an action against plaintiff, alleging that for eight months, it was unable to use the $21 million facility it had constructed specifically to house the equipment that it had bought from plaintiff. Instead, Hill Country alleged, it had been obliged to use that period to fix the equipment, and had expended an additional $1.9 million to render the equipment operable.

Plaintiff requested defense and indemnity from its insurer, defendant Columbia Casualty Co. Plaintiff's insurance policy defined "property damage" as "[p]hysical injury to tangible

property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." The policy also defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Defendant ultimately tendered a formal disclaimer letter, finding that the alleged defects in the freezer did not qualify as an "occurrence" under the policy because there had been no accident. Further, defendant asserted, there had been no "property damage" within the meaning of the policy.

The IAS court properly denied defendant's motion and granted plaintiff's cross motion. Courts have held that commercial general liability (CGL) policies do not insure against faulty workmanship in the work product itself (*see George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994] [no "occurrence" where damage was to premises upon which construction manager/contractor performed work], *lv denied* 84 NY2d 806 [1994]). However, such policies do insure against property damage caused by faulty workmanship to something other

than the work product (*id.*; *see also Transporation Ins. Co. v AARK Constr. Group, Ltd.*, 526 F Supp 2d at 350, 356-357 [ED NY 2007][analyzing case under New York law]). Plaintiff does not seek coverage simply for allegedly faulty workmanship that caused the defect in the freezer. Rather, it seeks defense and indemnity for property damage that Hill Country, a third party, alleged that it suffered because of a defect in the freezer. Indeed, in *George A. Fuller Co.* (200 AD2d 255), on which defendant places much reliance, the damage occurred to the property upon which the contractor performed the work - that is, to the work product itself. Plaintiff, by contrast, seeks coverage for the damage to the cakes, not to the freezer. This damage is precisely the kind that plaintiff's CGL policy contemplated, and therefore, the complaint properly alleges an "occurrence" within the meaning of the policy (*cf. Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586, 586-587 [1st Dept 2004]). Hill Country's loss of use of the facility specifically built to house the freezer is also covered under the policy, since "property damage" is defined to include "[l]oss of use of tangible property that is not physically injured."

Furthermore, in support of its argument, defendant notes

that according to Hill Country, the freezer itself did not ruin the cakes; rather, the cakes did not freeze to the proper temperature within the required time and were ruined only when Hill Country tried to cut them, not when they were in the freezer. Therefore, defendant concludes, there was no causal nexus between any occurrence (the freezer's failure to work properly) and any property damage (ruined cakes). We reject this argument, as it articulates a distinction without a difference. Although the freezer itself did not cut the cakes, the fact remains that Hill Country's product was rendered unusable as a direct result of the alleged defect in plaintiff's freezer. Hill Country's primary purpose in buying the freezer was to quickly freeze the cakes in order to streamline the cutting and distribution process; whether the freezer itself actually ruined the cakes or simply caused them to be ruined when cut with a separate instrument is beside the point.

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

All concur except Andrias, J.P. and Abdus-Salaam, J. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I disagree with the majority that the claims here constitute "property damage" caused by an "occurrence." Plaintiff I.J. White (White), the insured, contracted to build a spiral freezer for Hill Country Bakery's facility. The contract called for a freezer that would cool baked goods to a temperature of 0 to 5 degrees within 150 minutes. However, as alleged in the underlying complaint filed by Hill Country against White, the freezer only cooled the cakes down to 20 to 25 degrees within that time, and at the higher temperature ranges "the cakes were still too warm to cut, and attempts to cut the cakes at that range resulted in ruined product that could not be sold." The complaint further alleges that the freezer required an additional 105 minutes over the freezing time required by the contract to freeze the cakes to the desired temperature.

White's insurer does not owe a defense to White in the action brought by Hill Country Bakery. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general conditions." The Hill Country complaint, which sounds in breach of contract, breach of implied and express warranty, and fraudulent inducement, does not allege an "occurrence" as defined by the policy, but rather

arises out of a contract dispute where it is alleged that the spiral freezer did not perform as required by the contract, causing Hill Country to spend additional money, including overtime wages to pay employees for extended hours to meet the demand for its products, and money to repair the freezer so that it was operational. Here, as in *George A. Fuller Co. v United States Fid. & Guar. Co.* (200 AD2d 255 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]), the policy "does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product (200 AD3d at 259; *see also Bonded Concrete, Inc., v Transcontinental Insurance Co.*, 12 AD3d 761, 762 [3rd Dept 2004] [gist of claims in underlying action is that plaintiff provided allegedly defective product]).

I am unpersuaded by White's argument, adopted by the majority, that the allegation that the cakes were ruined falls squarely within the policy's definition of "property damage." Firstly, "[w]hether examined in its totality or by a review of each cause of action (*Fuller* at 259), it is clear that Hill Country is not claiming that the freezer ruined the cakes, but is alleging that the cakes did not freeze to the proper temperature

within the required time, and that attempts to cut the cakes when they were still too warm resulted in ruined product. A plain reading of the complaint reveals that Hill Country is not seeking any damages from White for ruined cakes. The Wherefore clause contains no such demand and Hill Country's disclosure in the underlying action specifies the categories of damages as approximately $1.7 million paid to White for the freezer, $1.2 million in repair costs to render the freezer operational in accordance with the contract specifications, and $700,000 in employee overtime wages. There is no category of damage for ruined product, and no category that would constitute an "occurrence" under the policy.

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9030 Wolfgang Doerr, Index 103840/10
Plaintiff-Respondent,

-against-

Daniel Goldsmith,
Defendant,

Julie Smith,
Defendant-Appellant.

_____

Hoey, King, Epstein, Prezioso & Marquez, New York (Erik C. Porcaro of counsel), for appellant.

Gregory W. Bagen, Brewster, for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 8, 2011, which denied defendant Julie Smith's (defendant) motion for summary judgment dismissing the complaint as against her, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when, while riding his bicycle, he collided with defendant's dog. Plaintiff alleges that defendant was negligent because as plaintiff was riding nearby, defendant called for the dog, which was not wearing a leash, to come to her, resulting in the dog's running into plaintiff's path of travel.

"New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" (*Egan v Hom*, 74 AD3d 1133, 1134 [2d Dept 2010]). Rather, when harm is caused by a domestic animal, its owner can be held liable if he knew, or should have known, of the animal's vicious propensities (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Collier v Zambito*, 1 NY3d 444, 446 [2004]; *see also Bard v Jahnke*, 6 NY3d 592, 596-597, 599 [2006]). The term "vicious propensities" includes "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (*Collier v Zambito*, 1 NY3d at 446 [internal quotation marks omitted]). Here, there is no evidence that defendant had knowledge that her dog had a propensity to interfere with traffic, and her motion for summary judgment should have been granted (*see Smith v Reilly*, 17 NY3d 895 [2011]).

The dissent believes that this case is distinguishable because it was defendant Smith's action in calling the dog and defendant Goldsmith's action in letting it go, "not the dog's own instinctive, volitional behavior, that caused the accident." However, in *Petrone* (12 NY3d at 546), a mail carrier alleged that the dog's owner violated a local leash law and that the violation

proximately caused her injuries, and the Court of Appeals held that the defendant's violation of local leash law was "irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability after *Collier* and *Bard*" (*see* 13 NY3d at 550 [internal quotation marks omitted]; *see also Tesmer v Colonna*, 77 AD3d 1305 [4th Dept 2010]). Here, the accident occurred when defendant's dog collided with plaintiff, and defendant's alleged negligence in calling the dog does not provide a basis to depart from the strict liability rule recognized by the Court of Appeals in *Petrone, Bard* and *Collier* (*see Bloomer v Shauger,* 94 AD3d 1273, 1274 [3d Dept 2012] ["Although ... defendant's conduct on the day in question indeed may have evidenced some negligence on her part ..., the Court of Appeals has made its position clear ...; therefore, we are constrained to view this matter solely in the context of strict liability"] [internal citations omitted]; *Curbelo v Walker*, 81 AD3d 772, 774 [2d Dept 2011] ["We reject the plaintiff's argument that this Court should recognize a common-law negligence claim based on the defendant's actions in allegedly releasing six dogs in a public place, in light of the clear constraints against recognizing such claims imposed by the

Court of Appeals holdings in *Petrone*, *Bard*, and *Collier*"]; *Debellas v Verrill*, 53 AD3d 593, 594 [2d Dept 2008] ["plaintiff may not recover on her common-law negligence cause of action"]).

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

MAZZARELLI, J.P. (dissenting)

This accident occurred while plaintiff was riding his bicycle around the Central Park loop road. Plaintiff had passed the intersection where cars merge onto Seventh Avenue at the southernmost part of the loop, but he was not near one of the designated areas for pedestrians to cross into the interior of the park. He observed defendant Smith on the left side of the loop and defendant Goldsmith, Smith's boyfriend, on the right side, roughly 30 to 50 yards ahead of him. Plaintiff testified that Goldsmith "was holding a dog in a manner that he was almost hugging the dog, so he had his arm around the chest and the neck of the dog" and that Smith was "slightly bending down and clapping her hands on her upper thighs." Interpreting Smith's actions to be a signal to the dog (which was hers) to come to her, plaintiff screamed out, "Watch your dog." Plaintiff then saw the dog in the middle of the road, but was unable to avoid colliding with it and being propelled off the bicycle. Defendants do not materially dispute plaintiff's recounting of the incident. Plaintiff seeks to recover against defendants on a theory of negligence. He does not claim that the dog's actions were a result of any vicious propensities of which defendants may have been aware.

The Court of Appeals has held that a person who is injured in an accident involving an animal can never have a claim for negligence against the animal's owner, but can only recover in strict liability on a showing that the owner knew of the animal's vicious propensities (*see Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bard v Jahnke*, 6 NY3d 592 [2006]). In *Bard*, the plaintiff, who was doing carpentry work in a dairy barn located on the defendant's farm, was injured when a bull charged him. The bull had been permitted by the defendant to roam the farm and to breed with cows that had not been impregnated through artificial insemination. The Court rejected the plaintiff's argument that the defendant was negligent in permitting a breeding bull, with a tendency to express its dominance through acts of aggression, to roam freely. In *Petrone*, the Court refused to entertain a negligence claim asserted by a mail carrier who was injured while running away from an unrestrained Rottweiler that had begun to chase her.

The rule articulated in *Bard* and affirmed in *Petrone* is not without controversy. Indeed, Judge Pigott concurred in the holding in *Petrone* "on constraint" of *Bard* (12 NY3d at 551), and endorsed Judge Robert Smith's dissent in that earlier case (*id.* at 552). In Judge Smith's dissent in *Bard*, he stated that the

holding that no negligence cause of action can ever lie in these cases "leaves New York with an archaic, rigid rule, contrary to fairness and common sense, that will probably be eroded by ad hoc exceptions" (6 NY3d at 599, R.S. Smith, J., dissenting).

Because of the *Bard*/*Petrone* rule, it has been virtually impossible for people injured by animals to recover if they could not establish the defendants' knowledge of the animals' vicious propensities. Indeed, even if the injury was not caused by "vicious" behavior, no remedy exists. Thus, in *Lista v Newton* (41 AD3d 1280 [4th Dept 2007]), the Fourth Department refused to entertain a negligence claim where the plaintiff's ladder was knocked down when the defendant's horse ran into a fence the plaintiff was installing. In *Hastings v Sauve* (94 AD3d 1171 [3d Dept 2012), the plaintiff's car struck a cow that had wandered onto the highway from an adjacent farm owned by the defendant, and the Third Department rejected her negligence claim. And in *Egan v Hom* (74 AD3d 1133 [2d Dept 2010]), the Second Department awarded the defendant summary judgment dismissing the negligence claim that was based on the plaintiff's having become entangled in the chain of a dog that was running around on the defendant's property.

I fail to see how the majority in this case reconciles the

facts here with the relevant precedents. The common denominator in each of the cited cases is that the plaintiff was injured because an animal did what nature permits it to do in the absence of its owner's control. Here, conversely, the dog was in the control of defendants at all times in the split second before the accident occurred. Had Smith not called the dog, and Goldsmith not let it go, plaintiff would have ridden past them without incident. Thus, the majority's statement that "there is no evidence that defendant had knowledge that her dog had a propensity to interfere with traffic" is irrelevant. Simply put, this case is different from the cases addressing the issue of injury claims arising out of animal behavior, because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that caused the accident.

Defendants' actions can be likened to those of two people who decide to toss a ball back and forth over a trafficked road without regard to a bicyclist who is about to ride into the ball's path. If the cyclist collided with the ball and was injured, certainly we would not find that no negligence claim was available. However, the majority's application of the *Bard/Petrone* rule to the facts of this case suggests that the law is in danger of evolving to the point where, simply because an

animal is the immediate instrument of harm to a plaintiff, no claim for negligence lies against its owner. One can even imagine the following hypothetical situation falling within this rigid rule. A cat in an apartment several stories above the ground is sleeping on a windowsill. Its owner opens the window to let in some air, and inadvertently knocks the cat off its perch. The cat falls to the sidewalk below, injuring a pedestrian. Surely the Court of Appeals did not intend to bar a negligence claim against the owner under those circumstances. Nevertheless, the majority's inflexible reading of *Bard* and *Petrone* represents a significant step towards that absurd outcome. Accordingly, I dissent, and would affirm the motion court's denial of summary judgment to defendant Smith.

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

ENTERED: APRIL 16, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

9178 The People of the State of New York, Ind. 3580/08
Respondent,

-against-

Huston Belvett,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Simpson Thacher & Bartlett LLP, New York (Michael J. Catiglione of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 2, 2010, convicting defendant, after a jury trial, of burglary in the first degree (three counts), burglary in the second degree, attempted robbery in the first degree, attempted robbery in the second degree (three counts), criminal possession of a weapon in the second degree (two counts) and unlawful possession of marijuana, and sentencing him to an aggregate term of 16 years, unanimously affirmed.

The court should have permitted cross-examination of two witnesses regarding whether they thought they could lose their New York City Housing Authority apartment based on drug-selling activity. Under the circumstances of the case, this line of

inquiry was relevant to the witnesses' alleged motives to give false testimony. However, the error was harmless, given the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]) including testimony from multiple witnesses to the crime, as well as evidence of actions and statements by defendant that undermined his claim of innocence. There is no reasonable possibility that the restriction on cross-examination affected the verdict. Furthermore, defendant received a full opportunity to impeach these witnesses with regard to other matters relating to credibility.

Defendant's argument that the court committed reversible error by delivering an improper *Allen* charge (*see Allen v United States*, 164 US 492, 501 [1896]) is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we would find the court's instruction to the jurors that they return the next day to "attempt to resolve all the issues in this case [and] attempt to reach a unanimous verdict" was not "unbalanced and coercive so as to deprive defendant of a fair trial" (*People v Aponte*, 2 NY3d 304, 305 [2004]).

Defendant did not preserve his argument that the verdict sheet contained annotations that violated CPL 310.20, because defendant did not specifically object to the improper annotations

(*see People v Goode*, 87 NY2d 1045 [1996]). Although defense counsel objected "on principle to any annotations" when the court disclosed its proposed annotations, he declined to provide input on the issue of annotations to distinguish between counts. We decline to review this claim in the interest of justice.

We perceive no basis for reducing the sentence.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Román, Clark, JJ.

9242-
9243 Index 104360/11

Mark Hersh, derivatively on behalf of
nominal defendant, BRA Management LLC,
Plaintiff-Respondent,

-against-

Betty Weg, et al.,
Defendants-Appellants,

BRA Management LLC,
Nominal Defendant.

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Mark Hersh, derivatively on behalf of
nominal defendant, BRA Management LLC,
Plaintiff-Respondent,

-against-

Betty Weg, et al.,
Defendants-Appellants,

BRA Management LLC,
Nominal Defendant-Appellant.

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T. Kevin Murtha & Associates, P.C., Westbury (William Bird, III of counsel), for appellants.

Brown & Whalen P.C., New York (Ryan J. Whalen of counsel), for respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 14, 2011 and June 4, 2012, which denied defendants' motion for summary judgment dismissing the complaint and defendants and nominal defendant's motion for the release of

funds held by the court, respectively, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint.

In opposition to defendants' prima facie showing of their ownership of the property that provided the disputed rental income, plaintiff failed to raise an inference that either he or nominal defendant BRA Management LLC, the leasing agent for the property, has a legal interest in the property or the income. Plaintiff contends that there was an agreement between defendant S&G Hotel Corp., the legal owner of the property, and BRA, the entity on behalf of which plaintiff has commenced this derivative action. However, it is undisputed that no written agreement existed, and any oral agreement that BRA would serve as leasing agent for the property is unenforceable under the statute of frauds (General Obligations Law § 5-701[a][10]). Contrary to plaintiff's contention, the distribution of the property's rental income to BRA, which distributed the income to its members, was not so "unequivocally referable" to the terms of the alleged unwritten agreement as to remove that agreement from the operation of the statute of frauds under the doctrine of part performance (*see Korff v Pica Graphics*, 121 AD2d 511, 512 [2d Dept 1986] [internal quotation marks omitted], citing *Anostario v*

Vicinanzo, 59 NY2d 662, 664 [1983]). Given that the record establishes that BRA has no legal entitlement to the funds at issue, all of the claims that the complaint asserts on its behalf fail as a matter of law. In view of the foregoing, we need not determine whether plaintiff has sufficiently alleged facts that would excuse pre-suit demand upon the other members of BRA.

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

ENTERED: APRIL 16, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9329 Andres Restrepo, Index 117421/05
Plaintiff-Appellant,

-against-

Yonkers Racing Corporation, Inc., et al.,
Defendants-Respondents,

Tishman Construction Corporation of New York,
Defendant.

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The Law Office of Dino J. Domina, P.C., Garden City (Lisa M. Comeau of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Kelly A. McGee of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 8, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his claims under Labor Law § 240(1) and § 241(6) to the extent it is predicated on a violation of 12 NYCRR 23-1.7(b)(1), unanimously reversed, on the law, with costs, and summary judgment granted to plaintiff on these claims.

Plaintiff was injured when an access door in the floor of the soffit, or attic, where he was working opened downward,

causing him to fall approximately 12 to 13 feet to the floor below. Plaintiff, who was removing asbestos from the pipes in that area, was unaware of the door and did not see the door because it was covered by plastic. The record shows that the work area, which plaintiff described as an attic containing air conditioning, electrical cables and pipes, was above the first floor of the building. Plaintiff gained access to the attic, not by the door that caused his accident, but by using a ladder and climbing through a hole that had been opened to that area for the purpose of the asbestos removal. The access door, through which plaintiff fell, was a downward opening door and it was intended to be used only to gain access, from the first floor, to the pipes, valves, etc. that were contained in the attic. As explained by the general contractor Tishman's first vice president, access doors are placed to be used to access something that is right above the door, e.g. a valve; one opens the door and reaches to access the valve.

Under these circumstances, there is no genuine issue of fact as to whether it was foreseeable that the door, which was not intended for use as a floor, but instead intended only to enable one to reach up from the floor below, would fail when traversed upon by plaintiff (*compare Espinosa v Azure Holdings II, LP*, 58

AD3d 287, 293 [1st Dept 2008] [triable issue as to whether sidewalk collapse was foreseeable]; *Jones v 414 Equities LLC*, 57 AD3d 65, 80 [1st Dept 2008] [plaintiff failed to make prima facie showing that collapse of floor was foreseeable risk]). This is especially so where plaintiff was unaware of the door, and therefore could not take any steps to avoid it. Accordingly, plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim.

Nor do we perceive any triable issue as to whether the access door was sufficiently substantial or adequately fastened in place to guard the hazardous opening. Thus, summary judgment based on a violation of 12 NYCRR 23-1.7(b)(1)(i) is warranted.

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

ENTERED: APRIL 16, 2013

CLERK

Andrias, J.P., DeGrasse, Abdus-Salaam, Feinman, JJ.

9333 Maria Pilar Bustos, et al., Index 107925/04
Plaintiffs-Respondents,

-against-

Lenox Hill Hospital,
Defendant-Appellant,

Pedro Segarra, M.D., et al.,
Defendants.

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Mauro Lilling Naparty LLP, Woodbury (Caryn L. Lilling and Katherine Herr Solomon of counsel), for appellant.

Hill & Moin LLP, New York (Cheryl R. Eisberg Moin of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 26, 2011, which denied defendant Lenox Hill Hospital's motion to set aside the verdict, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

The only testimony plaintiffs' expert gave as to the alleged deviation from the accepted standard of medical care in the performance of the birthing maneuvers was that the maneuvers "were excessive and caused th[e] injuries" and deviated from the appropriate standard of care. He did not explain or in any other

way support his opinion, which therefore was speculative and conclusory and without probative force (*See e.g. Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]).

As to plaintiffs' theory that there was a deviation from the accepted standard of care in the dosage of the epidural block given to plaintiff Maria, their own expert conceded that the dosage was standard and appropriate.

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

ENTERED: April 16, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9480 Agyeman Boateng, Index 301727/10
Plaintiff-Respondent, 302100/10

-against-

Pompeyo G. Calle,
Defendant-Appellant,

Nora Ofosu Dankyi, also known
as Nora Ofosu Allen,
Defendant-Respondent.

[And Another Action]

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

Michael P. Mossberg, New York, for Ageyeman Boateng, respondent.

Richard T. Lau & Associates, Uniondale (Keith E. Ford of counsel), for Nora Ofosu Dankyi, respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 22, 2012, which, insofar as appealed from, denied defendant Pompeyo G. Calle's motion for summary judgment dismissing the complaint based upon the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and, upon a search of the record, defendant Allen's motion for summary judgment dismissing the complain granted. The Clerk is directed to enter judgment accordingly.

Defendant Calle established his entitlement to judgment as a matter of law. Calle submitted the affirmed reports of a radiologist, who examined plaintiff and reviewed his medical records, and found that the injuries to the right shoulder and thoracic spine were degenerative in nature. Calle also submitted the affirmed report of an orthopedist, who examined plaintiff and found normal ranges of motion in his right shoulder and cervical and lumbar spines (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]; *Johnson v Singh*, 82 AD3d 565, 565 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to submit objective evidence of significant limitations of any of the subject body parts (*see Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]).

Dismissal of the 90/180-day claim is warranted in light of plaintiff's testimony that he only missed two days of work following the accident and that he was placed on a reduced work schedule thereafter (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]; *Borja v Delarosa*, 90 AD3d 407, 408-409 [1st Dept 2011]).

Defendant Allen did not appeal from the denial of her motion for summary judgment. Nonetheless, she is entitled to dismissal

of the complaint as against her because "if [a] plaintiff cannot meet the threshold for serious injury against one defendant, [he or] she cannot meet it against the other" (*Lopez v Simpson*, 39 AD3d 420, 421 [1st Dept 2007]).

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

ENTERED: APRIL 16, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9724 Gerald Boyd, Index 310500/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about June 8, 2012, which denied defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that he was injured in the grounds outside the building in which he lives, when he could not find a seat on a bench, and decided to lean back against what he thought was a sturdy, three-foot-high black iron fence surrounding an area of greenery. In fact, he had leaned against an unlocked gate, which swung inward, causing him to fall and suffer injuries.

Although property owners have a duty to maintain their property in a reasonably safe condition, and to warn of latent

hazards of which they are aware (*see Basso v Miller*, 40 NY2d 233, 245 [1976]), they have no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous (*see e.g. Lazar v Burger Heaven*, 88 AD3d 591 [1st Dept 2011]; *Baynes v City of New York*, 81 AD3d 423 [1st Dept 2011]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property" (*Cupo*, 1 AD3d at 52).

Here, defendant NYCHA established prima facie that the unlocked gate that allegedly caused plaintiff to injure himself was open and obvious, and was not inherently dangerous. The color photographs in the record show that the gate was "plainly observable and did not pose any danger to someone making reasonable use of his or her senses" (*Buccino v City of New York*, 84 AD3d 670, 670 [1st Dept 2011] [internal quotation marks omitted]; *see also Gallub v Popei's Clam Bar, Ltd., of Deer Park*, 98 AD3d 559 [2d Dept 2012]). The gate was not obscured by other people or objects, or by its location, and nothing about it or the fence created any optical confusion. Plaintiff had lived in the building since 2007, and the gate had been unlocked and in

the same condition since 2006, if not longer. Plaintiff testified that he looked at the fence before he leaned against it and "assumed it was sturdy," and there is no evidence that he did not notice the gate because he was distracted. NYCHA's superintendent of groundskeepers stated that NYCHA had not received any other complaints about the fence, and no one else had ever been hurt by it. Furthermore, "there is nothing inherently dangerous about a gate that has no lock" (*Ortiz v New York City Hous. Auth.*, 85 AD3d 573, 574 [1st Dept 2011]).

In opposition, plaintiff failed to raise an issue of fact (*see Bloom v Lula Realty Corp.*, 43 AD3d 662, 662 [1st Dept 2007] ["plaintiff has failed to demonstrate that the absence of a knob or handle on the gate in any way constituted a defect, violated a statute, or was inherently dangerous"]). The dissent disagrees, finding an issue of fact whether the gate was a trap for the unwary, based on the affidavits of plaintiff's expert and an eyewitness stating that the fence and gate had the appearance of one continuous fence. However, the color photographs in the record show that the gate is not flush with the rest of the fence and that three hinges on the right side and a hasp on the left side of the gate, attached to posts that are thicker than the vertical bars in the fence, are clearly visible. Thus, the

opinion of plaintiff's expert and the eyewitness are belied by the photographs the expert took, which demonstrate that the condition was open and obvious and not inherently dangerous (*see Salman v L-Ray LLC*, 93 AD3d 568, 569 [1st Dept 2012] ["Defendants submitted evidence, including testimony and photographs, demonstrating that the condition of the steps was not inherently dangerous"]; *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 [1st Dept 2009] ["several color photographs in the record depicted the step as not particularly high, and clearly painted in white and black so as to be visible even in the low light provided by the recessed ceiling bulb above"]; *Cardia v Willchester Holdings, LLC*, 35 AD3d 336, 336-337 [2d Dept 2006] ["Willchester made a prima facie showing of entitlement to judgment as a matter of law by presenting photographs depicting the condition of the parking lot at the time of the plaintiff's accident, which demonstrate that the wheel stop over which the plaintiff tripped and fell was not an inherently dangerous condition, and was readily observable by those employing the reasonable use of their senses"]).

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

Since the majority has unnecessarily thrust itself into the role of factfinder, I must respectfully dissent from the dismissal of the complaint. Our role as gatekeeper should not undermine the right of litigants to have their cases -- even ones about which we are skeptical -- heard by a jury. Even if our experience tells us that a litigant is likely to face an uphill battle, the courtroom is the proper venue for the determination of the controversy.

Plaintiff testified that he leaned back against what he thought was part of the sturdy, three-foot-high black iron fence surrounding a grassy area. Only when the section of fence gave way and swung inward, causing him to fall and sustain injuries, did he discover that, in fact, the portion that he had leaned against was a gate that was not secured. The gate had been designed to be secured to the fence by means of a hasp -- a metal plate with a hole in it -- that would line up with a matching hasp on the adjacent fence post, so that a lock or pin could be threaded through the holes in the two hasps to hold them together. However, according to plaintiff's expert, the two hasps were out of alignment, and could not be secured with a padlock. Marks on the fence post indicate that instead the gate

was held closed solely by friction. Thus, the gate had the appearance of lining up with the fence, but moderate pressure would cause it to give way.

As plaintiff's expert stated, and as some of the photographs in the record indicate, the fence and the gate are of uniform height, color, design, and shape, and are indistinguishable at first glance, giving the appearance of one continuous fence. Further, as the expert pointed out, there in no indication in the sidewalk on one side, or the grass on the other side, such as a path or curb cut, that a gate is located in that section of the fence. Another eyewitness also asserted that the gated portion of the fence is not obvious, but looks like a continuous fence, without visible signs indicating the presence of an opening such as a gate.

In support of its summary judgment motion, defendant offered an affidavit by its supervisor of groundskeepers at the housing development, asserting that there are many such unlocked and unlatched gates in the fences, that "one does not have to look very closely to see that on one side, like all gates, it is hinged in three (3) places," and that "the spacing of the vertical bars on both sides of the gate clearly are very different, indicating that a gate is there." However, this is

merely his opinion, and does not establish the facts he asserted as a matter of law. His position does not invalidate the opposing view by plaintiff's expert, with which an eyewitness to the accident agreed, that due to their uniform height, color, design, shape and location, the fence and the gate "are nearly indistinguishable at first glance, appearing to be one continuous fence." Despite the clear factual issue on this point, the majority relies on photographs in the record to make the finding urged by defendant, namely, that, as a matter of law, the presence of the gate is "clearly visible" and "open and obvious" and therefore "not inherently dangerous." In so doing, the majority is engaging in fact-finding, which is impermissible in the context of a summary judgment motion.

Defendant's other arguments, explaining why keeping the gate unlocked and unlatched is useful or necessary to the development's residents, cannot negate the possibility that an unlatched gate that is attached to the fence merely by friction and appears to be part of the fence, may constitute a hazard.

While "there is nothing inherently dangerous about a gate that has no lock" (*Ortiz v New York City Hous. Auth.*, 85 AD3d 573, 574 [1st Dept 2011]), this particular gate did not even latch, and an issue of fact exists whether a reasonable person

would have discerned that it was in fact a gate, rather than merely a portion of an apparently sturdy iron fence able to bear the weight of a person leaning on it. As in *Ortiz*, where there was an issue of fact about the placement and use of the gate, the particular circumstances of the gate in this case create an issue whether the gate constituted a dangerous condition (*see id.*).

In addition, a "condition that is ordinarily apparent to a person making reasonable use of his senses . . . may be rendered a trap for the unwary," depending upon the circumstances, including whether "the condition is obscured . . . or the plaintiff's attention is otherwise distracted" (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004]). While plaintiff did not mention being distracted, he did assert that his belief at that moment was that he was leaning on a fence. This presents a question of fact whether the fact that it was a gate was obscured in any way.

Accordingly, in my view, the motion court correctly determined, upon review of the expert and eyewitness affidavits, deposition testimony and photographs of the site of the accident, that issues of fact existed whether the unlocked gate set in the iron fence was readily observable and whether it posed a danger to a person making reasonable use of his senses. In addition, a

question exists whether the appearance of the fence and gate obscured the presence of the gate so as to make it a "trap for the unwary."

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9798 The People of the State of New York, Ind. 3262N/11
Respondent,

-against-

Daryl Norrell,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered March 5, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of nine years, unanimously affirmed.

Defendant did not preserve any of his arguments regarding the court's discharge of a regular juror and an alternate who had been selected but not sworn, and the court's procedure for replacing these jurors, and we decline to review them in the interest of justice. Despite having a sufficient opportunity to be heard, defense counsel only asked the court to excuse all jurors and start jury selection over, and he made only a vague

argument for doing so. Furthermore, counsel gave no indication, at any time, that he wanted the two jurors to retain their positions. As an alternative holding, we find that the court's actions were proper exercises of discretion under the circumstances presented (*see People v Davis*, 292 AD2d 168, 169 [1st Dept 2002], *lv denied* 98 NY2d 674 [2002]; *People v Velez*, 255 AD2d 146, 146 [1st Dept 1998]). In any event, there was no basis for the drastic remedy of a mistrial, the only remedy requested (*see People v Rice*, 75 NY2d 929, 932-933 [1990]; *see also People v Young*, 48 NY2d 995 [1980]).

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of jury misconduct, since defendant did not set forth a legal ground for such relief. In support of the motion, defendant presented only an affidavit from a dissatisfied juror that was merely an attempt to impeach the

verdict with regard to the jury's deliberative process (*see People v Brown*, 48 NY2d 388, 393-394 [1979]; *People v Redd*, 164 AD2d 34, 38-39 [1st Dept 1990]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9799 In re Paulet Facey, Index 403202/10
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Paulet Facey, appellant pro se.

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

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered March 22, 2012, which denied the petition to vacate an arbitration award finding petitioner guilty of certain charges, imposing a fine of $8,000 and directing that petitioner receive up to 48 hours of pedagogical training, confirmed the arbitration award and dismissed the proceeding, unanimously affirmed, without costs.

The record supports the findings of misconduct committed by petitioner, including making a remark comparing the elementary school where she worked "to the shootings and killings of individuals in the Iraq war." Moreover, while uttering the remark, she stood up and feigned pulling the trigger of a gun, which was worrisome to her colleagues. There exists no basis to

disturb the credibility determinations of the arbitrator (*see Matter of Lackow v Department of Educ. of the City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]).

The arbitrator's reference to petitioner's miming of shooting a gun flowed naturally from the credited witnesses' testimony, and did not go beyond what the arbitrator was authorized to hear. Furthermore, the charges preferred against petitioner specifically notified her of the misconduct that she was accused of and were sufficiently specific to permit petitioner to prepare her defense (*see Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]).

The penalty imposed does not shock our sense of fairness, and in fact was well-tailored to the misconduct of which petitioner was found guilty of (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9800-
9801-
9802 In re Aaron C.,

A Child Under Eighteen Years
of Age, etc.,

Grace C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 4, 2011, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, found that respondent-appellant mother had neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about March 20, 2012, upon the mother's default, unanimously dismissed, without costs, as taken from a nonappealable paper. Order, same court and Judge, entered on or about April 23, 2012, which denied

the mother's petition for modification of the order of disposition, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The record shows that, despite evidence of the father's untreated mental illness and aggressive and violent behavior towards the mother and others, the mother refused domestic violence services and would allow the father to have primary decision-making responsibility for the child's care, placing the child in imminent danger of impairment (*see* Family Ct Act § 1012[f][i][B]; *see also Matter of Angelique L.*, 42 AD3d 569, 572 [2d Dept 2007]; *Matter of Alaina E.*, 33 AD3d 1084, 1086 [3d Dept 2006]). Although the mother denied that she had told anyone that she was frightened of the father and that he had abused her verbally, financially and physically, the court determined that her testimony was incredible, and its credibility assessment should be given deference (*see Matter of Daquan D.*, 18 AD3d 363, 364 [1st Dept 2005]).

The court properly granted petitioner agency's motion to amend the petition to conform to the evidence. The record demonstrates that the mother had ample notice of the new

allegations and an opportunity to respond (*see Matter of Madison H. [Demezz H.-Tabitha A.]*, 99 AD3d 475, 476 [1st Dept 2012]). Given the efforts of the court to ensure that the mother had enough time to defend against the new allegations, her contention that the court was biased is not supported by the record.

To the extent the mother appeals from the order of disposition, no appeal lies from an order entered on default (*see Matter of Lisa Marie Ann L. [Melissa L.]*, 91 AD3d 524, 525 [1st Dept 2012]). Contrary to the mother's contention, she defaulted at the dispositional hearing upon her unexplained failure to appear (*see Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d 536, 537 [1st Dept 2010]). Although her attorney was present for the dispositional hearing, she had no explanation as to why the mother was not present and did not state that she was authorized to proceed in the mother's absence (*cf. Matter of Bradley M.M. [Michael M.-Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]).

There is no basis for vacating the default (*see Matter of Lisa Marie Ann L.*, 91 AD3d at 525).

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9803 Alec J. Megibow, M.D., etc., Index 115588/10
Plaintiff-Appellant,

-against-

Caron.Org, etc., et al.,
Defendants-Respondents.

_____

Anthony M. Bentley, New York, for appellant.

Duane Morris LLP, New York (Fran M. Jacobs of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered June 9, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court had jurisdiction to entertain defendants' motion, which was interposed after entry of the federal court order of remand but before the ministerial mailing of the order to the state court (*see In re Lowe*, 102 F3d 731, 735 [4th Cir 1996]; *Health for Life Brand, Inc. v Powley*, 57 P3d 726, 730-731 [Ariz App 2002]). Plaintiff's claims were barred by the broad language of the March 2009 release (*see Centro Empresarial Cempresa S.A. v América Móvil S.A.B. de C.V.*, 76 AD3d 310, 318 [1st Dept 2010], *affd* 17 NY3d 269 [2011]). Plaintiff failed to

show that the release should be vacated on the ground that it had been induced by fraud because, among other reasons, plaintiff ratified the settlement by retaining the consideration he received for it (*see Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

In view of the foregoing, it is unnecessary to address defendants' unopposed contentions regarding deficiencies in plaintiff's causes of action.

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: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9804 Oppenheimer & Co., Inc., Index 651839/12
Plaintiff-Respondent,

-against-

Northstar Agri Industries, LLC,
Defendant-Appellant,

Hayden Capital USA, LLC,
Defendant.

_____

Arnold & Porter LLP, New York (Steward D. Aaron of counsel), for appellant.

Satterlee Stephens Burke & Burke LLP, New York (Walter A. Saurack of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 7, 2013, which, to the extent appealed from as limited by the briefs, denied defendant-appellant Northstar Agri Industries, LLC's (Northstar) motion to dismiss plaintiff Oppenheimer & Co., Inc.'s (Oppenheimer) unjust enrichment claim pursuant to CPLR 3211, unanimously affirmed, without costs.

Oppenheimer seeks to recover a finder's fee for having introduced Northstar to an investment firm, PICO Holdings, Inc. (PICO), which ultimately invested in Northstar's canola processing facility. Northstar contends that the claim is barred

by the statute of frauds (*see* General Obligations Law § 5-701[a][10]).

The only agreement in the record to which Northstar had subscribed is the Confidentiality & Non-Disclosure Agreement (NDA), which it executed with Oppenheimer. The stated "Purpose" of the NDA was to "facilitate ongoing business dealings between [Northstar] and Oppenheimer associated with the development of a Canola Processing facility in Northwest Minnesota." The agreement required that the parties keep "all information disclosed by one party to the other in any manner related to the Purpose" confidential. Such terms, "by reasonable implication," evince Northstar's employment of Oppenheimer to perform services related to the canola processing facility. Thus, Northstar's obligation to provide reasonable compensation for the alleged services is implied (*see Morris Cohon & Co. v Russell*, 23 NY2d 569, 575-576 [1969]; *Davis & Mamber v Adrienne Vittadini, Inc.*, 212 AD2d 424 [1st Dept 1995]).

We note that, in addition to the NDA, the parties submitted an unsigned Finder's Fee Agreement that Oppenheimer had sent Northstar and accompanying emails referencing a prior "verbal agreement," as well as Northstar's pleadings and its CEO's deposition testimony in related actions in North Dakota state

court and New York federal court admitting that it had engaged Oppenheimer for its services, that it signed the NDA, and that Oppenheimer had introduced Northstar to PICO. The pleadings and testimony also acknowledge Northstar's understanding and expectation that Oppenheimer would be compensated for its services pursuant to industry practice.

Northstar's contention that it owes no finder's fee because the transaction it ultimately entered into with PICO was not the one initially contemplated by parties is unavailing. The transaction still involves development of the canola processing facility, and "the change in the 'set-up' for the final transaction would not alone preclude recovery of a commission" (*Simon v Electrospace Corp.*, 28 NY2d 136, 141 [1971]). Its contention that the NDA had terminated in April 2010, before the December 2010 Northstar/PICO transaction, was not properly raised

before the motion court (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]) and, in any event, is unavailing.

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9805 The People of the State of New York, Ind. 3353/08
Respondent,

-against-

Delroy Bulgin,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered March 29, 2011, convicting defendant, after a jury trial, of criminal mischief in the second degree and criminal contempt in the first degree, and sentencing him to time served and a conditional discharge, unanimously modified, on the law, to the extent of vacating the contempt conviction and dismissing that count of the indictment, and otherwise affirmed.

The People failed to prove that defendant had written or oral notice of an order of protection and its contents, as required for a conviction of criminal contempt in the first degree (*People v McCowan*, 85 NY2d 985, 987 [1995]; Penal Law § 215.51[d]). While the order contained check marks of unidentified origin indicating that defendant was present in

court and was advised of the "issuance" of the order, defendant's signature was not on the order (*compare People v Inserra*, 4 NY3d 30, 31-33 [2004]; *People v D'Angelo*, 284 AD2d 146, 146 [1st Dept 2001], *affd* 98 NY2d 733 [2002]), and there was no evidence establishing that defendant was present in court and orally advised of the prohibited conduct (*compare People v Clark*, 95 NY2d 773 [2000]).

Contrary to defendant's assertions, there was no spillover error onto the criminal mischief conviction. There is no reasonable possibility that the contempt count influenced the guilty verdict on the criminal mischief count in any meaningful way (*see People v Concepion*, 17 NY3d 192, 197 [2011]; *People v Daly*, 14 NY3d 848 [2010]). Both convictions stemmed from the same incident, in which defendant intentionally sideswiped and damaged the victim's van while she and her fiancé were inside. However, proof of defendant's guilt of criminal mischief had nothing to do with his knowledge of the order of protection. There was strong independent proof of defendant's guilt of criminal mischief provided by the victim, her fiancé, and the police officer who pursued and arrested defendant.

In light of this determination, we find it unnecessary to address defendant's remaining contentions.

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9806 In re Joshua J.P.,

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

Deborah P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

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

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Order of fact-finding and disposition, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about May 7, 2012, which, to the extent appealed from as limited by the briefs, following a hearing, found that respondent-appellant had neglected the subject child by using excessive corporal punishment, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). Respondent's frequent use of belts, cords and other objects, including an incident that left a scar on the child's thumb,

constituted excessive corporal punishment (*see Matter of Alysha M.*, 24 AD3d 255 [1st Dept 2005], *lv denied* 6 NY3d 709 [2006]). The child's testimony was sufficiently corroborated by the testimony of the agency caseworker and physical evidence, as well as respondent's admission that she might have struck the child on the six or seven occasions that she attempted to discipline him with a belt. It cannot be said that the Family Court erred in discrediting respondent's testimony (*see Matter of Erich J.*, 22 AD3d 849, 850 [2d Dept 2005]).

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9808 The People of the State of New York, Ind. 5399/10
Respondent,

-against-

Paul Dobbins,
Defendant-Appellant.

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

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

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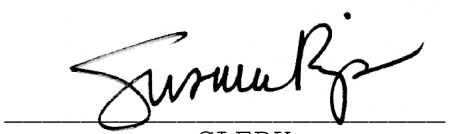
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena Uviller, J. at plea; A. Kirke Bartley, J. at sentencing), rendered on or about April 20, 2011,

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

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

ENTERED: APRIL 16, 2013



CLERK

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

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9809 In re Annette Perel,
Petitioner-Respondent,

-against-

Daniel Michael Gonzalez,
Respondent-Appellant.

_____

Port & Sava, Garden City (George S. Sava of counsel), for appellant.

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for respondent.

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Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 7, 2012, which denied respondent's objection to the Support Magistrate's imputation to him of income based on the full market value of his employer-provided apartment, and bringing up for review an order, same court and Justice, entered on or about May 26, 2010, which denied his objections to the parts of the Support Magistrate's order of support that required him to pay child support in the amount of $476.49 per week, applied the child support percentage to the parties' combined income above the $130,000 statutory cap, and required respondent to pay his pro rata share of the child's private pre-kindergarten tuition, unanimously affirmed, without costs.

The court correctly determined the parties' income for purposes of calculating their basic child support obligations (*see* Family Court Act § 413[1][b][3], [c]; *Matter of Cassano v Cassano*, 85 NY2d 649 [1995]). The record supports the Support Magistrate's determinations of respondent's income based on his 2008 annual gross income and the value of his employer-provided apartment and petitioner's income based on her 2008 annual gross income and her previous full-time employment as a concierge.

The Support Magistrate articulated the basis for applying the statutory percentage to the parties' income in excess of the $130,000 statutory cap (*see Matter of Cassano*, 85 NY2d at 654-655). Citing *Gina P. v Stephen S.* (33 AD3d 412, 414 [1st Dept 2006]), she observed that the parties' combined income was not well in excess of the cap. Respondent contends that the child's needs were met by the statutory amount of the first $130,000 of combined parental income (*see* Family Court Act 413[1][b][3][i]). However, the record shows that the child's pre-school tuition and allocated housing cost alone – that is, excluding food, clothing and all other expenses – is almost equal to that amount.

The Support Magistrate properly declined to credit respondent with "extraordinary expenses" in connection with his visitation with the child. The Court of Appeals considered and

expressly rejected any use in New York of the proportional offset formula in *Bast v Rossoff* (91 NY2d 723, 728-730 [1998]). Thus, we decline to follow *Matter of Carlino v Carlino* (277 AD2d 897 [4th Dept 2000]), as urged by respondent.

We reject respondent's arguments that income may not be imputed to him based on the value of his employer-provided apartment because the value of lodging furnished to an employee pursuant to employment is excluded from income under the Internal Revenue Code (*see* 26 USC § 119[a]), the Supremacy Clause of the United States Constitution requires the value to be excluded as income for child support purposes, and it is unconstitutional because it conflicts with the Internal Revenue Code. The Family Court Act provides that "at the discretion of the court, the court may attribute or impute income from[] such other resources as may be available to the parent, including, but not limited to: ... lodging ... or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirec[t]ly confer personal economic benefits" (Family Court Act § 413[1][b][5][iv][B] [footnote omitted]). The record shows that respondent had a separate office in the same building, that he was not required to be on the premises after

completing his 9 to 5 shift, that he used the apartment for his daily living activities, and that he was not restricted in any way in his use of the apartment.

Contrary to respondent's argument that the Support Magistrate's valuation of the subject apartment was not supported by evidence, respondent himself testified that the rent for a similar apartment in the building was $3,000, and he did not challenge the court's reliance on that figure.

Respondent's claim that the Support Magistrate should have reduced the imputed income based on the apartment by the mortgage payment for the home he is unable to use, i.e., his "investment loss," is unpreserved for appellate review.

The record supports the Support Magistrate's finding that respondent consented to the enrollment of the child in a private pre-kindergarten school. He admitted that before enrolling the child in the school he and petitioner had looked at several other private schools. There is no evidence that the parties ever considered enrolling the child in a public pre-kindergarten program. Respondent did not sign the enrollment contract, but he was aware that petitioner had made a non-refundable deposit to reserve the child's place in February 2009. We defer to the Support Magistrate's finding that respondent's consistent denial

that he ever consented to the child's enrollment in private school was "wholly incredible and self serving."

Nothing in the record supports respondent's contention that the Support Magistrate exceeded her authority or demonstrated bias against him.

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

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9810 The People of the State of New York, Ind. 4968/10
Respondent,

-against-

Daniel DeJesus-Garcia,
Defendant-Appellant.

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about August 3, 2011,

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

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

ENTERED: APRIL 16, 2013

CLERK

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

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9811 Roman Estrella, Index 20204/04
Plaintiff-Respondent, 85168/06

-against-

GIT Industries, Inc., et al.,
Defendants,

Broadway 69, LLC,
Defendant-Appellant,

Broadway Women's Wear, Inc., et al.,
Defendants.

- - - - - -

Broadway 69, LLC,
Third-Party Plaintiff-Appellant,

-against-

Broadway Women's Wear, Inc., et al.,
Third-Party Defendants-Respondents.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for Roman Estrella, respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 11, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and denied defendant Broadway 69, LLC's (Broadway) motion for summary judgment dismissing the Labor Law §

241(6) and § 200 and common-law negligence causes of action, unanimously modified, on the law, to the extent of dismissing the Labor Law § 200 and common-law negligence claims as against Broadway, and otherwise affirmed, without costs.

Partial summary judgment on the issue of liability on the Labor Law § 240(1) claim was properly granted in plaintiff's favor. The record shows that while performing repairs to a ceiling, plaintiff fell when the unsecured ladder on which he was working suddenly moved (*see Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478 [1st Dept 2010]). Plaintiff was not required to show that the ladder was defective (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [1st Dept 2009]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]), and Broadway failed to raise a triable issue as to whether plaintiff's actions were the sole proximate cause of the accident.

The court properly denied Broadway's motion to the extent it sought dismissal of the Labor Law § 241(6) claim against it. 12 NYCRR 23-1.21(b)(4)(ii) requires all ladders to have firm footings, and is not limited to ladders that are at least 10-feet tall. Broadway's argument that plaintiff failed to show a violation of that provision is unavailing. Since Broadway failed

to make an affirmative showing that the ladder complied with the firm-footing requirement, the sufficiency of plaintiff's opposition is irrelevant (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Moreover, even if Broadway had met its initial burden, plaintiff raised a triable issue as to whether the lack of rubber footings constituted a violation of the Industrial Code provision, causing him to fall (*see Soodin v Fragakis*, 91 AD3d 535 [1st Dept 2012]).

Dismissal of the Labor Law § 200 and common-law negligence claims as against Broadway was proper in light of the lack of evidence that Broadway supervised or controlled plaintiff's work (*see Castellon v Reinsberg*, 82 AD3d 635 [1st Dept 2011]). Plaintiff, an independent contractor, testified that nobody directed the manner in which he performed his work. The testimony by an employee of Broadway's agent, suggesting that

Broadway's superintendent supervised plaintiff and told him what work to do, did not raise a triable issue of fact (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9812 The People of the State of New York, Ind. 1154N/08
Respondent,

-against-

Akwasiba Radellant,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Kerry S. Jamieson of counsel), and Linklaters, LLP, New York (Anna Greene of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered March 3, 2010, convicting defendant, after a jury trial, of criminal possession of marijuana in the second degree, endangering the welfare of a child and unlawfully dealing with a child in the first degree, and sentencing her to an aggregate term of 45 days, concurrent with 5 years' probation, unanimously affirmed.

The court properly denied defendant's motion to suppress her statements. The record supports the court's finding that the questioning by the detective was not the product of custodial interrogation, and thus did not require *Miranda* warnings. A reasonable innocent person in defendant's position would not have

thought that she was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). Defendant returned to her apartment of her own volition, unaccompanied by the police. In the apartment, she was free to walk around, and the police did not restrain her in any way or do anything to convey that she was not free to leave; additionally, neither the questioning nor the atmosphere was coercive with regard to defendant (*see e.g. People v Miller*, 100 AD3d 466 [1st Dept 2012]; *People v Dillhunt*, 41 AD3d 216, 217 [1st Dept 2007], *lv denied* 10 NY3d 764 [2008]). The police activity at the apartment was likely to have conveyed the impression that an investigation was in progress, but there was no indication that the police had decided to arrest anyone but the codefendant, who was handcuffed. Defendant's claim of inadequate CPL 710.30(1)(a) notice is waived, and is without merit in any event.

The court also properly denied defendant's motion to suppress physical evidence recovered from her person after she made an incriminating statement and was placed under arrest. The information in the possession of the police concerning defendant's constructive possession of the marijuana found in the apartment was substantially the same as the evidence presented in the People's case at trial. As discussed below, that evidence

established her guilt beyond a reasonable doubt, and her assertion that this evidence did not even establish probable cause is without merit.

The verdict was based on legally sufficient evidence and 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, including its resolution of a conflict between a detective's testimony and that of defendant concerning the content of defendant's statement. The evidence warrants the conclusion that defendant exercised dominion and control over the contraband while acting in concert with the codefendant (*see* Penal Law § 10.00 [8]; *People v Manini*, 79 NY2d 561, 573 [1992]; *People v Torres*, 68 NY2d 677 [1986]). Defendant leased the apartment where the marijuana was found, and used it to operate a day care facility. Moreover, defendant made a statement to the police that had no reasonable interpretation except that she was doing the codefendant a "favor" by letting him store contraband in her apartment. As in *People v Mojica* (81 AD3d 506, 506 [1st Dept 2011], *lv denied* 17 NY3d 808 [2011]), "[t]he jury could have readily rejected any suggestion that the codefendant somehow sneaked the contraband into the apartment without defendant's knowledge." Finally, we have considered and

rejected defendant's challenges to her convictions on the two misdemeanor counts.

Defendant did not preserve any of her challenges to the prosecutor's summation. To the extent defendant objected during the summation, none of her objections had any preservation effect because she made general objections and failed to request further relief when the court sustained the objections. We decline to review her claims in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9814 Jorge Luetto, et al., Index 102646/09
Plaintiffs-Appellants,

-against-

Rosa Abreu,
Defendant-Respondent.

_____

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

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered April 25, 2012, which granted defendant's motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff Luetto did not suffer a serious injury to his right knee and lower back. Defendant submitted, among other things, the affirmed report of an orthopedist who opined that Luetto had no residuals from arthroscopic surgery performed four years earlier and no deficits in range of motion of his right knee, and the affirmed report of a radiologist who opined that the MRI film of Luetto's lumbar

spine showed no herniated or bulging discs (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]). Defendant also submitted evidence that Luetto had made claims for injuries suffered to his lower back in a prior and subsequent motor vehicle accident.

In opposition, plaintiffs failed to raise an issue of fact, since they submitted no medical evidence supporting Luetto's claim of lumbar spine injury, and no evidence of current range-of-motion deficits or qualitative limitations in the use of his right knee to rebut the findings of defendant's medical expert (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]).

Defendant also made a prima facie showing that plaintiff Garcia had full range of motion in her cervical and lumbar spine, that the MRI of her lumbar spine was normal, and that the MRI of her cervical spine showed a condition that was preexisting and congenital in origin (*see Mitrotti*, 91 AD3d at 449-450).

In opposition, Garcia failed to raise an issue of fact, since the only admissible medical evidence offered was the affirmation of her treating physician who provided no evidence of current range-of-motion deficits or qualitative limitations, and did not address the evidence that the cervical condition was

congenital (*see Mitrotti*, 91 AD3d at 450). The uncertified and unaffirmed medical reports submitted by plaintiffs could not be used to raise an issue of fact (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435, 435-436 [1st Dept 2011]; *Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509, 510 [1st Dept 2010]). In any case, the mere "existence of . . . bulging and herniated discs is not evidence of serious injury in the absence of objective proof of the extent of the alleged physical limitations resulting from the injury, and its duration" (*Williams v Horman*, 95 AD3d 650, 651 [1st Dept 2012]).

Plaintiffs' attacks on the credibility and reliability of defendant's medical experts are unpreserved for appellate review (*see Felix v Fragosa*, 85 AD3d 417, 418 [1st Dept 2011]), and, in any case, are without merit.

The court properly dismissed plaintiffs' 90/180-day claims because, among other things, their bill of particulars alleged

"incapacitation" of less than two months as a result of the subject accident (*see Mitrotti*, 91 AD3d at 450).

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

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

ENTERED: APRIL 16, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9815 Fieldstone Capital, Inc., et al., Index 653319/11
Plaintiffs-Appellants,

Foxhurst Realty, Inc., et al.,
Plaintiffs,

-against-

Loeb Partners Realty, et al.,
Defendants-Respondents,

LH Eagle Ridge Associates LLC, et al.,
Defendants,

L 63 Partners, L.P., et al.,
Nominal Defendants.

_____

Sullivan & Cromwell LLP, New York (David B. Tulchin of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Adam M. Abensohn of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 29, 2012, which denied plaintiffs-appellants' motion for a preliminary injunction, unanimously reversed, on the law, with costs, and the motion granted to the extent of ordering that defendants-respondents are enjoined from continuing to act or purporting to act as plaintiffs-appellants' agent and property manager for the listed properties, and directing that the accounts in dispute be frozen and their

contents held in escrow pending determination of this action.

In the 1990s, the parties entered into written contracts pursuant to which defendants agreed to act as agent and property manager with respect to certain properties owned by plaintiffs. In 2011, plaintiffs notified defendants that their agency was being terminated. Defendants took the position that the termination was ineffective given their residuary interests in the properties. Plaintiffs commenced this action seeking, among other things, an order enjoining defendants from continuing to purport to act as an agent for plaintiffs and requiring defendants to relinquish control over relevant bank and investment accounts. Several months later, plaintiffs moved for a preliminary injunction seeking the same relief.

The court improvidently exercised its discretion in failing to issue a preliminary injunction enjoining defendants from continuing to assert that they are agents of plaintiff owners with respect to the specified properties. Plaintiff owners have a probability of success on the merits with respect to the effectiveness of their termination of their agent, have shown that they are suffering irreparable injury to the extent the properties they own continue to be managed by an agent they do not desire, and the balance of the equities weighs in their favor

(*see e.g. Archdiocese of Ethiopian Orthodox Church in U.S. & Can. v Yesehaq*, 232 AD2d 332 [1st Dept 1996]).

To the extent plaintiff owners also seek a preliminary order requiring defendants to turn over to their possession and control the contents of bank accounts that are contested by the parties, the circumstances presented in this case are not of such an extraordinary nature so as to warrant mandatory preliminary relief upsetting the status quo (*see St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [1st Dept 2003]). However, in order to preserve the status quo, the contested accounts should be frozen and the funds held in escrow pending a determination as to the rights of the parties (*see e.g. Banana Kelly Community Improvement Assn. v Schur Mgt. Co., Ltd*, 34 Misc 3d 1207[A] [Sup Ct, Bronx County 2012]).

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

ENTERED: APRIL 16, 2013

CLERK

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

9453 & M-363 — Index 570284/10

Branic International Realty Corp.,
Petitioner-Respondent,

-against-

Phillip Pitt, etc.,
Respondent-Appellant,

"John Doe," et al.,
Respondents.

_____

West Side SRO Law Project, New York (Martha Weithman of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for Branic International Realty Corp., respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about December 22, 2010, reversed, on the law, with costs, respondent Phillip Pitt's motion granted, and petitioner's motion denied.

M-363 - Motion to strike portions of the Appendix denied.

Opinion by Clark J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Rolando T. Acosta
Helen E. Freedman
Darcel D. Clark, JJ.

9453 &
M-363
Index 570284/10

_____x

Branic International Realty Corp.,
Petitioner-Respondent,

-against-

Phillip Pitt, etc.,
Respondent-Appellant,

"John Doe," et al.,
Respondents.

_____x

Respondent Phillip Pitt appeals from an order of the Appellate Term of the Supreme Court, First Department, entered on or about December 22, 2010, which, to the extent appealed from, as limited by the briefs, reversed an order of the Civil Court, New York County (Gerald Lebovits, J.), entered on or about June 9, 2009, granting his motion for summary judgment dismissing the petition and denying petitioner's motion for summary judgment on its claim for possession, denied respondent's motion and granted petitioner's motion.

West Side SRO Law Project, New York (Martha Weithman of counsel), and Manhattan Legal Services, New York (Jim Provost of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg, Lesley A. Reardon and Diana Attner of counsel), for Branic International Realty Corp., respondent.

CLARK, J.

In this appeal, the primary question is whether respondent Phillip Pitt was a "permanent tenant" as defined in Rent Stabilization Code (9 NYCRR) § 2520.6(j). We find that the record amply demonstrates that respondent "continuously resided" in a room within petitioner Branic International Realty Corp.'s (Branic) hotel for more than six months. Accordingly, respondent-appellant was a "permanent tenant," as defined by Rent Stabilization Code § 2520.6(j).

Branic is the owner of a single room occupancy (SRO) rent-stabilized hotel located at 216 West 103rd Street, New York, New York. In 2003, Branic and the New York City Human Resources Administration (HRA) entered into a written "memorandum of understanding" whereby HRA agreed to rent 134 rooms in Branic's hotel to house the homeless.[1] The agreement provides that HRA would refer "Eligible Persons," i.e. HRA clients in need of emergency housing and eligible for a public assistance shelter allowance, to the hotel. Eligible Persons with income over public assistance were obligated to contribute 30 percent of that income to the hotel. HRA agreed to pay a nightly rate of $65.00

[1] The parties dispute whether the HRA/Branic agreement is properly included in the Appendix since it was never produced in the prior proceedings by Branic.

for each Eligible Person occupying a hotel room.

In January 2003, HRA referred Phillip Pitt to Branic for housing under the agreement, and Pitt began residing in Room 214 on or about January 10, 2003. From January 2003 until April 2007, HRA paid the nightly rate of $65.00 on behalf of Pitt. By an April 2007 notice of "CANCELLATION/ROOM CLOSURE VERIFICATION (Emergency Facility)," HRA informed Branic that payments on Pitt's room would be stopped on April 17, 2007 because Pitt was no longer living there. HRA ceased paying for Pitt's room on or about April 17, 2007, but Pitt continued residing there without paying.

In June 2007, Branic commenced a licensee holdover proceeding in the Civil Court, New York County. Pitt answered and moved for summary judgment, arguing that he was entitled to dismissal of the proceeding because he was not a licensee but a "permanent tenant" under the Rent Stabilization Code (RSC). Branic cross-moved for summary judgment. By order dated June 9, 2009, the Civil Court granted Pitt's motion for summary judgment dismissing the holdover proceeding and denying Branic's motion for summary judgment. The court held that RSC (9 NYCRR) § 2520.6(j) categorizes Pitt as a permanent rent-stabilized tenant and protects him from eviction.

Branic moved to renew and reargue the order. The Civil

Court denied the motion to renew and reargue by order dated December 3, 2009.

By order dated December 22, 2010, the Appellate Term reversed the Civil Court's orders, reinstated Branic's holdover petition and granted Branic summary judgment on the petition. Pitt moved to reargue in the Appellate Term or, in the alternative, for leave to appeal to this Court. On March 8, 2011, the Appellate Term denied Pitt's motion.

Pitt's motion to this Court for leave to appeal was granted on December 11, 2011. The Court also stayed Pitt's eviction on the condition that he paid all arrears and ongoing use and occupancy within 60 days.

On July 30, 2012, Pitt voluntarily moved out of the hotel. Pitt's counsel thereafter perfected the appeal in September 2012. On October 26, 2012, Branic moved this Court to dismiss the appeal on the ground of mootness. This Court denied the motion without opinion on December 4, 2012.

Branic also moves this Court to strike portions of the Appendix that were not part of the record before Civil Court, including Pitt's memoranda of law and his motion for leave to appeal to the Appellate Term and accompanying exhibits.

As a threshold matter, we find that this appeal is not rendered moot by the fact that Pitt voluntarily vacated the

premises before the appeal was perfected. Although, as a general principle, courts are precluded from considering questions which have become moot by a change in circumstances, an exception to the mootness doctrine exists in situations that present the following: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). This matter presents an issue of substantial public interest that is likely to recur and evade review. Specifically, this Court must address the question of what constitutes a legal tenancy under the Rent Stabilization Code, and what rights are vested in a person occupying premises under the contract between a landlord and a social service agency. This is an issue that affects a large number of New Yorkers who declare permanent tenancy in a SRO. Thus, it presents an exception to the mootness doctrine (*see generally Matter of Jones v Berman*, 37 NY2d 42, 57 [1975]; *Matter of Concord Realty Co. v City of New York*, 30 NY2d 308, 312-313 [1972]).

Turning to the merits, the crux of this appeal is whether Pitt is a "permanent tenant" as defined by RSC § 2520.6(j). Under RSC § 2520.6(j), "permanent tenant" is defined as follows:

> "For housing accommodations located in hotels, an individual or such individual's family members residing with such individual, who have continuously resided in the same building as a principal residence for a period of at least six months."

Further, RSC § 2520.6(m) defines a "Hotel occupant" as "[a]ny person residing in a housing accommodation in a hotel who is not a permanent tenant." It also states:

> "Such person shall not be considered a tenant for the purposes of this Code, but shall be entitled to become a permanent tenant as defined in subdivision (j) of this section, upon compliance with the procedure set forth in such subdivision."

A plain reading of RSC § 2520.6(j) reveals that the only requirement to be a "permanent tenant" is six months or more of continuous residence in a particular hotel building (*see Kanti-Savita Realty Corp. v Santiago*, 18 Misc 3d 74 [App Term, 2d Dept 2007] [criterion is not the payment of rent but continuous residence in the unit for six months]). Thus, even if Pitt and Branic did not have an express or implied landlord-tenant relationship, Pitt nevertheless qualified as a "permanent tenant," entitling him to the enumerated protections of the Rent Stabilization Code. As it is undisputed that Pitt lived in the subject SRO for well over six months, he certainly acquired the status of a "permanent tenant."

The Appellate Term's citation to the definition of "tenant"

under RSC § 2520.6(d) in support of its holding that the lack of a landlord-tenant relationship between Branic and Pitt precluded Pitt from being a "permanent tenant" under RSC § 2520.6(j), was erroneous. Nothing in the RSC mandates that these sections should be read together, such that a person must become a "tenant" before becoming a "permanent tenant." Rather, RSC § 2520.6(d) defines a "tenant" as "[a]ny person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use or occupancy of a housing accommodation." A hotel's "permanent tenant," on the other hand, by definition, is not necessarily a party to a landlord-tenant relationship, but merely a hotel occupant who has resided there for six months (RSC § 2520.6[j], [m]).

RSC § 2520.6(j) states that "reference in this code to 'tenant' shall include permanent tenant with respect to hotels." This language indicates that even though the eligibility criteria of a "tenant" and a "permanent tenant" are different, a hotel's permanent tenant is nonetheless afforded the rent stabilization protections under the RSC.

Moreover, a close reading of the definition of "hotel occupant" (RSC § 2520.6[m]) demonstrates that "tenant," under RSC § 2520.6(d), and "permanent tenant," under RSC § 2520.6(j), are

not to be read together. The statutory language indicates that a "hotel occupant" shall not be considered a "tenant," but may be entitled to become a "permanent tenant" (RSC § 2520.6[m]). Hence, even if a person residing in a hotel has a landlord-tenant relationship with the hotel, that person may only become a permanent tenant, not a tenant.

As a result, when Pitt satisfied the requirements of RSC § 2520.6(j) he was entitled to the protections afforded a "permanent tenant." Any reliance upon the HRA/Branic agreement, which was not part of the record, and the determination that Pitt was "merely a licensee of HRA," was error. Pitt's status as a "permanent tenant" was established by his long-term residence in the hotel, not by the agreement. Therefore, the existence of an agreement between petitioner and the New York City Human Resources Administration to house eligible homeless persons in a portion of the hotel did not make respondent a licensee or render the Rent Stabilization Code inapplicable to the hotel.

Notwithstanding, Branic argues that under RSC § 2520.11(b), the agreement between it and HRA was a lease by a government agency, exempting the SRO from the RSC. RSC § 2520.11(b) states that "housing accommodations owned, operated or leased by the United States, the State of New York, any political subdivision, agency or instrumentality thereof, any municipality or any public

housing authority" are exempt from the RSC. However, we find Branic's argument unavailing.

Branic never made the HRA/Branic "memorandum of understanding" agreement part of the record below, and it should not be permitted to use the agreement to support its current claims. Further, even if Branic were permitted to rely on the agreement, it was not a lease. The agreement does not show, by its own terms, "the surrender of absolute possession and control of property to another party for an agreed-upon rental" (*Matter of Davis v Dinkins*, 206 AD2d 365 [2d Dept 1994], *lv denied* 85 NY2d 804 [1995]).

In *Dinkins*, the Court held that a similar agreement between the City and a hotel in Queens, which agreed to house up to 150 homeless families, was not a lease for the purposes of Uniform Land Use Review Procedure and for a "fair-share" hearing (*id.* at 366-367). Here, like the agreement in *Dinkins*, the parties agreed that the hotel would set aside "at most" 134 rooms for potential occupancy by Eligible Persons and HRA would pay a nightly rate for the occupied rooms. HRA did not guarantee that it would fill all rooms. Given the absence of essential terms such as the precise number of rooms to be occupied and paid for by HRA, the agreement cannot be construed as a lease between HRA and Branic (see *Dinkins*, 206 AD2d at 367).

Branic's motion to strike portions of the Appendix is denied. The record demonstrates that Branic failed to produce the subject agreement in the proceedings below. Additionally, even if this Court were to consider the agreement, the terms clearly belie Branic's arguments against Pitt's "permanent tenant" status since the agreement states that an Eligible Person can become a permanent tenant and that Branic may not evict such a person without cause and notice to HRA.

Pitt's request for sanctions against Branic and its attorneys for their failure to produce the agreement is denied. Pitt has not demonstrated that Branic purposefully concealed the agreement in bad faith.

Accordingly, the order of the Appellate Term of the Supreme Court, First Department, entered on or about December 22, 2010, which, to the extent appealed from as limited by the briefs, reversed an order of the Civil Court, New York County (Gerald Lebovits, J.), entered on or about June 9, 2009, granting respondant's motion for summary judgment dismissing the petition and denying petitioner's motion for summary judgment on its claim for possession, denied respondent's motion, and granted petitioner's motion, should be reversed, on the law, with costs, respondent's motion granted, and petitioner's motion denied.

M-363 - *Branic International Realty Corp. v Phillip Pitt*

Motion to strike portions of the Appendix denied.

All concur.

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

ENTERED: APRIL 16, 2013

CLERK