

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 15, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, JJ.

4364 Tiffany Applewhite, etc., et al., Index 22234/98
 Plaintiffs-Appellants,

-against-

Accuhealth, Inc., et al.,
Defendants,

City of New York,
Defendant-Respondent.

Murray S. Axelrod, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered March 30, 2010, that in an action for personal injuries sustained as a result of allegedly negligent treatment rendered by emergency personnel of defendant City of New York, sued herein as Emergency Medical Service and the City of New York, granted said defendant's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law,

without costs, the motion denied, and the complaint reinstated as against the City of New York.

The record demonstrates that plaintiffs filed the note of issue on May 8, 2009. This required the City (defendant) to file a motion for summary judgment no later than 120 days after the filing of the note of issue, i.e., September 5, 2009 (CPLR 3212[a]). However, because September 5th was a Saturday, and Monday, September 7th, was Labor Day (see General Construction Law § 25-a[1]), the motion defendant served on September 8, 2009, was timely.

The facts underlying this case are discussed in a decision on a prior appeal (81 AD3d 94 [2010]). Accordingly, this decision will relate only those facts necessary to a full understanding of this decision.

The infant plaintiff suffered anaphylactic shock during a home infusion of medication called Solu-Medrol. Her mother called 911 while the nurse who had been giving the home infusion commenced CPR. Two emergency medical technicians (EMTs) arrived, but only in a Basic Life Support (BLS) ambulance because an Advanced Life Support (ALS) ambulance was not available at the time the mother placed her call. While one of the EMTs assisted the nurse with CPR, the other left the apartment to request an

ALS ambulance, because the ambulance that arrived first lacked a stretcher, a valve mask and a defibrillator. During that time, the mother made a second call to 911. Some time thereafter, paramedics arrived in an ALS ambulance. These paramedics administered epinephrine and oxygen to infant plaintiff and then transported her to the hospital. She survived, but suffered significant brain damage.

Plaintiffs commenced this action against the City of New York because it administered the ambulance service through the fire department. After plaintiffs filed the note of issue, defendant moved for summary judgment. The motion court granted that motion. Plaintiffs appealed.

As a threshold issue, we must determine the capacity in which the City was acting. When the City acts in a proprietary capacity, it is subject to the same principles of tort law as a private entity (*Miller v State*, 62 NY2d 506, 511 [1984]). By contrast, discretionary acts, such as the failure to issue a license, can never be a basis for damages (*McLean v City of New York*, 12 NY3d 194, 202 [2009]). Similarly, public entities are not usually liable for claims arising out of the performance of a government function (ministerial acts) (*id.*). "A municipality is not liable to a person injured by the breach of a duty - like the

duty to provide police protection, fire protection or ambulance service - that the municipality owes to the general public" (*Laratro v City of New York*, 8 NY3d 79, 83 [2006]).

However, liability for ministerial acts may arise where there exists a special relationship between the injured party and the public entity that creates a special duty of protection to the injured party (see *McLean*, 12 NY3d at 201). To establish that a municipality owes a special duty, a plaintiff must demonstrate four elements:

"(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking"

(*Mastroianni v County of Suffolk*, 91 NY2d 198, 204 [1997], quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

Plaintiffs posit that we must analyze this case under general tort principles because the EMS personnel were allegedly negligent in their provision of medical care, and provision of medical care is not a government function. Conversely, the City argues that the provision of emergency medical services is a

government function that requires proof of a special duty as a basis for liability.¹

Under the facts of this case, defendant was acting in a ministerial capacity. Plaintiffs fault defendant for failing to bring oxygen to the apartment, for advising the mother that she should wait for the ALS ambulance and for waiting for the ALS ambulance that arrived 20 minutes later instead of taking the infant plaintiff to the hospital that was four minutes away. Absent are allegations that defendant provided medical treatment in an improper manner. Thus, this case is not like *Kowal v Deer Park Fire District* (13 AD3d 489 [2004]), in which it was not necessary to establish a special relationship where a municipal paramedic mistakenly placed an endotracheal tube in the plaintiff's esophagus thereby causing her death (*see also Fonville v New York City Health & Hosps. Corp.*, 300 AD2d 623, 624

¹ The City concedes that "plaintiffs are correct that acts of misfeasance may render the special duty doctrine inapplicable" but insists that what occurred here was an act of nonfeasance that does require a special relationship before liability can attach. In *McLean* (12 NY3d 194), the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function. Accordingly, we will not evaluate this case using a distinction between nonfeasance and misfeasance. We merely distinguish proprietary functions from ministerial functions.

[2002] [claims based upon improper treatment were not subject to special relationship analysis]).

Here, the gravamen of plaintiffs' claim is that defendant should have transported the infant plaintiff to the hospital immediately rather than waiting an additional 20 minutes for the ALS ambulance to effectuate transport. This claim involves the quintessential purpose of the municipal ambulance system - transporting the patient to the hospital as quickly as possible. Thus, defendant's poor advice and failure to transport is much closer to the performance of a government function than to the proprietary act of a medical provider caring for a patient. Accordingly, defendant's actions were ministerial and the special relationship doctrine applies.

Pursuant to that doctrine, dismissal of the complaint was improper because defendant assumed a special duty toward this plaintiff. The first element of a special relationship is the assumption of an affirmative duty to act.² Here, the first ambulance to arrive at plaintiffs' home was a BLS ambulance, that did not have the necessary equipment to treat infant plaintiff. Despite her mother's request to take the child to the nearby

² Because the motion court found no justifiable reliance, it did not reach this issue.

hospital immediately, the EMTs allegedly assured the mother that it would be better for infant plaintiff to wait at the home until an ALS ambulance arrived with paramedics and proper equipment. Under these alleged circumstances, the assurances and advice of the emergency personnel constituted an assumption, "through promises or actions, . . . to act on behalf of [infant plaintiff]" for the purposes of determining a special relationship (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

The parties do not dispute the second factor, knowledge on the part of the municipality's agents that inaction could lead to harm, and the third factor, some form of direct contact between the municipality's agents and the injured party. The main point of contention centers around the fourth factor in the special relationship analysis - justifiable reliance. Defendant contends that the mother could not have relied on anything they said or did. This misses the point. The record reflects that the mother asked the EMS technicians to take her daughter to Montefiore Hospital, only four minutes away. The EMS technicians responded that it was preferable to wait for the ALS ambulance and continued to administer CPR. The EMS technicians made the decision not to transport the child immediately and to call for the ALS ambulance to effectuate transport. At no point did

defendant communicate to the mother that the ALS ambulance would take another 20 minutes to arrive for the subsequent transport. The mother justifiably relied on the EMS technicians, who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance.

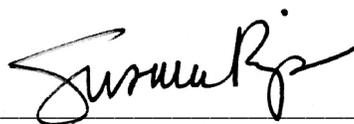
It is irrelevant that the mother's affidavit in opposition to a different motion by defendant Nurse Russo did not specifically allege that she asked the EMTs to take infant plaintiff to the hospital. This amounts to, at most, a triable issue of fact or a credibility determination, neither of which is appropriate for resolution on this motion for summary judgment (see *Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [2010]).

The issue of proximate cause also cannot be resolved on the existing record. There are triable issues regarding whether the infant plaintiff's brain damage could have been altogether

avoided or, at the very least, mitigated. The expert affidavits do not resolve the cause and severity of the injuries, but instead raise material issues of fact.

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

ENTERED: DECEMBER 15, 2011

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CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4588 Ariana Komonaj, etc., et al., Index 8864/07
Plaintiffs-Respondents,

-against-

Kola Curanovic, et al.,
Defendants-Appellants,

3021 Briggs Avenue Realty Corp.,
Defendant.

Krinsky & Musumeci, New York (James E. Gear of counsel), for appellants.

Joseph T. Mullen & Associates, New York (Allan L. Brenner of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about March 9, 2010, which, to the extent appealed from, denied individual defendants Kola Curanovic and Gjon Vcaj's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

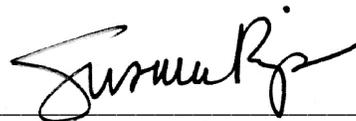
The infant plaintiffs allegedly suffered injuries as a result of exposure to lead-based paint in their apartment in the building owned by the corporate defendant. Supreme Court properly denied the motion for summary judgment dismissing the complaint as against the individual defendants, who are officers and employees of the corporate defendant. In moving for summary

judgment, the individual defendants failed to present evidence that, if uncontroverted, would have established that they did not personally participate in malfeasance or misfeasance constituting an affirmative tortious act (see *Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-559 [2009]; *Espinosa v Rand*, 24 AD3d 102, 102 [2005]). In the absence of such evidence, the individual defendants failed to make a prima facie showing that they were entitled to judgment as a matter of law, and this failure required the denial of their summary judgment motion regardless of the sufficiency of the opposing papers (see *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

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

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Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5649 & 47 East 34 Partners LP, et al., Index 600090/10
M-3852 Plaintiff-Respondents,

-against-

Great American Insurance Company
of New York,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (James A. Yates, J.), entered on or about December 16, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed November 18, 2011,

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

M-3852 Motion to strike appendix deemed withdrawn.

THIS CONSTITUTES THE DECISION AND ORDER
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additional time attributable to the court's grant of a longer adjournment for other reasons (see e.g. *People v Delacruz*, 241 AD2d 328 [1997], *lv denied* 90 NY2d 939 [1997]).

The minutes of February 26, 2009 reflect that the People requested a one-week adjournment, being unready to proceed to trial and having no information from the assigned prosecutor to convey concerning the case. Defense counsel then requested an adjournment to April 7th and, when apprised by the court of the dates available, amended his request to April 6th, to which the court acceded. On the return date, the People answered not ready due to the unavailability of witnesses. The court inquired whether the People had filed a statement of readiness, and defense counsel responded that he did not think so because he could not locate one in the file. The court then stated, "File a Statement of Readiness. This is not ready. February 26th you weren't ready and indicated that a Statement of Readiness will be filed." When the court clerk produced a document, the court dismissed it, stating, "Do you have one -- no, that's an old one. It is from 2007."

The motion court charged the People with the entire 39-day period on the ground that the judge's notes indicated that the People had been told to file a statement of readiness and, as the

minutes of April 6 reflected, no such statement was filed. However, nothing in the minutes of February 26 supports the motion court's finding that the People were directed to file a statement of readiness (*cf. People v Nunez*, 47 AD3d 545, 546 [2008]), nor does the appendix contain any subsequently filed statement. The extent of the People's obligation is "to make a record sufficient to permit an appellate court to determine who should be charged with a post-readiness adjournment" (*People v Daniels*, 217 AD2d 448, 454 [1995], *appeal dismissed* 88 NY2d 917 [1996]), and the transcript of the proceedings clearly reflects that it was defense counsel who, on February 26, asked for an adjourned date beyond the single week requested by the People (*see People v Liotta*, 79 NY2d 841, 843 [1992]). The calendar notes relied upon by the motion court are not dispositive of the issue (*see People v Berkowitz*, 50 NY2d 333, 349 [1980]). Nor are they consistent with the record, which is in any event controlling (*see Daniels*, 217 AD2d at 454).

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

ENTERED: DECEMBER 15, 2011



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Moskowitz, J.P., Renwick, DeGrasse, Abdus-Salaam, Román JJ.

6144 & Ruth Rogin,
M-4870 Plaintiff-Appellant,

Index 102951/11

-against-

Gilbert Rogin,
Defendant-Respondent,

504 Associates LLC,
Defendant.

Robert A. Katz, New York, for appellant.

Robert A. Horn, New York, for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 27, 2011, which, in this action where plaintiff is, inter alia, seeking an injunction against her former husband, defendant Gilbert Rogin, compelling him to pay rent to her landlord, defendant 504 Associates LLC, under a written guaranty, inter alia, denied plaintiff's motion to remove a pending nonpayment proceeding brought against her by defendant landlord in Civil Court and join it with this action, and denied defendant landlord's motion to dismiss the complaint, unanimously modified, on the law, to the extent of granting plaintiff's motion to remove the nonpayment proceeding from Civil Court and join it with the present action, and otherwise affirmed, without costs.

Dismissal of the complaint against the landlord was proper since plaintiff failed to state a cause of action against it. Plaintiff's first claim against the landlord, where she alleges that instituting a summary proceeding against her "amounts to unfair conduct" is essentially an allegation of promissory estoppel. However, while her complaint alleges that Gilbert Rogan induced her to rent the subject apartment, it fails to allege that the landlord in any way *induced* her to rent the apartment. Reliance upon a promise made by the party against whom estoppel is alleged is an element necessary to an estoppel claim (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836 [2011]; *Winchester-Simmons Co. v Simmons*, 222 AD 639, 640 [1928]), and since plaintiff failed to allege that the landlord made any promises to her upon which she relied, her first claim against the landlord, sounding in promissory estoppel, must be dismissed (*id.*). Moreover, plaintiff's second cause of action against the landlord, alleging intentional infliction of emotional distress also fails to state a cause of action since the basis for the claim - landlord's commencement of a nonpayment proceeding against plaintiff - is not "so outrageous in character, and so extreme in degree, as to go beyond all

possible bounds of decency" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [internal quotation marks and citations omitted]).

However, the motion court erred in denying plaintiff's motion for removal and a joint trial.¹ That Gilbert Rogan, pursuant to the guaranty agreement, is responsible to pay plaintiff's rent is both an equitable claim made by plaintiff in this action and an equitable defense raised by her in the summary proceeding. Accordingly, this action and the nonpayment proceeding share a substantial common question of law or fact, warranting joinder (see CPLR 602[a], [b]; *Braun v Fraydun Realty Co.*, 158 AD2d 430, 431 [1990]; *F.W. Woolworth Co. v Manhattan Hi-Rise Apts.*, 118 AD2d 505 [1986]). Moreover, joinder is also warranted since plaintiff seeks an equitable remedy, an injunction, which the Civil Court cannot grant (*DeCastro v Bhokari*, 201 AD2d 382, 383 [1994]; cf. *Lun Far Co. v Aylesbury*

¹ The motion court's order treats plaintiff's motion as one for consolidation, when the relief prayed for was an order directing a joint trial. Here, that distinction is critical since a true consolidation, where the captions merge and we are then left with only one action and one caption, is inappropriate since plaintiff in this action is also a respondent in the other action (*Bass v France*, 70 AD2d 849, 849 [1979] ["Consolidation was inappropriate since Milton James Bass. . . [a party to both actions] would have been both a plaintiff and a defendant in the consolidated action"]).

Assn., 40 AD2d 794 [1972] [Unless it is clear that the relief sought cannot be obtained in a summary proceeding in Civil Court, an action should not be removed, joined and/or consolidated with a another in Supreme Court]). While prejudice serves to bar consolidation or joinder (*Chinatown Apts. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1984]), here, the landlord has never raised such argument, arguing instead the incongruity of the issues between the actions. Moreover, as noted by the motion court, any delay of the nonpayment proceeding resulting from joinder of these actions, can be ameliorated by ordering expedited discovery concomitantly with the issuance of the order mandating that the actions be joined (*id.* at 825; *Tillotson v Shulman*, 73 AD2d 688, 689 [1979]).

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

M-4870 *Rogin v Rogin, et al.*

Motion to strike brief denied.

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ENTERED: DECEMBER 15, 2011



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for an improvement of real property," as required by Lien Law § 70(1), and petitioner has not established that the trust provisions of Lien Law article 3-A are applicable.

We reject petitioner's argument that the loan proceeds were received "in connection with a contract for an improvement of real property" because the property and air rights were acquired to facilitate the development of the overall project. Although article 3-A is a remedial statute and is to be liberally construed to carry out its purpose, the courts are not authorized to enlarge that clearly defined purpose (see *Tri-City Elec. Co., v People*, 96 AD2d 146, 149 [1983], *affd* 63 NY2d 969 [1984]). Lien Law article 3-A was enacted "to insure that funds obtained for financing of an improvement of real property and moneys earned in the performance of a contract for either a privately owned improvement or a public improvement will in fact be used to pay the costs of that improvement" (*Canron Corp. v City of New York*, 89 NY2d 147, 153-154 [1996], quoting 1959 Report of NY Law Rev Commn, at 209, reprinted in 1959 NY Legis Doc No. 65 [F], at 25). To hold that funds received for the purpose of purchasing real property become part of a trust constituted for the purpose of improving property would unduly enlarge this clearly defined purpose.

While Lien Law § 70(5)(c) provides that trust funds for which an owner is deemed to be a trustee include money received by him or her "under a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after completion of the improvement," the mere fact that the mortgages were recorded during the statutory period does not render the loan proceeds a trust fund. Section 70(5)(c) is subject to the requirement of § 70(1) that trust funds be "for or in connection with an improvement of real property" (see McKinney's Cons Laws of NY, Book 1, Statutes § 98; *Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990 [all parts of statute to be harmonized and given effect]]).

Nor does the mere presence of the Lien Law § 13(3) language in the mortgages transform the underlying acquisition loans into trust funds (see *Monroe Sav. Bank v First Natl. Bank of Waterloo*, 50 AD2d 314, 318 [1976], *lv denied* 39 NY2d 708 [1976]). Lien Law §§ 13(2) and 13(3), read together, govern the priority between mechanic's liens and mortgages; they do not govern the creation of trust funds (see *A&V 425 LLC Contr. Co. v RFD 55th St. LLC*, 15 Misc3d 196, 202-203 [Sup Ct NY County 2007]). *Weber v Welch* (246

AD2d 782 [1998]) is not to the contrary. The funds at issue there were borrowed under a mortgage-secured improvement loan for the construction of a residential dwelling and constituted trust funds.

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become effective until October 7, 2009, which was after defendant's sentencing. Since defendant received the minimum sentence permitted by law, we have no authority to reduce that sentence as a matter of discretion in the interest of justice (see CPL 470.20[6]).

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Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6332 In re Emily Rosio G.,

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

 Milagros G.,
 Respondent-Appellant,

 The Children's Aid Society, et al.,
 Petitioners-Respondents.

Randall S. Carmel, Syosset, for appellant.

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

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

 Order of disposition, Family Court, Bronx County (Karen I.
Lupuloff, J.), entered on or about October 15, 2010, which, inter
alia, upon a finding of permanent neglect, terminated respondent
mother's parental rights to the subject child and committed
custody and guardianship of the child to petitioner agency and
the Commissioner of the Administration for Children's Services
for the purpose of adoption, unanimously affirmed, without costs.

 The finding of permanent neglect was supported by clear and
convincing evidence (see Social Services Law § 384-b[7][a]). The
record shows that the agency acted diligently by issuing several

referrals for the mother to attend programs mandated by her service plan, and the mother was repeatedly reminded of her need to complete the programs in order to regain custody. Despite these diligent efforts, the mother failed to complete her service plan in that she did not complete the individual counseling requirement, despite evidence of her emotional instability, which caused the developmentally delayed child to exhibit emotional distress. Furthermore, the mother continued to deny responsibility for the conditions necessitating the child's removal and failed to gain insight into how to best accomplish her parental duties and address the child's special needs (see *e.g. Matter of Irene C. [Reina M.]*, 68 AD3d 416 [2009]).

The preponderance of the evidence demonstrates that the child's best interests were served by terminating the mother's parental rights (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child was thriving in the home environment provided by her foster mother, who tended to her special needs and wished to adopt her.

A suspended judgment was not warranted under the circumstances presented (*see generally Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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preponderance of the evidence (*Matter of Lee TT. v Dowling*, 87 NY2d 699, 703 [1996]). Upon judicial review, the inquiry is limited to whether the administrative determination is supported by substantial evidence in the record" (*Matter of Valentine v New York State Cent. Register of Child Abusers & Maltreatment*, 37 AD3d 249, 249-250 [2007]).

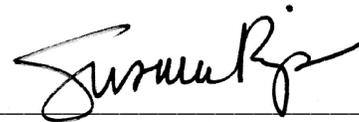
Here, OCFS' determination that respondent New York City Administration for Children's Services (ACS) proved by a fair preponderance of the evidence that petitioner had maltreated two of her former foster children, is supported by substantial evidence. The record demonstrates that one child's account was corroborated by the other child (*see id.* at 250). The fact that ACS' case consisted entirely of hearsay, whereas petitioner testified, does not preclude OCFS' determination from being supported by substantial evidence (*see id.*; *see also Matter of Khalil v New York State Cent. Register of Child Abuse & Mistreatment*, 292 AD2d 208 [2002]).

Petitioner testified at the fair hearing that she had no interest in being a foster parent again. Furthermore, the foster children at issue have been adopted by someone other than petitioner, the adoptions have been finalized by a court, and petitioner is not challenging them. Therefore, she has not

satisfied the "stigma plus" test set forth in *Matter of Lee TT. v Dowling* (see 87 NY2d at 708-709). Even assuming that petitioner had an interest of constitutional magnitude, reliance on hearsay -- even double hearsay -- does not violate due process (see *Matter of Bauer v New York State Off. of Children & Family Servs., Bur. of Early Childhood Servs.*, 55 AD3d 421, 422 [2008]; *Matter of Pluta v New York State Off. of Children & Family Servs.*, 17 AD3d 1126, 1127 [2005], *lv denied* 5 NY3d 715 [2005]).

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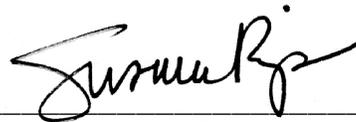


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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6338 Linda Merritt, etc., Index 603673/08
Plaintiff-Appellant,

-against-

Michael V. Blumenthal, Esq.,
Defendant-Respondent,

Brown, Raysman, Millstein, Felder
& Steiner LLP, et al.,
Defendants.

Linda Merritt, appellant pro se.

Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson
of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried,
J.), entered September 10, 2009, which granted defendants' motion
to dismiss the complaint on the ground that all of plaintiff's
claims are untimely, unanimously affirmed, without costs.

The motion court correctly applied CPLR 202, New York's
"borrowing statute," in finding that plaintiff's claims of
transactional malpractice are untimely under the governing two-
year Pennsylvania statute of limitations (see 42 Pa Consol Stat
§ 5524[3]). Plaintiff never argued before the motion court, as
she does now on appeal, that the Florida statute of limitations
should apply to her malpractice claims, or that those claims

sound in contract, rather than tort (see 42 Pa Consol Stat § 5525), and we decline to consider those arguments raised here for the first time (see *Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 570 n 1 [1993]; *Kohn v City of New York*, 69 AD3d 463, 463-64 [2010]).

The motion court likewise correctly found plaintiff's claim under Judiciary Law § 487 to be untimely under Pennsylvania's two-year statute of limitations (see 42 Pa Consol Stat § 5524). Plaintiff has failed to preserve her argument that only New York's statute of limitations – presumably three years (see CPLR 214[2]; *Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]) – may be applied, because neither Delaware nor Florida nor Pennsylvania, the states to which plaintiff claims some connection, has an analogous statute. In any event, this argument lacks merit. Application of the borrowing statute does not turn on whether suit would be possible in the foreign plaintiff's home state;

instead the statute merely seeks to apply the limitations period that would apply if the action could be brought there (see *Insurance Co. of N. Am. v ABB Power Generation*, 91 NY2d 180, 186-87 [1997]).

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Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6339 In re Christopher James A., etc.,

A Dependent Child Under
Eighteen Years of Age, etc.

Anne Elizabeth Pierre L., etc.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti
of counsel), for respondent.

Order, Family Court, Bronx County (Sidney Gribetz, J.),
entered on or about February 3, 2011, which denied respondent
mother's motion to vacate a dispositional order entered on or
about February 3, 2010, which, inter alia, upon her default in
appearing at the fact-finding and dispositional hearings,
terminated her parental rights on the ground of neglect and
transferred custody and guardianship of the child to petitioner
agency and the Commissioner of Social Services for the purpose of
adoption, unanimously affirmed, without costs.

Respondent mother's motion to vacate her default was
properly denied because she failed to establish a reasonable
excuse for her failure to appear for the fact-finding and

dispositional hearings and also failed to establish a meritorious defense to the petition to terminate her parental rights (see CPLR 5015[a][1]; *Matter of Jones*, 128 AD2d 403, 404 [1987]). She did not present detailed information or documentation to substantiate her excuse that she was prevented from appearing at the hearings due to her job as a home health aide which required her to accompany a patient to a medical appointment at which she had to wait with the patient for a long time and also due to a delay in public transportation (see *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, *lv dismissed* 15 NY3d 766 [2010]). In addition, she did not present a reasonable excuse for failing to apprise her counsel of her nonappearance (*id.*).

Respondent further failed to controvert the allegation of permanent neglect by showing that she had completed all of the required programs, maintained a suitable residence for the child, or obtained a source of income to support the child (see *Matter of Shaianna Mae F. [Tsipora S.]*, 69 AD3d 437 [2010]). In addition, respondent's delay of nearly one year in moving to vacate weighed in favor of denying the motion (see *Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]).

Respondent's argument that she was hospitalized for part of

the one-year period relevant to the petition is unpreserved for this Court's review (see *Matter of Anthony P.*, 84 AD3d 510, 511 [2011]). As an alternative holding, we reject this argument on the merits (cf. *Matter of Christopher V.*, 72 AD3d 980, 981 [2010]).

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

ENTERED: DECEMBER 15, 2011

A handwritten signature in black ink, appearing to read "Susan R.", is written over a horizontal line.

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6343N Mercedes Colwin, Index 111400/09
Plaintiff-Respondent,

-against-

Bruce Katz, M.D., et al.,
Defendants-Appellants.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellants.

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

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 16, 2011, which denied defendants' motion to compel plaintiff to submit a further or supplemental bill of particulars, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff alleges that she suffered personal injuries as a result of defendants' performance of cosmetic surgery. In her bill of particulars, plaintiff alleges that she sustained, among other things, lymphedema in her right leg resulting in "pain and tenderness in her right leg, knee, ankle and foot, restriction of motion . . . weakness, inability to bear weight, loss of function and the articulations, [and] aggravation of a preexisting latent and asymptomatic degenerative condition." Defendants moved to compel

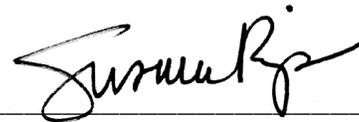
a further response to their demands, seeking a specific statement as to the injury sustained, i.e., whether the lymphedema was caused or simply aggravated by the alleged malpractice.

“The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial” (*Harris v Ariel Transp. Corp.*, 37 AD3d 308, 309 [2007]; *Twiddy v Standard Mar. Transp. Servs.*, 162 AD2d 264, 265 [1990]). It need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure (see *Harris*, 37 AD3d at 309). Not only was it permissible for plaintiff to amplify the nature of her injuries in the bill of particulars (see *Anderson v Dainack*, 39 AD3d 1065, 1068 [2007]; *Behan v Data Probe Intl.*, 213 AD2d 439, 440 [1995]; cf. *Barrera v City of New York*, 265 AD2d 516, 518 [1999]), defendants seek evidentiary matter not within the scope of a bill of particulars (see *Harris*, 37 AD3d at 309). Plaintiff’s response, which includes medical records that illuminate her preexisting injuries

or condition (see *Sobel v Midchester Jewish Ctr.*, 52 AD2d 944 [1976]), is sufficient to apprise defendants of the nature of the injury (CPLR 3043[a][6]).

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

ENTERED: DECEMBER 15, 2011

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CLERK

regulatory exception (see *Matter of Commissioner of Social Servs. v Paul C.*, 73 AD3d 469, 470 [2010], *affd* 16 NY3d 846 [2011]; *D & Z Holding Corp. v City of N.Y. Dept. of Fin.*, 179 AD2d 796, 798 [1992], *lv denied* 79 NY2d 758 [1992])).

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

ENTERED: DECEMBER 15, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6349N-

6350N-

6350NA Shamarie Young, etc., et al.,
Plaintiffs-Respondents,

Index 24749/05

-against-

New York City Health and Hospitals
Corporation, etc.,
Defendant-Appellant,

St. Luke's-Roosevelt Hospital Center,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai
Newman of counsel), for appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel),
for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.),
entered December 13, 2010, which granted defendant-appellant's
motion to renew and reargue plaintiffs' motion for, among other
things, leave to file a late notice of claim to the extent of
clarifying that it had previously granted the motion solely to
the infant plaintiff, unanimously affirmed, without costs.
Appeals from orders, same court and Justice, entered January 11,
2010 and February 8, 2010, unanimously dismissed, without costs,
as superseded by the appeal from the order entered December 13,
2010.

The motion court providently exercised its discretion in granting the motion (General Municipal Law § 50-e[5]). Defendant's possession of medical records, including a sonogram stating that the infant plaintiff's mother had severely low amniotic fluid and that intrauterine growth restriction to the fetal plaintiff should be ruled out, established actual notice of the essential facts constituting the claim within the statutory 90-day period (see *Greene v New York City Health & Hosps. Corp.*, 35 AD3d 206, 207 [2006]). Defendant's claim that the memories of its employees are no longer at their "most fresh" does not evidence substantial prejudice attributable to the delay (see *Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [2007]). Under the circumstances, the absence of a reasonable excuse for the delay is not fatal (see *Greene*, 35 AD3d at 207; *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]).

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

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

ENTERED: DECEMBER 15, 2011


CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6351N Milagros Mantilla, et al., Index 104414/07
Plaintiffs-Appellants,

-against-

Lutheran Medical Center, et al.,
Defendants-Respondents,

LMC Physician Services, P.C., et al.,
Defendants.

The Adam Law Office, P.C., New York (Richard Adam of counsel),
for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York
(Michele R. Rita of counsel), for Lutheran Medical Center and
Sampath Kumar, M.D., respondents.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C.
Mandell of counsel), for Thomas Woloszyn, M.D., respondent.

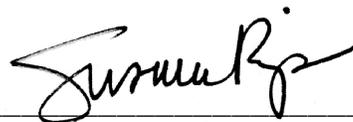
Order, Supreme Court, New York County (Alice Schlesinger,
J.), entered May 19, 2010, which denied plaintiffs' motions to
amend their complaint and bill of particulars, unanimously
affirmed, without costs.

Plaintiffs did not meet their burden, as movants, to show
the merit of their proposed new medical malpractice theory, i.e.,
that a mesh patch surgically applied to plaintiff's abdominal
wall during reconstructive surgery was known in the medical
industry to be defective, that plaintiff's mesh patch was

defective, and/or that plaintiff's mesh patch caused her harm (*Shulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [2006]). Further, plaintiffs have not reasonably explained their delay in asserting their new defective-patch theory, which was brought by motion to amend dated April 9, 2010, when their moving papers indicate that they had reason to believe the mesh was defective at the time of plaintiff's corrective surgery, performed in January 2005 (see generally *Cherebin*, 43 AD3d 364).

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

ENTERED: DECEMBER 15, 2011

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CLERK

Jackson, 98 NY2d 555, 558-559 [2002])). The age and clothing disparities among the lineup participants were not so noticeable as to call attention to defendant. The record does not support defendant's claim that the police pressured the victim into identifying someone. We have considered and rejected defendant's remaining arguments concerning the lineup.

Defendant's Fourth Amendment claim is without merit. Probable cause for defendant's arrest was amply provided by the victim's identification of the person depicted in a surveillance photograph as the perpetrator of the crime, coupled with evidence establishing that defendant was the person depicted. Defendant's challenges to the reliability of the evidence may have raised issues to be resolved at trial, had defendant chosen to go to trial, but they do not negate or undermine probable cause (see *People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003])).

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

ENTERED: DECEMBER 15, 2011

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CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6353 Raj Vohra, et al., Index 114912/08
Plaintiffs, 591158/08

-against-

Queen Anne Co., L.L.C.,
Defendant.

- - - - -

Queen Anne Co., L.L.C.,
Third-Party Plaintiff-Respondent,

-against-

Dr. Nabil Megally,
Third-Party Defendant-Appellant.

Cascone & Kluepfel, LLC, Garden City (Ajay C. Bhavnani of
counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York
(Joel M. Simon of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman,
J.), entered May 9, 2011, which, in this personal injury action,
denied third-party defendant Dr. Nabil Megally's motion for
summary judgment dismissing the third-party complaint,
unanimously reversed, on the law, without costs, and the motion
granted. The Clerk is directed to enter judgment dismissing the
third-party complaint.

Megally rented two offices in defendant/third-party
plaintiff Queen Anne's building and sublet one of the offices to

nonparty Especially For You. Plaintiff, a partner in Especially For You, allegedly injured himself when he fell into a hole located on the floor of the building's meter room. The hole, which housed the sewer drain pipe, was generally covered by a heavy piece of sheet metal. The parties dispute whether Queen Anne's superintendent gave Especially for You permission to store items in the meter room or whether that permission came from Megally, who obtained it from the superintendent. In any event, Megally made a prima facie showing of entitlement to judgment as a matter of law with evidence that it did not own, occupy, control or make special use of the meter room (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1988], *lv dismissed in part, lv denied in part* 73 NY2d 783 [1988]).

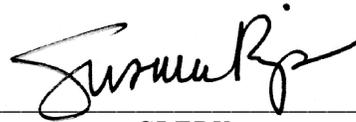
In opposition, Queen Anne failed to raise a triable issue of fact. Indeed, it is undisputed that the meter room was not part of the demised premises, and plaintiff failed to present any agreement obligating Megally to maintain or control the room or correct an unsafe condition therein. Although Especially for You had access to the room and used it for storage, Queen Anne retained a key to it and also made use of it. Even if Especially for You made special use of the room, plaintiff failed to present evidence that Megally controlled the room or Especially for You's

activities sufficient to give rise to a duty owing to Queen Anne (see *Balsam*, 139 AD2d at 297; see generally *Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254-255 [2005]). Moreover, there is no evidence that the alleged special use proximately caused plaintiff's injuries (see *Taveras v City of New York*, 59 AD3d 178 [2009]; see also *Fine v City of New York*, 303 AD2d 306 [2003], *lv dismissed* 1 NY3d 607 [2004]). Indeed, the evidence indicates that an improperly covered sewer pipe portal caused plaintiff's injury, and that Queen Anne had sole control over the portal and cover. Queen Anne's speculative argument that Especially for You might have caused the cover to shift, is insufficient to raise a triable issue of fact (see *Smith v 125th St. Gateway Ventures, LLC*, 75 AD3d 425 [2010]). Nor did Megally's alleged breach of his lease with Queen Anne raise an issue of fact, since there is no evidence that the alleged breach proximately caused plaintiff's injuries (see generally *Bonomonte v City of New York*, 79 AD3d 515, 516 [2010], *affd* 17 NY3d 866 [2011]). Lastly,

because there is no indemnification provision in the lease, there is no claim for contractual indemnity.

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

ENTERED: DECEMBER 15, 2011

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CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6354 In re Carysse R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

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

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about August 6, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree and attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations. There was competent evidence that appellant was suspended from school, that

school safety agents knew of the suspension, and that the agents thus had a duty to remove appellant from the premises.

Accordingly, the agents were performing an "official function" within the meaning of Penal Law § 195.05 when they attempted to carry out that duty. Appellant's intent to cause physical injury to an agent was readily inferable from testimony that appellant repeatedly punched and kicked the agent.

We have considered and rejected appellant's remaining claims, including her missing witness argument.

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

ENTERED: DECEMBER 15, 2011

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CLERK

Tom, J.P., Friedman, Freedman, Richter, JJ.

6355 Patrick Sanders, Index 16640/07
Plaintiff-Appellant,

-against-

Aqua Chlor Enterprises, Inc.,
Defendant-Respondent,

IMS Hospital Services, Inc.,
Defendant.

Uwem Umoh, Brooklyn, for appellant.

Faust Goetz Schenker & Blee LLP, New York (Peter Kreymer of
counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),
entered March 5, 2010, which, in this personal injury action,
granted defendant Aqua Chlor Enterprises, Inc.'s motion for,
among other things, summary judgment dismissing the complaint and
imposed sanctions against plaintiff's counsel in the amount of
\$150, and awarded defendant costs and attorney's fees in the
amount of \$500, unanimously modified, on the law, to vacate the
imposition of sanctions and attorney's fees, and otherwise
affirmed, with costs against plaintiff-appellant.

Defendant Aqua Chlor made a prima facie showing of
entitlement to judgment as a matter of law by submitting evidence
- including its owner's and plaintiff's deposition testimony and

New York City Department of Finance records – that defendant IMS, not Aqua Chlor, owned the lot adjoining the sidewalk where plaintiff alleges he tripped and fell. In opposition, plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Indeed, plaintiff failed to submit any evidence that Aqua Chlor owned the subject lot. It is unclear whether the complaint also was dismissed as against IMS. In any event, there would be no basis to dismiss as against IMS, which has not answered, because there is evidence that it owned the lot.

The motion court improperly found that plaintiff's continued prosecution of this action against Aqua Chlor was frivolous; and thus, costs, attorney's fees and sanctions were not warranted. The attorney had a reason not to sign a stipulation of

discontinuance before ascertaining exactly where his client fell.

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.

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The lease between the City and the Transit Authority establishes that the City was not responsible for maintenance of the subway station.

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

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CLERK

Cabatu, a specialist in physical and rehabilitation medicine. Pursuant to evaluations by other physicians, he had knee surgery on December 2008.

Defendants met their initial burden of demonstrating absence of significant limitation of use of plaintiff's left knee by submitting a report from radiologist Peter Ross, M.D. showing only degenerative changes in the menisci in an otherwise normal knee, and a December 2009 report from orthopedist Gregory Montalbano, M.D. showing that objective tests revealed full range of motion, that plaintiff sustained a left thigh contusion that had resolved, and that plaintiff's obesity and patellofemoral syndrome contributed to plaintiff's knee condition (see *Cabrera v Gilpi*, 72 AD3d 552 [2010]).

In response, plaintiff submitted the report of orthopedist Stanley Liebowitz, M.D. showing that plaintiff saw him on October 29, 2008 complaining that daily activities (standing, walking, stair climbing, and his job duties as a bus driver) increased the level of knee discomfort, and a diagnosis of post-traumatic tenosynovitis based on the doctor's observations of mild effusion and tenderness. Pursuant to a radiologist's MRI findings of joint effusion and tears in the lateral collateral ligament and anterior cruciate ligament, Dr. Liebowitz performed knee surgery

in December 2008, during which he discovered a "crush injury" of the medial femoral condyle, "extensive synovitis," and a torn and lax anterior cruciate ligament with positive anterior drawer sign and Lachman testing. A February 2009 report of Dr. Cabatu noted that plaintiff still complained of pain, especially when bending or squatting, and tenderness on palpation. Plaintiff testified at his November 2009 deposition that he still saw Dr. Cabatu for physical therapy, and that he could not pick up his children, climb stairs, bend, run, exercise, or stand for long periods without feeling knee pain. The report of orthopedist Paul Post, M.D., who examined plaintiff in October 2010, noted a 20-degree limitation in flexion of the knee, and tenderness and thickness of the synovium. The evidence of limitations, and injuries set forth in the MRI and operative reports, raise a factual issue as to existence of a significant limitation of use of the knee (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

The evidence of plaintiff's treatment, which began days after the accident, including Dr. Liebowitz' sufficiently contemporaneous findings during surgery of a crush injury and positive anterior drawer sign and Lachman testing, raises an issue of fact as to causation (see *Salman v Rosario*, 87 AD3d 482 [2011]). Plaintiff adequately addressed defendants' evidence of

degenerative and pre-existing conditions (see *Perl v Meher*, __ NY3d __, NY Slip Op 8452 [2011]; *Pommells v Perez*, 4 NY3d 566, 580 [2005]).

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

ENTERED: DECEMBER 15, 2011

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CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6360 Tirson Baez, etc., et al., Index 350271/09
Plaintiffs-Appellants,

-against-

May H. Boyd, et al.,
Defendants-Respondents.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellants.

Crisci, Weiser & Huenke, New York (Joy R. Simon of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 28, 2010, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting the affirmed reports of their medical experts. Their orthopedic expert reported ranges of motion for the subject ankle and foot, compared them to the norm, found that plaintiff had no range-of-motion limitations, and concluded that his injuries had resolved (see *Glover v Capres Contr. Corp.*, 61 AD3d 549, 549 [2009]). Their other physician

reviewed the X rays and MRIs of the subject areas and found that the infant plaintiff had sustained no fracture.

Plaintiffs, however, raised a triable issue of fact by submitting the affirmed report of the infant plaintiff's treating orthopedist, who affirmed that his review of the infant plaintiff's MRI films revealed a nondisplaced fracture of the calcaneus (heel bone) and a presumed Salter-Harris I fracture of the distal fibula. A fracture, by definition, constitutes a "serious injury" under the statute (Insurance Law § 5102[d]; *Elias v Mahlah*, 58 AD3d 434, 434-435 [2009]). Although the equivocal finding of a "presumed" Salter-Harris I fracture, standing alone, may not satisfy the serious injury threshold (see *Glover*, 61 AD3d at 550), if the trier of fact determines that a serious injury has been sustained, it may award damages for all injuries causally related to the accident, even those that do not meet the threshold (see *Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

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

ENTERED: DECEMBER 15, 2011

A handwritten signature in black ink, appearing to read "Justice Rivera", is written in a cursive style.

CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6361 In re Kamilah Aminah Abdulla K.,
etc., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Jarmila O., etc.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

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

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 12, 2010, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the children's future (Social Services Law § 384-b[7][a]; *Matter of Fernando Alexander B. v Simone Anita W.*, 85 AD3d 658, 659

[2011]). The evidence established that in the four years since the older child was removed from the mother's care, and in the two years since the younger child was removed, the agency acted diligently by issuing numerous referrals for the mother to obtain housing, submit to drug testing, and attend drug treatment programs mandated by her service plan and it repeatedly reminded her of the importance of compliance with the service plan. Although the mother completed mandatory anger management and parenting skills classes and consistently visited the children, she was terminated from the housing programs and never obtained suitable housing, either never attended or failed to complete any of the seven drug treatment programs to which she was referred, and refused to comply with the overwhelming majority of drug testing referrals. Moreover, she failed the five drug tests that she took.

A preponderance of the evidence establishes that it is in the best interests of the children to terminate respondent's

parental rights to them (see *Matter of Khalil A. [Sabree A.]*, 84 AD3d 632 [2011]). The children have been residing in a stable and nurturing environment with their foster mother (their maternal grandmother), who is willing and able to adopt them.

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

ENTERED: DECEMBER 15, 2011

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CLERK

himself to the officers, and informed them that defendant, who continued to flee, had just "robbed the lady of her chains." The difference in behavior between the pursuer and the pursued made it obvious which man was the criminal (see e.g. *People v Lopez*, 258 AD2d 388 [1999], *lv denied* 93 NY2d 1022 [1999]), and defendant's arguments to the contrary are without merit. Regardless of whether the police already had probable cause at this point, the level of suspicion clearly escalated to that level when the police found defendant in the backyard of a residence hiding under a children's wading pool (see e.g. *People v Reyes*, 272 AD2d 244 [2000], *lv denied* 95 NY2d 907 [2000]), and when he put up a struggle (see e.g. *People v Flow*, 37 AD3d 303, 304 [2007], *lv denied* 9 NY3d 843 [2007]).

We have considered and rejected defendant's arguments concerning the resubmission of certain charges to the grand jury. Any error was rendered harmless by defendant's acquittal of those

charges (see e.g. *People v Grant*, 210 AD2d 166 [1994], lv denied 85 NY2d 862 [1995]). Nothing in the record supports defendant's claim that he was nonetheless prejudiced.

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

ENTERED: DECEMBER 15, 2011


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for 1992 notes that he began residing in the apartment "as of 10/1/92" - less than two years before his father died. Thus, DHCR's determination that petitioner failed to demonstrate that the apartment was his primary residence for two years before his father's death was rationally based in the record and was not arbitrary and capricious (see *Taylor v New York State Div. of Hous. & Community Renewal*, 73 AD3d 634 [2010]; *Matter of Greichel v New York State Div. of Hous. & Community Renewal*, 39 AD3d 421, 422 [2007]).

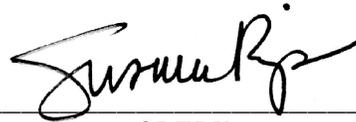
Notwithstanding that respondent Southbridge Towers, Inc. accepted maintenance payments from petitioner and permitted him to occupy the apartment for more than 13 years after his father died, estoppel cannot be invoked to prevent DHCR from carrying out its statutory duties (*Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]; *Taylor*, 73 AD3d at

634).

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

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

ENTERED: DECEMBER 15, 2011

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damages contemplated by the parties.

Affording the complaint a liberal construction and according plaintiff the benefit of every possible inference, as we must on a motion to dismiss (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff sufficiently pleaded the breach of contract cause of action. The documentary evidence submitted on the motion does not conclusively establish a defense to the claim. Indeed, the affidavits submitted by defendant "do no more than assert the inaccuracy of plaintiff['s] allegations . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [2007]). Similarly, the e-mails and other documentary evidence do not conclusively establish the terms of the parties' oral contract.

Defendant's claim that it understood the oral agreement, and the parties' various e-mail exchanges, to require it only to mail the notice of annual meeting to Street Holders of CLST's stock, is insufficient to warrant dismissal of the breach of contract cause of action. Indeed, the parties' different interpretations need to be considered at trial where their credibility can be weighed. Defendant's claim that there was no meeting of the minds regarding the mailing of the notice is merely another way

of disputing plaintiff's allegations regarding the parties' agreement. Defendant's contention that plaintiff improperly modified the parties' oral agreement by requesting it to mail the notice also fails, since it assumes that the agreement did not include the task of mailing the notice.

Supreme Court properly declined to dismiss plaintiff's request for consequential damages, as the complaint sufficiently alleges that the consequential damages plaintiff seeks were contemplated by the parties at the time of contracting (see *Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462-463 [2010]). Although plaintiff may not in the end be able to prove its damages with reasonable certainty, "a determination to that effect at this juncture would be premature" (*Morris v Putnam Berkley, Inc.*, 259 AD2d 425, 426 [1999]).

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

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

ENTERED: DECEMBER 15, 2011



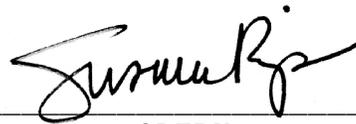
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the two buildings, she fell into a hole near the curb when she turned left to avoid an icy spot on the sidewalk. This testimony was consistent with the Big Apple map, which depicted a broken or raised curb in the area directly in front of the recessed portion between the buildings and with plaintiff's testimony that the hole into which she fell must have been filled in with cement after her fall. Moreover, even if plaintiff exited from one of the other buildings, the Big Apple map indicated that a hole was located on the sidewalk to the left of one entrance, and a sidewalk obstruction was located to the left of the other entrance. Accordingly, the record presents questions as to whether defendant had prior written notice of the condition (*Quinn v City of New York*, 305 AD2d 570, 571 [2003] ["(w)here there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the

alleged defect is designated on the map, the question should be resolved by a jury"]; see *Cruzado v City of New York*, 80 AD3d 537, 538 [2011]).

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ENTERED: DECEMBER 15, 2011

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(see Real Property Law § 232-c; *Teri-Nichols Inst. Food Merchants, LLC v Elk Horn Holding Corp.*, 64 AD3d 424 [2009], *lv dismissed* 13 NY3d 904 [2009]; *Thirty-Third Equities Co. v Americo Group*, 294 AD2d 222 [2002]). Defendant submitted no evidence in support of his argument that he owes no rent because he was fraudulently induced to enter the lease.

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

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service of a copy of this order.

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

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

ENTERED: DECEMBER 15, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written above a horizontal line.

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Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6372N Starlene Robles, et al., Index 8242/05
Plaintiffs, 83695/09
84140/09

-against-

Microtech Contracting Corp., et al.,
Defendants.

[And a Third-Party Action]

Quest Communications Company, LLC, etc.,
Second Third-Party
Plaintiff-Appellant,

-against-

Kajima Construction Services, Inc., et al.,
Second Third-Party
Defendants-Respondents.

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany
(Jessica A. Desany of counsel), for appellant.

Malapero & Prisco LLP, New York (Won J. Choi of counsel), for
respondents.

Order, Supreme Court, Bronx County (Howard R. Silver, J.),
entered October 8, 2010, which granted the motion of second
third-party defendants Tokio Marine & Nichido Fire Insurance Co.,
Ltd., f/k/a Tokio Marine and Fire Insurance Company, Limited, and
Tokio Marine Management, Inc. (collectively Tokio Marine) to
sever the second third-party action from the main action,
unanimously modified, on the facts, to the extent of deleting so

much of the order as states "the fourth-party action is severed from the main action" and substituting therefor "the second third-party action against Tokio Marine is severed from the main action," and otherwise affirmed, without costs.

The court properly exercised its discretion in severing the second third-party action against Tokio Marine from the main action to avoid the prejudice that would result from the jury's awareness of the existence of liability insurance (see *Kelly v Yanotti*, 4 NY2d 603, 607 [1958]; *Chunn v New York City Hous. Auth.*, 55 AD3d 437 [2008]).

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

ENTERED: DECEMBER 15, 2011


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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

4913
Ind. 6425/05

x

The People of the State of New York,
Respondent,

-against-

Anthony Griffin,
Defendant-Appellant.

x

Defendant appeals from a judgment of the Supreme Court, New York County (Micki A. Scherer, J., at substitution of counsel; Edward J. McLaughlin, J., at plea and sentencing), rendered October 19, 2006, convicting him of robbery in the first degree and attempted robbery in the first degree, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Anthony Griffin, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea and Alan Gadlin of counsel), for respondent.

ACOSTA, J.

Although a trial court has broad discretion to control its calendar, such discretion must be administered in an even-handed manner. While we understand the frustrations caused by the numerous delays in this case, under the circumstances, the court's discharge of defendant's counsel without consulting defendant was an abuse of discretion and interfered with defendant's right to counsel.

In February 2006, defendant was charged with robbery and attempted robbery for two separate offenses involving Starbucks stores. During the first five month-period after arraignment, multiple assistant district attorneys represented the People in this matter. The first ADA who was assigned to try this case left the prosecutor's office during this period. The case was delayed so that a new ADA could familiarize himself with it. Approximately six weeks after his assignment to the case, the new ADA had admittedly done very little to prepare the case. Furthermore, during the first-five month period, the People sought several adjournments for their unavailable police witnesses. Moreover, there were no court appearances in April 2006 because of the ADA's unavailability.

On July 10, 2006, with the case on for hearing and trial, the assigned ADA answered "not ready" because two police

witnesses were unavailable, and requested an adjournment until July 25. David Cohen of The Legal Aid Society, who had been representing defendant since his arraignment on February 8, 2006, then informed the court that he was leaving Legal Aid and requested that the next scheduled date be a control date "so we can bring you the new attorney who will be trying the case." The court declined the request and directed that a new attorney come to court that day or the next to meet with defendant and confer with Mr. Cohen so that the case could proceed on July 25.

Mr. Cohen stated that two lawyers, who Legal Aid thought were suitable to replace him, would be back from vacation at the end of July. Remarking that there were more than two sufficiently experienced Legal Aid lawyers and that Cohen must have informed his supervisors of his departure prior to that day, the court insisted that a new lawyer be assigned as it had instructed. Mr. Cohen acknowledged that he had previously given notice of his resignation but argued that this was a serious case with a potential life sentence and two weeks would be insufficient time for a new lawyer to prepare for trial. The court disagreed.

Mr. Cohen's supervisor informed the court that they were not going to be ready for trial on the next court date, and if the court thought that The Legal Aid Society should be relieved, it

should do so. Emphasizing the seriousness of the case and the complicated nature of the charges, and stating that there were not many lawyers who could enter the case and be ready to try it in two weeks, the supervisor told the court that the "one or two lawyers" he had in mind for the assignment would "be on vacation sporadically through the middle of August" and could be ready to try the case "some time in late August or early September."

The court criticized The Legal Aid Society's procedures for the substitution of lawyers as not "professional or responsible." Stating that Legal Aid had an "enormous" turnover rate, it suggested that Legal Aid should assign two attorneys to every case. The supervisor acknowledged that Cohen had given notice approximately 10 days before, but noted that he had been trying to achieve a disposition in the interim. He also noted that the adjournment request was a standard one in the criminal justice system and was neither unreasonable nor unprofessional. The court announced, "Legal Aid is relieved. That is also your request." In response, the supervisor stated, "[W]hat I asked you to do is if you were going to force us to be ready for trial on July 25th, that what you should do is relieve us because we're not going to be ready."

Throughout this colloquy defendant, who was facing a life term, was never asked for his input. Rather, the case was

adjourned to July 12, 2006 for the assignment of 18B counsel. Significantly, notwithstanding the court's insistence that the case proceed to trial immediately, the court did not hold the People to the same standard it applied to Legal Aid when they sought additional adjournments.

The case was eventually transferred to another judge in October 2006, when defendant pleaded guilty to robbery in the first degree and attempted robbery in the first degree for a promised sentence of concurrent terms of 20 years to life. Shortly thereafter, defendant filed a pro se motion to withdraw his plea asserting that his plea was "induced," that the court was biased and that his attorney was ineffective. The motion was denied and defendant was sentenced on October 19, 2006.

Although an indigent defendant's constitutional right to the assistance of counsel "is not to be equated with a right to choice of assigned counsel" (*People v Sawyer*, 57 NY2d 12, 18-19 [1982], *cert denied* 459 US 1178 [1983]), "that distinction is significantly narrowed once an attorney-client relationship is established" (*People v Childs*, 247 AD2d 319, 325 [1998], *lv denied* 92 NY2d 849 [1998], citing *People v Knowles*, 88 NY2d 763, 766-767 [1996]). Consequently, once an attorney-client relationship has been formed between assigned counsel and an indigent defendant, the defendant enjoys a right to continue to

be represented by that attorney as counsel of his own choosing (see *People v Arroyave*, 49 NY2d 264, 270 [1980]).

This right "is qualified in the sense that a defendant may not employ [it] as a means to delay judicial proceedings" (*id.* at 271). Indeed, whether to grant or deny a request for an adjournment in this situation is entrusted to the sound discretion of the trial court (*id.*; *People v Torres*, 60 AD3d 584 [2009], *lv denied* 13 NY3d 750 [2009]). A court, however, may not interfere with this right arbitrarily (*People v Knowles*, 88 NY2d at 766). Thus, "judicial interference with an established attorney-client relationship in the name of trial management may be tolerable where when the court first determines that counsel's participation presents a conflict of interest or where defense tactics may compromise the orderly management of the trial or the fair administration of justice" (*id.* at 766-767). The court must make a "threshold finding[] that [the attorney's] participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense" (*id.* at 767). Such findings must demonstrate that interference with the attorney-client relationship was "justified by overriding concerns of fairness or efficiency" (*id.* at 769).

In this case, defendant had a long-standing attorney-client

relationship with The Legal Aid Society. The attorney of record was Seymour James, the Attorney-in-Charge of the Criminal Defense Division of The Legal Aid Society. David J. Cohen, Esq., of counsel, had represented defendant during the entire five-month period between arraignment and the time the court relieved The Legal Aid Society and assigned new counsel. During that time, The Legal Aid Society, through Cohen, had filed all of the necessary motions and had engaged in protracted negotiations with the People for a plea resolution of this case. In addition to Cohen, this Court recognizes that the Society had relied on the services of many of its employees, including supervisors, investigators and social workers, in preparing for the defense.

During this same five-month period, as noted above, multiple assistant district attorneys represented the People in this matter and requested adjournments resulting in numerous delays. The court, however, treated the People much differently when they requested time for reassigned ADA's.

The court's improvident exercise of discretion reflected a difference in treatment of the Legal Aid Society as compared to the People. This was made abundantly clear by the disparaging remarks made by the court about The Legal Aid Society during the July 10 colloquy. In addition, although it was the People who requested lengthy adjournments in this case, the court wrongly

castigated Cohen for these delays. It should also be noted that, although the ADA requested only a two-week adjournment on July 10 due to the unavailability of two police witnesses, one of those witnesses was out on sick leave and would not be available until late August. The Legal Aid Society would have had sufficient time to prepare a new attorney to take over defendant's case and be ready for trial.

Thus, contrary to the dissent, the court improperly interfered with an established attorney-client relationship between defendant and The Legal Aid Society. There was no reason the court could not have accommodated the single request for an adjournment to allow a new attorney sufficient time to prepare for trial in this serious and complicated case, particularly since the People would not be ready to proceed during that time. Moreover, especially in light of the anticipated reassignment of this case in the DA's office due to the ADA's pre-planned paternity leave, the proposed single delay neither affirmatively delayed the proceedings in this case nor prejudiced the People. Therefore, the court erred in relieving The Legal Aid Society in this case over defense objection (*People v Knowles*, 88 NY2d at 769 ["the court interfered with an existing attorney-client relationship"]; *People v Espinal*, 10 AD3d 326 [2004], lv denied 3 NY3d 740 [2004]; *People v Burton*, 28 AD3d 203 [2006]).

Of course by so holding in this case we do not mean to suggest that The Legal Aid Society or any litigant should have ultimate control of a court's calendar. Indeed, we have no interest in micromanaging the trial courts. Likewise, courts should be hesitant about micromanaging the institutional providers of legal services. Furthermore, we expect trial courts to treat institutional indigent defense providers with the same courtesy and respect as they treat the district attorney or non-institutional attorneys. Although courts in certain circumstances have the discretion to substitute counsel, a judge simply cannot treat litigants and their counsel differently without a basis in reason or fact. To do so is the definition of caprice and arbitrariness. Thus, although courts for the most part are mindful of the general structure and case assignment procedures of large organizations, the record here indicates that the trial court at issue was not. Significantly, in a case such as the present one, a defendant should not be treated as a mere spectator.

Since the doctrine of harmless error is inapplicable to a violation of a defendant's right to counsel of his own choosing, this error was per se reversible (*People v Arroyave*, 49 NY2d at 273; *People v Espinal*, 10 AD3d at 330). Nor was the issue waived

by defendant's guilty plea (see *People v Hansen*, 95 NY2d 227, 230-231 [2000] ["A guilty plea does not . . . extinguish every claim on appeal. The limited issues surviving a guilty plea in the main relate [,inter alia,] to rights of a constitutional dimension that go to the very heart of the process . . . The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not" [internal citations and footnotes omitted]). In any event, as noted above, the court did not include defendant in the discussion to assign new counsel. Therefore, it cannot be said that defendant knowingly and voluntarily waived the issue.

Nor do we find that counsel's plea in desperation, that Legal Aid be relieved if an adjournment was not granted, is dispositive of the issue as the dissent suggests. What the dissent fails to recognize is that counsel was placed between the proverbial "rock and a hard place." Inasmuch as it could not be ready in two weeks in a complex case involving a life sentence, the Legal Aid supervisor had no choice but to ask to be relieved when the court denied his request for a reasonable adjournment, which effectively resulted in removal. Contrary to the dissent's view, that counsel never stated that denying his request infringed on defendant's right to counsel of choice does not

prevent this Court from reviewing the issue. It was abundantly clear by the colloquy that counsel was seeking to protect defendant's right. In any event, unlike *People v Tineo* (64 NY2d 531, 535-536 [1985]), where the Court of Appeals was precluded from deciding the issue on preservation grounds, this Court may decide it in the interest of justice.

We have reviewed the additional claims raised by appellate counsel as well as those raised in defendant's pro se supplemental brief and find them to be without merit, unpreserved or are premised on allegations of fact outside the record.

Accordingly, the judgment of the Supreme Court, New York County (Micki A. Scherer, J., at substitution of counsel; Edward J. McLaughlin, J., at plea and sentencing), rendered October 19, 2006, convicting defendant of robbery in the first degree and attempted robbery in the first degree, and sentencing him to concurrent terms of 20 years to life should be reversed, on the law, and the matter remanded for further proceedings.

All concur except Sweeny and Moskowitz, JJ.
who dissent in part in an Opinion by Sweeny,
J.

SWEENY, J. (dissenting in part)

I concur with the majority to the extent it, without discussion, finds that the sentencing court properly denied defendant's motion to withdraw his plea without a hearing (see *People v Frederick*, 45 NY2d 520 [1978]).

I dissent from its decision to vacate the plea on the ground that appellant was allegedly denied his right to counsel, i.e., because he was no longer represented by an attorney from the Legal Aid Society. There is no basis for this argument.¹ It cannot be said that, as a matter of law, the court abused its discretion in requiring Legal Aid to assign another staff attorney to represent defendant and to have that attorney ready to proceed to trial within two weeks from that point. As the majority concedes, a judge must be afforded great discretion in the handling of her calendar. The decision whether to grant an adjournment is ordinarily committed to the sound discretion of the trial court (*People v Spears*, 64 NY2d 698, 699-700[1984]). A court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice

¹The attorney who was actually handling this case was not removed - he resigned from Legal Aid. Rightfully so, the majority claims no interference with the attorney-client relationship as a result of this.

(see *People v Keitt*, 60 AD3d 501 [2009], *lv denied* 12 NY3d 917 [2009]).

Here, the record clearly reflects that the court did not improperly remove Legal Aid from the case or otherwise interfere with the attorney-client relationship. The court was advised on the date in question that the assigned staff counsel from Legal Aid had resigned. This fact was known by the Legal Aid attorney and supervisor ten days prior to notifying the court. It directed Legal Aid to assign another of its staff attorneys to be ready for trial within two weeks, thus giving Legal Aid more than three weeks time to assign a different staff attorney and prepare for trial. Legal Aid demurred and asked to be relieved. This request was granted and new counsel was assigned. As a result, there was no removal and clearly no violation of the attorney-client relationship. Since the majority agrees that defendant's subsequent plea was properly entered, there is no basis to now vacate it.

While there were unforeseen scheduling difficulties that arose after new counsel was appointed which further delayed commencement of the trial, the majority unfairly uses these delays to bootstrap its criticism of the court. The question of whether the court providently exercised its discretion must be considered in relation to the circumstances that existed at the

time the assigned staff attorney resigned and should not be influenced by subsequent events. Notably, the majority takes a rather one-sided view of the reasons for the numerous delays in the handling of this case and the court's exasperation with them. While the majority outlines the delays occasioned by the People, a review of the limited record before us demonstrates that there were also delays occasioned by defendant's counsel.

Significantly, the record clearly reflects that the assigned staff attorney and his supervisor made no attempt to explain to the court with any particularity why another Legal Aid attorney, with the assistance of outgoing staff attorney, could not prepare for trial in two weeks. Rather, the assigned staff attorney and his supervisor stressed the seriousness of the crimes charged and the severity of the authorized sentence should defendant, a persistent felon, be convicted. At no time did either attorney argue the intricacies of the case, including the number of witnesses, the volume of material involved, or the complexity of issues of law which potentially could arise during the trial.

In addition, during discussions with the court over the assignment of a new Legal Aid staff attorney and the time necessary for that attorney to be ready for trial, neither the assigned Legal Aid staff attorney nor his supervisor raised the issue with the court, prior to requesting that Legal Aid be

relieved, that such an action would be an interference with defendant's right to be represented by counsel of his choosing.

The majority's criticism of the court for not consulting with the appellant about relieving Legal Aid and appointing 18-B counsel is unfounded. It was Legal Aid who presented the court with the conundrum that it should be relieved if it was not granted more than a two-week adjournment. There is no evidence that any Legal Aid attorney, including the assigned staff attorney, discussed this with the defendant before they presented this argument to the court. Moreover, given defendant's persistent felony status, it is difficult to believe that he was not experienced enough in the criminal justice system to make himself heard had he chosen to do so.

Of particular note is the fact that, when defendant did enter a plea, he did so months later, after being appointed new counsel and engaging in extensive discussions between himself, his counsel, the prosecutor and the new trial judge. At no time during any of the subsequent trial court proceedings did

defendant assert that his plea should be vacated because the previous judge improperly removed the Legal Aid Society. The majority is therefore creating an issue where none exists.

The conviction should be affirmed.

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

ENTERED: DECEMBER 15, 2011


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