SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 2, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7312 Osvaldo Mendoza, Index 310188/08
Plaintiff-Appellant, 84087/09

-against-

Velastate Corp.,
Defendant-Respondent.
- - - - -
Velastate Corp.,
Third-Party Plaintiff-Respondent,

-against-

Thrift Land USA of Yonkers Inc.,
Third-Party Defendant-Respondent.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Velastate Corp., respondent.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Thrift Land USA of Yonkers Inc., respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered August 10, 2011, which granted defendant's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for summary judgment as to liability on his

Labor Law § 240(1) claim, unanimously modified, on the law, to deny the cross motion, and otherwise affirmed, without costs.

Plaintiff was injured while engaged in his duties as an employee of third-party defendant Thrift Land USA of Yonkers, Inc. (Thrift), which operates a warehouse on property leased from defendant/third-party plaintiff Velastate Corp. Plaintiff moved for summary judgment as to liability on his claim under Labor Law § 240(1), and Velastate cross-moved for summary judgment dismissing the complaint on the ground that it was an alter ego of plaintiff's employer (Thrift) and, as such, immune from being sued by plaintiff under Worker's Compensation Law §§ 11 and 29(6) (*see Shine v Duncan Petroleum Transp.*, 60 NY2d 22, 28 [1983] [Cooke, Ch. J., concurring]). Supreme Court denied plaintiff's motion and granted Velastate's cross motion, and plaintiff has appealed.

The cross motion should have been denied. In this action, Velastate is asserting a third-party claim for indemnity and contribution against Thrift. The pendency of a claim asserted in litigation by one corporation against the other suggests, on its face, that the entities have at least some adverse interests and, in the absence of any explanation, it is impossible to conclude as a matter of law that Velastate and Thrift, however

they may be related, "function[] as one company" and "share . . . a common purpose" (*Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529 [1st Dept 2011]) to such an extent that they should be considered alter egos.

Since it cannot be determined at this juncture whether Velastate is entitled to immunity under the Worker's Compensation Law, plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim must be addressed on the merits. We find that the record raises issues of fact as to whether plaintiff was the sole proximate cause of his injuries. Specifically, the affidavits and depositions in the record give conflicting accounts of whether plaintiff freely chose the equipment he was using for his work when he was injured, used the equipment with his manager's knowledge and tacit approval, or was directed to use the equipment by his manager. Accordingly, we affirm the denial of plaintiff's summary judgment motion.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

7566-
7567 In re Bear, Stearns & Co., Inc., etc., et al., Petitioners-Respondents, Index 650125/11

-against-

International Capital & Management Company LLC, Respondent-Appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Paul D. Sarkozi of counsel), for appellant.

Freshfields Bruckhaus Deringer US LLP, New York (Gabrielle Gould of counsel), for respondents.

Amended and superseding judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered October 25, 2011, awarding petitioners a total amount of $339,698.94, and bringing up for review an order and judgment (one paper), same court and Justice, entered June 20, 2011, which granted the petition to confirm the arbitration award, dated January 13, 2011, insofar as it incorporated by reference an order directing respondent to pay petitioners $316,922.53 in attorneys' fees, and denied respondent's motion to vacate or modify the award of attorneys' fees, unanimously affirmed, without costs. Appeal from order and judgment (one paper), entered June 20, 2011, unanimously

dismissed, without costs, as subsumed in the appeal from the amended and superseding judgment.

In this proceeding brought under article 75 of the CPLR, the panel in the underlying arbitration, operating pursuant to the rules of the Financial Industry Regulatory Authority (FINRA), did not exceed its powers or violate a strong and well-defined public policy by awarding attorneys' fees to petitioners Bear, Stearns and its affiliates, who were the respondents in the arbitration (*see Matter of Goldberg v Thelen Reid Brown Raysman & Steiner LLP*, 52 AD3d 392 [1st Dept 2008], *lv denied* 11 NY3d 749 [2008]). In contrast to the litigants in *Matter of Matza v Oshman, Helfenstein & Matza* (33 AD3d 493 [1st Dept 2006]) and *Matter of Stewart Tabori & Chang (Stewart)* (282 AD2d 385 [1st Dept 2001], *lv denied* 96 NY2d 718 [2001]), respondent International Capital, which was the petitioner in the arbitration, demonstrated its consent to the imposition of attorneys' fees on multiple occasions throughout the arbitration. International Capital sought an award of attorneys' fees in both its initial pleadings and in amended pleadings which it filed two years later. It agreed to arbitration pursuant to FINRA rules, which specifically permit an award of attorneys' fees as a sanction for discovery abuse, of which it was accused by the Bear, Stearns parties (*see*

Matter of Warner Bros. Records (PPX Enters.), 7 AD3d 330, 330-331 [1st Dept 2004]). During pre-hearing discovery, which took more than two years and required the Bear, Stearns parties to produce millions of pages of documents, International Capital twice complied without objection to the panel's direction that it pay the Bear, Stearns parties attorneys' fees.

Moreover, during the hearing International Capital failed to object to petitioners' repeated request for fees or withdraw its own fee request. International Capital's last-minute attempt to withdraw consent was ineffectual. It waited until its closing statement at the conclusion of the proceedings before withdrawing its own claim for attorneys' fees, by which time it was apparent that the panel would award the Bear, Stearns parties attorneys' fees they had incurred in defending claims that International Capital withdrew only after discovery was completed. In any event, it is clear from the record that the panel's award amounted to a sanction for discovery abuse that was authorized by the FINRA rules.

The Decision and Order of this Court entered herein on June 14, 2012 is hereby recalled and vacated (*see* M—3301 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

7571 William Glazier, et al., Index 103482/10
Plaintiffs-Respondents,

–against–

Lyndon Harris, et al.,
Defendants-Appellants,

Robert A. Rimbo, et al.,
Defendants.

_____

Satterlee Stephens Burke & Burke LLP, New York (James J. Coster of counsel), for appellants.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 1, 2011, which, to the extent appealed from, denied defendants Lyndon Harris, Lee Wesley, and St. John's Lutheran Church's motion to dismiss the causes of action for defamation as against them, unanimously modified, on the law, to grant the motion as to Wesley, and otherwise affirmed, without costs.

The complaint states a cause of action for defamation as against defendants Harris and St. John's Lutheran Church since it is pleaded with the required specificity (CPLR 3016[a]), identifying "the particular words that were said, who said them

and who heard them, when the speaker said them, and where the words were spoken" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). That every alleged defamatory statement set forth in the complaint is not enclosed in quotation marks does not, without more, render the complaint defective (*see Moreira-Brown v City of New York*, 71 AD3d 530 [2010]).

The challenged statements are actionable as "mixed opinions," since they imply that the opinions are based upon facts unknown to the church council members who heard the statements (*see Guerrero v Carva*, 10 AD3d 105, 112 [2004]). In the context of the entire publication, the unmistakable import of Harris's statements is that plaintiffs engaged in inappropriate conduct, essentially amounting to exerting undue influence over a parishioner and stealing from the church, and accordingly cannot be trusted.

The alleged defamatory statements state a cause of action for slander per se, since they may arguably impugn plaintiffs' reputations in their trade, business or profession, in which case special damages need not be alleged or proven (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]).

The complaint fails, however, to state a cause of action for

defamation as against Wesley, since it does not set forth "*in haec verba* the particular defamatory words claimed to have been uttered by [him]" (*see Gardner v Alexander Rent-A-Car*, 28 AD2d 667 [1967]). The only allegedly defamatory statements attributed to Wesley are that "he had been present with defendant[] Harris, during [a] visit to Ms. Lilli Jaffe's residence," and that "plaintiffs had been visiting Ms. Jaffe and taking care of her to the exclusion of other parties such as himself." Neither of these statements is actionable. Plaintiffs otherwise allege that Wesley "confirmed" Harris's statements to the council members at the retreat. Contrary to plaintiffs' contention, there is no basis for waiting for discovery to learn the particular words that they failed to plead (*see BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [2009]).

The Decision and Order of this Court entered herein on May 8, 2012 is hereby recalled and vacated (*see* M—2701 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7619-
7620 Sule Cabukyuksel, et al., Index 108356/08
Plaintiffs,

-against-

Ascot Properties, LLC,
Defendant.
- - - - -
Laskin Law PC,
Nonparty Petitioner-Respondent,

-against-

Marc E. Verzani,
Nonparty Respondent-Appellant.

_____

Glenn Backer, New York, for appellant.

Laskin Law PC, Mineola (Michael B. Grossman of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 25, 2011, which granted nonparty Laskin Law P.C.'s petition to enforce an attorney's lien in the amount of $233,333.33, or one third of the settlement amount obtained by nonparty respondent Marc E. Verzani, and denied Verzani's cross motion to dismiss the petition, unanimously reversed, on the law, with costs, and the petition denied and dismissed. Appeal from order, same Court and Justice, entered December 13, 2011, which, upon renewal and reargument, adhered to the original

determination, unanimously dismissed, with costs, as academic.

In April 2008, plaintiff Eleni Papaioannou signed a retainer agreement with Levine & Grossman, Esqs. for her personal injury claims, and the loss of services claim of her husband, resulting from the collapse of a crane onto her apartment building while she was in the apartment. Thereafter, the firm filed a notice of claim with the City of New York. The Laskin firm was substituted as counsel for the Papaioannous in April 2010.

One week after Mrs. Papaioannou executed the retainer agreement with Levine & Grossman, her husband, Demetrios Papaioannou, apparently without her knowledge, engaged Verzani to handle claims against the Papaioannous' landlord, who had refused to restore the building and was attempting to evict the tenants. In a letter retainer agreement, Verzani stated that his office "will not handle Mrs. Papaioannou's claim for personal injury with regards to her being present in the building at the time of the accident as [he] [has] been informed she has retained separate counsel." On June 16, 2008, Verzani commenced an action (the Ascot action) against Ascot Properties, the owner of the building, naming the Papaioannous and three other tenants of the building, seeking declaratory relief obligating the owner to restore the damaged apartments and restore the tenants to their

apartments, and damages for unlawful eviction. On August 7, 2008, Verzani filed an amended summons and complaint, adding causes of action for negligent and intentional infliction of emotional distress arising out of the landlord's willful failure to restore the tenants to their tenancies, which allegedly caused the tenants to experience physical and emotional injuries.

On August 27, 2008, a general release in the Ascot action was signed by the Papaioannous. Their claims were settled for $700,000 as part of the total settlement of $2 million. The release includes language that the landlord failed to take any action to restore the tenants to their apartments, and that as a result, the tenants began to experience physical and emotional injuries. The tenants agreed to release all claims to their apartments. The release provided that it shall not preclude either party from bringing claims against the crane operator, the City, or any other entity related to the crane collapse.

On April 6, 2009, nearly 10 months after the Ascot action was commenced and approximately seven months after it was settled, a summons and complaint was filed by Levine & Grossman (counsel prior to the substitution of the Laskin firm) on behalf of the Papaioannous - - not against Ascot Properties - - but against various contractors, crane operators and the City of New

York (the Reliance action), alleging that Eleni Papaioannou was in the apartment when the crane collapsed, causing her to suffer severe and protracted personal injuries, and seeking damages for her personal injuries and Mr. Papaioannou's loss of services. In November 2009, a 50-h hearing was conducted by the City. In May 2011, at the deposition of Mrs. Papaioannou in the Reliance action, the general release from the Ascot action was marked as an exhibit and shown to her. She testified that it was her signature on the release, but that she had never before seen the release. According to Michelle Laskin, Esq., it was then that she was first told by Mr. Papaioannou that he had retained the Verzani law firm and had received a $700,000 settlement, with 1/3 going to Verzani as an attorney's fee. Mr. Papaioannou is said to have admitted that his wife had no knowledge of the Ascot action, of the general release or of the money received in the settlement.

The motion court erred in granting Laskin Law P.C.'s petition to enforce an attorney's lien pursuant to Judiciary Law § 475 in the Ascot action and denying Verzani's cross motion to dismiss the petition. The statute provides that "[f]rom the commencement of an action . . . the attorney who appears for a party has a lien upon his client's cause of action . . . which

attaches to a verdict, determination, decision, judgment or final order in his client's favor. . ." The Laskin firm cannot have a charging lien on the settlement proceeds in the Ascot action where it never commenced an action against Ascot and thus was never attorney of record for the Papaioannous in the Ascot action, but instead commenced an action against other parties, months after the Ascot action was filed and settled. Rather, the remedy available to the Laskin firm is a plenary action (*see e.g. Rodriguez v City of New York*, 66 NY2d 825 [1985] [where the attorney's name "never appeared on any of the pleadings, motion papers, affidavits, briefs or record in plaintiff's action," "it is clear that [he] is not entitled to seek an attorney's lien under Judiciary Law § 475 and must enforce such rights as he may have in a plenary action"]; *see also Weg and Myers v Banesto Banking Corp.*, 175 AD2d 65, 66 [1st Dept 1991] [Judiciary Law § 475 grants charging lien to attorney only when there has been appearance by attorney in the action]; *Max E. Greenberg, Cantor & Reiss v State of New York*, 128 AD2d 939 [3rd Dept 1987], *lv denied* 70 NY2d 605 [1987] [while firm was attorney of record in State court action and provided legal services to client for which it may be entitled to compensation, firm not entitled to a lien under Judiciary Law § 475 for proceeds of a settlement in

Federal court action where it was not attorney of record in settled Federal action and not the firm that produced settlement]).

The Decision and Order of this Court entered herein on May 10, 2012 is hereby recalled and vacated (*see* M—2657 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

7835 In re Frances M.,
Petitioner-Appellant,

-against-

Jorge M.,
Respondent-Respondent.

Louise Belulovich, New York, for appellant.

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

Lisa H. Blitman, New York, attorney for the child.

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about October 12, 2010, which, after a fact-finding hearing, awarded sole physical and legal custody of the subject child to respondent father with visitation to petitioner mother according to an attached order of visitation, unanimously modified, on the facts, to provide that petitioner have visitation on Mother's Day from 10:00 a.m. until 7:00 p.m., the child's birthday for a maximum of two hours from the close of school, or from 10:00 a.m. until 3:00 p.m. if school is not in session, and during the Thanksgiving holiday, in even numbered years, from the Wednesday before Thanksgiving at 5:30 p.m. until the Friday after Thanksgiving at 6:00 p.m., and otherwise

affirmed, without costs.

The Referee's determination that the child's best interests would be served by awarding custody to respondent has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Indeed, the evidence shows that respondent has provided a healthy, stable environment for the child and has provided for the child's needs since the child was paroled to him in 2000, after a finding of neglect against petitioner. By contrast, the evidence shows that petitioner suffers from emotional, physical, and financial issues that prevent her from putting the child's needs before her own. Based on the parties' acrimonious relationship, joint decision making is not in the child's best interests (*see Reisler v Phillips*, 298 AD2d 228, 229-230 [1st Dept 2002]).

We modify the visitation schedule to the extent indicated (*see generally Matter of Blanchard v Blanchard*, 304 AD2d 1048, 1050 [3d Dept 2003]).

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

The Decision and Order of this Court entered herein on June 5, 2012 is hereby recalled and vacated (see M-2959 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2012

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7963 The People of the State of New York, Ind. 2735/95
Respondent,

-against-

Roman Baret,
Defendant-Appellant.

Labe M. Richman, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about March 3, 2011, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (John E. H. Stackhouse, J. at plea and motion to withdraw plea; Albert Lorenzo, J. at sentencing), rendered December 20, 2004, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 to 6 years, unanimously reversed, on the law, and the matter remitted to Supreme Court for a hearing.

To establish ineffective assistance of counsel under federal constitutional standards, a defendant must demonstrate both that counsel's performance was deficient and that the deficient

performance resulted in prejudice (*Strickland v Washington*, 466 US 668 [1984]). In *Padilla v Kentucky* (559 US __, 130 S Ct 1473 [2010]), the Supreme Court held that a constitutionally competent attorney must advise his or her client of the immigration consequences of a guilty plea. Defendant moved to vacate judgment, alleging that counsel did not advise him that his conviction would result in his being deported, prohibited from re-entering the United States and forever barred from citizenship, and that had he known of these consequences, there was a reasonable probability that he would have gone to trial.

We conclude that *Padilla*, decided after defendant's conviction was affirmed on direct appeal (43 AD3d 648 [2007], *affd* 11 NY3d 31 [2008]), should be applied retroactively. To determine whether a rule is to be applied retroactively, the court must determine whether the rule is "new" or "old" (*Teague v Lane*, 489 US 288, 301 [1989]; *People v Eastman*, 85 NY2d 265, 275 [1995]). When a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an "old" rule, and is always retroactive (*Eastman*, 85 NY2d at 275).

Prior to *Padilla*, the Court of Appeals held that deportation was a collateral consequence, so that the failure of counsel to

warn a defendant of the possibility of deportation as a result of a guilty plea did not constitute ineffective assistance of counsel (*see People v Ford*, 86 NY2d 397, 405 [1995]). Actual misadvice by counsel concerning immigration consequences of a plea, however, could constitute ineffective assistance of counsel (*see People v McDonald*, 1 NY3d 109 [2003]).

We conclude that *Padilla* did not establish a "new" rule under *Teague*; rather, it followed from the clearly established principles of the guarantee of effective assistance of counsel under *Strickland*, and "merely clarified the law as it applied to the particular facts" (*United States v Orocio*, 645 F3d 630, 639 [3d Cir 2011] [internal quotation marks omitted]; *but see Chaidez v United States*, 655 F3d 684 [7th Cir 2011], *cert granted* __US__, 132 S Ct 2101 [2012]). Rather than overrule a clear past precedent, *Padilla* held that *Strickland* applies to advice concerning deportation, whether it be incorrect advice or no advice at all (*see People v Nunez*, 30 Misc 3d 55 [Appellant Term, 2d Dept 2010], *lv denied* 17 NY3d 820 [2011]; *but see People v Kabre*, 29 Misc 3d 307 [Crim Ct, NY County 2010]).

We note that defendant's plea was taken on December 23, 1996. We express no opinion on the applicability of *Padilla* to pleas taken before 1996, a year in which there were significant

changes in immigration law.

Applying *Padilla* retroactively, we conclude from the submissions on the motion to vacate judgment that a hearing is required on the issues of what advice, if any, counsel gave defendant regarding the immigration consequences of his plea, and, assuming the advice was constitutionally deficient, whether there is a reasonable probability that but for this deficiency, defendant would have gone to trial (*see Hill v Lockhart*, 474 US 52, 59 [1985]).

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

ENTERED: OCTOBER 2, 2012

CLERK

Sweeny, J.P., Catterson, Acosta, Freedman, Román, JJ.

7991N In re New York City Asbestos Litigation,
- - - - -
Lawrence Bernard, et al.,
Plaintiffs-Respondents,

-against-

Brookfield Properties Corp., et al.,
Defendants,

Colgate-Palmolive Company,
Defendant-Appellant.
- - - - -
Lori Konopka-Sauer, et al.,
Plaintiffs-Respondents,

-against-

Colgate-Palmolive Company,
Defendant-Appellant.
- - - - -
Arlene Feinberg, et al.,
Plaintiffs-Respondents,

-against-

Colgate Palmolive Company,
Defendant-Appellant,

Union Carbide Corporation,
Defendant.

Index 107211/08
190078/08
190070/11

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Faith E. Gay of counsel), for appellant.

Levy, Phillips & Konigsberg, New York (James M. Kramer of counsel), for Lawrence Bernard, Marilyn Bernard, Lori Konopka-Sauer and Richard Konopka, respondents.

Seeger Weiss LLP, New York (Laurence V. Nassif of counsel), for Arlene Feinberg and Jacob Feinberg, respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered March 1, 2012, which granted plaintiffs' motion to consolidate their respective actions for joint trial, unanimously affirmed, without costs.

Plaintiffs attempt to hold defendant Colgate-Palmolive liable for the alleged presence of mesothelioma-causing asbestos in the consumer cosmetic talcum powder product called "Cashmere Bouquet." The IAS court providently exercised its discretion in consolidating these actions for joint trial, as they involve common questions of law and fact (*see* CPLR 602[a]; *Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 224-225 [1993], *affd* 82 NY2d 821 [1993]).

Defendant has not established that it will be prejudiced by consolidation of the cases. Contrary to defendant's contention, these cases do not present a novel scientific theory. Indeed, that a link has not yet been established between consumer talcum powder and mesothelioma-causing asbestos does not render plaintiffs' theory an immature tort, particularly where the link has been established in the use of industrial talc (*see e.g. R.T. Vanderbilt Co., Inc. v Franklin*, 290 SW3d 654 [Ky 2009]).

We reject defendant's contention that separate trials are required because a different state's law will apply to each plaintiff. Defendant has not yet asked the IAS court to undertake a choice-of-law analysis on the issue of causation; thus, it would be premature to deny the motion on this ground. In any event, even if the IAS court concludes that the laws of the different states must apply to the different plaintiffs, New York, Oregon, and Florida (the states at issue) have the same standard with regard to proving causation in asbestos-exposure cases (*see e.g. Diel v Flintkote Co.*, 204 AD2d 53, 54 [1994]; *Purcell v Asbestos Corp., Ltd.*, 153 Or App 415, 422-423 [1998], *lv denied* 329 Or 438 [1999]; *Reaves v Armstrong World Indus., Inc.*, 569 So2d 1307, 1309 [Fla 1990], *lv denied* 581 So2d 166 [Fla 1991]). Moreover, defendant has not demonstrated why the purported differences in the various states' laws cannot be cured with appropriate jury instructions.

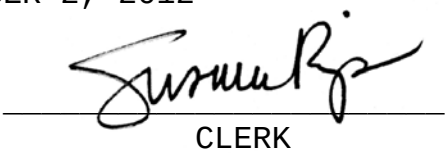
Nor are separate trials required because of factual differences in plaintiffs' cases. The individual issues do not predominate over the common questions of law and fact — namely, whether asbestos was present in the consumer talcum product used by plaintiffs and whether defendant should have been aware of its presence. Under these circumstances, the IAS court rightly

concluded that the facts here are on all fours with the criteria set forth in *Malcolm v National Gypsum Co.* (995 F2d 346, 350-352 [2d Cir 1993]), as there is a common disease, a common defendant and a common type of exposure by the three plaintiffs.

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: OCTOBER 2, 2012



CLERK

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

8101-
8102-
8103 Index 106958/11

Lillian N. Nall, et al.,
Plaintiffs-Appellants,

-against-

Estate of Dawn Powell, et al.,
Defendants-Respondents,

Karen Powell, et al.,
Defendants.

Kennedy Berg LLP, New York (James W. Kennedy of counsel), for appellants.

Schnader Harrison Segal & Lewis LLP, New York (Benjamin P. Deutsch of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 29, 2012, which, in an action seeking specific performance, declaratory relief and an injunction, inter alia, granted defendants-respondents' motion to dismiss the complaint as untimely and denied plaintiffs' cross motion for leave to amend the complaint, and order, same court and Justice, entered March 19, 2012, which, inter alia, determined that defendant York Amusement Co., Inc. does not require the consent of a supermajority of its shareholders pursuant to Business Corporation Law § 909 to lease its New York City commercial

property, unanimously affirmed, without costs. Appeal from order, same court and Justice, dated April 23, 2012, which declined to sign plaintiffs' order to show cause seeking renewal or vacatur of the prior orders, unanimously dismissed, without costs, as taken from a nonappealable paper.

The complaint is untimely under the four-year California statute of limitations governing contract actions (*see* CPLR 202). Plaintiff Nall is a California resident, and the economic impact of her claimed injury was sustained in that state (*see Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]). Nall's attempt to carve out a real estate transfer exception to the general rule articulated in *Global Fin. Corp.* is unpersuasive. Plaintiffs contend that the parties had a reasonable time to close after the scheduled December 31, 2004 closing date set forth in their term sheet agreement because the term sheet agreement did not provide that time was of the essence, and that the determination of a reasonable time ordinarily presents a question of fact. However, this action was commenced 2½ years after the 4-year limitations period had expired, and that interval was not adequately explained. Plaintiffs' allegations regarding the parties' agreements to extend some of the term sheet deadlines are

conclusory (*see Pitcock v Kasowitz, Benson, Torres & Friedman, LLP,* 80 AD3d 453, 454 [1st Dept 2011], *lv denied* 16 NY3d 711 [2011]). The events that plaintiffs allege occurred in 2005 and 2006 would not sufficiently postpone the date of the accrual of their claim. In view of the foregoing, it is unnecessary to address defendants' alternative argument that the term sheet was merely an unenforceable agreement to agree. As to plaintiff's motion for leave to amend, the proposed pleading does not remedy the deficiencies of the complaint (*see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

Business Corporation Law § 909 does not apply to the leasing of York's Seventh Avenue building because the proposed lease does not constitute a transfer of all or substantially all of York's assets, which include other commercial properties, and was not made outside of the ordinary course of York's actual business (*see Soho Gold v 33 Rector St.*, 227 AD2d 314 [1st Dept 2006], *lv denied* 89 NY2d 806 [1997]). The building has long been leased commercially, except for a recent period of several years when it was vacant and in need of renovations. Contrary to plaintiffs' contention, the motion court's determination of this issue was not procedurally improper.

No appeal lies from an order declining to sign an order to show cause (*Kalyanaram v New York Inst of Tech*, 91 AD3d 532 [1st Dept 2012]; *Naval v American Arbitration Assn*, 83 AD3d 423 [1st Dept 2011]; *Nova v Jerome Cluster* 3, *LLC*, 46 AD3d 292 [1st Dept 2007]).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8142-
8143 The People of the State of New York, Ind. 4209/08
Respondent,

-against-

Johnny Pruitt,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Debevoise & Plimpton LLP, New York (Matthew I. Fleischman 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 (Michael R. Sonberg, J. at *Sandoval*/*Molineux* hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered June 16, 2009, as amended August 31, 2009, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, two counts of sexual abuse in the first degree, and two counts of endangering the welfare of a child, and sentencing him, as a second felony offender, to an aggregate term of 20 years, unanimously affirmed.

Defendant failed to preserve, or affirmatively waived, each of his challenges to the hearing and trial court's evidentiary and *Sandoval* rulings, and his related claims regarding the

absence of limiting instructions, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits, with the following exceptions. While the court properly admitted testimony by two witnesses under the prompt outcry exception to the hearsay rule (*see People v Parada*, 67 AD3d 581, 582 [1st Dept 2009], *affd* 17 NY3d 501 [2011]), we find that the victim's statement to her teacher, many years after the events in question, was inadmissible, but that the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The absence of limiting instructions regarding the prompt outcry evidence and evidence of an uncharged crime was likewise harmless.

Defendant asserts that his counsel rendered ineffective assistance by expressly waiving or failing to raise the issues that defendant raises on appeal. Although defendant raised his ineffective assistance claim in a CPL 440.10 motion, that motion was denied, as was his motion for leave to appeal to this Court (*see* CPL 450.15[1]; 460.15). Accordingly, our review is limited to the trial record.

To the extent the trial record permits review, we conclude that defendant received effective assistance under the state and

federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for counsel's alleged deficiencies (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see also People v Taylor*, 1 NY3d 174, 177 [2003]). Furthermore, defendant has not shown that any of these alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice. In particular, we note that the prompt outcry evidence provided by the victim's mother and boyfriend was admissible, and that objections to this testimony would have been futile.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8144 In re Priscilla V.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 25, 2011, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 15 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request to convert the proceeding to a person in need of supervision proceeding, and instead adjudicated her a juvenile delinquent and placed her on probation. This was the least restrictive dispositional alternative consistent with appellant's

needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying incident was a serious and violent attack on appellant's mother. The disposition was also justified by appellant's prior violent acts and general misbehavior in the home, lack of remorse, history of running away from home, truancy and drug use.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8145 The People of the State of New York, Ind. 149/10
Respondent,

-against-

Wayne Dickinson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Eve Kessler 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 (Bonnie G. Wittner, J.), rendered on or about November 19, 2010,

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

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

ENTERED: OCTOBER 2, 2012

CLERK

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

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

8147-
8148 Nata Bob, Index 403033/10
Plaintiff-Respondent,

-against-

Steve Cohen,
Defendants-Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Nata Bob, respondent pro se.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 11, 2011, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 14, 2011, denying defendants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

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 served and filed their motion to dismiss by said 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]). Nevertheless, defendants were not entitled to dismissal of this legal malpractice action commenced by their former client on res judicata grounds. The award of legal fees by the workers' compensation board to defendants was not made against plaintiff, but rather was to be paid by the employer's insurance carrier (*cf. Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 263-265 [2d Dept 2010]). Moreover, no showing has been made that a charging lien or a retaining lien was asserted against proceeds awarded to plaintiff in the underlying administrative proceeding (*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]).

We have considered defendants' remaining arguments and find them unavailing, on this meager record.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8149 In re Antoinette Myers, Index 116672/10
Petitioner-Appellant,

-against-

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

_____

The White Rose Group, LLC, Jackson Heights (Vincent P. White of counsel), for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered July 14, 2011, which denied the petition seeking to vacate the hearing officer's determination which found petitioner New York City schoolteacher guilty of various specifications and recommended the termination of her employment, and granted respondents' cross motion to dismiss the proceeding brought pursuant to Education Law § 3020-a(5) and CPLR 7511, unanimously affirmed, without costs.

Respondent Department of Education brought specifications against petitioner, a tenured teacher, and ordered a disciplinary hearing in accordance with Education Law § 3020–a. The hearing officer sustained the vast majority of the specifications and by determination dated November 26, 2010, recommended terminating

petitioner from her employment.

On December 17, 2010, petitioner signed for and received by certified mail a copy of the hearing officer's determination. Thereafter, by notice of petition dated December 28, 2010, petitioner commenced this proceeding to vacate the hearing officer's determination. Petitioner acknowledges that Supreme Court was open on December 27, 2010, but argued that the historical snowstorm that occurred on that date resulted in the unavailability of mass transit, and rendered the courthouse inaccessible.

Education Law § 3020-a(5) provides that "[n]ot later than ten days after receipt of the hearing officer's decision, the employee. . .may make an application. . .to vacate or modify the decision of the hearing officer pursuant to [CPLR 7511]." Accordingly, the petition was properly dismissed as time-barred based on petitioner's failure to file the petition within the 10-day limitation period (*see Matter of Juste v Klein*, 83 AD3d 468 [1st Dept 2011]; *Matter of Awaraka v Board of Educ. of City of N.Y.*, 59 AD3d 442 [2d Dept 2009]). Despite petitioner's predicament, the court was without authority to extend the

statute's limitations period (*see Matter of Watkins v Board of Educ. of Port Jefferson Union Free School Dist.*, 26 AD3d 336, 338 [2d Dept 2006]).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8150-
8151 The People of the State of New York, Ind. 2759/05
Respondent,

-against-

Gerardo Yanayaco,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered June 16, 2009, convicting defendant, after a jury trial, of insurance fraud in the third degree, grand larceny in the third degree, offering a false instrument for filing in the first degree, falsifying business records in the first degree and scheme to defraud in the first degree, and sentencing him to concurrent terms of 10 months, and order, same court and Justice, entered on or about October 15, 2010, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). On the contrary, the evidence of defendant's guilt was overwhelming.

Defendant's knowing and intentional participation in an insurance fraud scheme was established by accomplice testimony that was fully corroborated by other evidence, including, among other things, recorded conversations with undercover agents posing as patients.

Although defendant concedes that the jury's mixed verdict was not legally repugnant, he bases his weight of the evidence argument primarily on the theory that the acquittals reflected implied findings of fact that undermined the convictions. In performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]). However, "[w]here a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]). Furthermore, "in performing its de novo review function as a 'thirteenth juror,' there is no good reason why a court should resolve any inconsistency in favor of a defendant rather than the People who, after all, have no right of appellate review of jury acquittals in mixed verdicts" (*Rayam*, 94 NY2d at 562). In any

event, we find that there was a reasonable evidentiary basis for the mixed verdict.

The court properly exercised its discretion (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]) in denying the CPL 440.10 motion without holding a hearing. The trial record and the parties' submissions were sufficient to decide the motion, and there was no factual dispute requiring a hearing (*see People v Satterfield*, 66 NY2d 796, 799-800 [1985]).

In his motion, defendant claimed that trial counsel rendered ineffective assistance by failing to produce enhanced images of a videotape depicting the undercover agent's patient file, which purportedly showed that certain annotations were not on the file when defendant last saw the patient. However, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have produced these images, there is no reasonable possibility that this omission had any

effect on the outcome of the case. Defendant's additional claim that the prosecutor elicited and relied upon false testimony about the annotations on the patient file is without merit.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8152 &
M-3827 In re Beverly Grayson, et al., Index 107050/03
Petitioners-Appellants,

-against-

New York City Department of
Parks and Recreation,
Respondent-Respondent.
- - - - -
Scott Verhagen, Lynn Peebles,
Leonard Peters, Eliza Gale,
Harvey Jedda, Erin Apple,
Thomas Lowy, Denise O'Blennes,
Hiram Vidal, Diane Pollan,
Amici Curiae.

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Patterson Belknap Webb & Tyler LLP, New York (David F. Dobbins and Jordan M. Engelhardt of counsel), for appellants.

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

Karlinsky LLC, New York (Martin E. Karlinsky Of counsel), for amici curiae.

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Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered August 5, 2011, which, to the extent appealed from as limited by the briefs, denied petitioners' motion for costs and/or sanctions, unanimously reversed, on the law and the facts, without costs, the motion granted, with sanctions to be imposed on respondents in the amount of $5000, payable to the Commissioner of Taxation and Finance.

In this article 78 proceeding, petitioners, a group of individuals who reside within two blocks of Riverside Park (the Park), in Manhattan, where they handle dogs, sought, inter alia, a declaration that respondent's practice of requiring that all dogs be on a leash within five blocks of any of the four dog runs in the Park, between the hours of 9:00 p.m. and 9:00 a.m., which was contrary to respondent's prior policy, was arbitrary, capricious and contrary to law and without notice to the public.

In November 2003, Corporation Counsel informed the court that respondent "plans to install signs near each Riverside Park entrance which will provide . . . a detailed map and explanation of restrictions concerning dog use," which would likely take between six months and one year to install.

Thereafter, by order, entered December 30, 2003, the court (Yates, J.), upheld the off-leash ban for a five-block radius around the dog runs in the Park, deferring to the Parks Commissioner's judgment. However, the court found merit in petitioners' argument that respondent failed to adequately notify the public of the new policy and noted that respondent was in the process of preparing signs to be installed which would detail the new restrictions. The court retained jurisdiction over the claim of arbitrary enforcement "as a result of inadequate notice" and "adjourn[ed] the matter for four months, pending implementation

of appropriate signage and distribution of information to the public describing the new boundaries for unleashed dog-walking."

In an April 13, 2004 letter, Corporation Counsel advised the court that "Parks Department staff are meeting with a designer to discuss preparation of larger, permanent signs" and "expect[ed] that the final sign design will be ready . . . by September 2004 and if approved, signs should be installed in the Spring of 2005."

By order dated April 14, 2004 (the April Order), the court (Yates, J.), directed respondent to place at least 20 signs identifying the "metes and bounds of the proposed modification of the 9 PM to 9 AM off-leash permission" in specified areas.

Despite its earlier representations to the court and the clear directive of the April order, respondent failed to post the required signage until July 2010, in response to petitioners' motion to preclude the enforcement of the off-leash ban, and only submitted a proposed sign design for approval to the Landmarks Preservation Commission in October 2010.

Pursuant to 22 NYCRR § 130-1.1(a), "[t]he court, in its discretion, may award . . . costs . . . resulting from frivolous conduct . . . . In addition . . ., the court . . . may impose financial sanctions upon any party . . . who engages in frivolous conduct." 22 NYCRR § 130-1.1(c) defines conduct as "frivolous"

where, inter alia, “it is completely without merit in law” or “is undertaken primarily to delay or prolong the resolution of litigation.” Compliance with court orders is essential to the integrity of our judicial system and thus, litigants must not be allowed to “ignore court orders with impunity” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [citation omitted]). Petitioners should not have had to resort to motion practice in order to enforce the April order (*see e.g. Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 339 [3d Dept 2011]). Here, sanctions are warranted to address the Parks Department’s continuous pattern of conduct and deter future frivolous conduct (*see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33-34 [1st Dept 1999]).

Under the circumstances, including respondent’s six-year delay in complying with an order, despite its prior representations to the court and awareness of claims of non-compliance, respondent’s delay was “completely without merit in

law" and warrants the imposition of a $5,000 sanction, (22 NYCRR 130-1.2).

M-3827 - ***Matter of Beverly Grayson, et. al. v NYC Department of Parks & Recreation***

Motion for leave to file amicus curiae brief granted.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8154-
8154A In re Miguel R.,

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

_____

Daniel R. Katz, New York, for appellant.

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

_____

Orders of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 9, 2011, which adjudicated appellant a juvenile delinquent, upon fact-finding determinations that he committed acts that, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree, grand larceny in the third degree, criminal possession of stolen property in the third degree, and scheme to defraud in the first degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

We reject appellant's challenge to the sufficiency of the evidence establishing the charge of obstructing governmental administration in the second degree. After a teacher confiscated appellant's school identification card in order to write him up

for a disciplinary infraction, appellant violently attacked the teacher while trying to get back the card. As it was part of the teacher's official function to enforce the school's rules, the evidence supported the inference that appellant's conduct was intended to interfere with the teacher's performance of his duties (*see* Penal Law § 195.05; *Matter of Joe R.*, 44 AD3d 376 [1st Dept 2007]).

The court properly denied appellant's motion to suppress his inculpatory statements to a police detective concerning the larceny-related charges. The totality of the circumstances establishes that appellant knowingly, intelligently, and voluntarily waived his *Miranda* rights in the presence of his mother. Appellant's arguments concerning the voluntariness of his statement are without merit.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8155 The People of the State of New York, Ind. 5650/09
Respondent,

-against-

Eugene Pennix,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about May 25, 2010,

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

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

ENTERED: OCTOBER 2, 2012

CLERK

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

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

8156-
8157 In re Samuel A.,
Petitioner-Appellant,

-against-

Aidarina S.,
Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Tennille M. Tatum-Evans, New York, for respondent.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about April 25, 2011, which dismissed petitioner father's petition to modify custody and visitation, and order, same court, Judge and entry date, which suspended petitioner's visitation with the subject children until he discloses to the mother where the children are being taken during weekend visitation, unanimously affirmed, without costs.

Family Court properly declined to conduct a full evidentiary hearing with respect to the petition, as petitioner failed to make any showing that modification of the custody and visitation

order is warranted on the grounds alleged in the petition (*Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]; *David W. v Julia W.*, 158 AD2d 1, 6-7 [1st Dept 1990]). Indeed, petitioner admitted that he had failed to visit with the children for at least five months, and there is no indication that joint custody is in the best interests of the children, particularly given the acrimonious relationship between the parties.

Family Court properly suspended petitioner's visitation until he reveals to the mother where he takes the children during visitation, as petitioner disregarded the court's direct order to reveal that information during the hearing on his petition. Under these exceptional circumstances, petitioner has forfeited his right to visitation (*see Weiss v Weiss*, 52 NY2d 170, 175 [1981]).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8161 The People of the State of New York, Ind. 5870/10
Respondent,

-against-

Carl Cody,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about February 22, 2011, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8162 Adama Njie, Index 114265/04
Plaintiff-Appellant,

-against-

Larry S. Thompson,
Defendant-Respondent.

_____

Ginsberg & Wolf, P.C., New York (Martin Wolf of counsel), for appellant.

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

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Order, Supreme Court, New York County (George J. Silver, J.), entered August 26, 2011, which granted defendant's motion for summary judgment dismissing plaintiff's 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.

Defendant made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "significant limitation of use" of his right shoulder (Insurance Law § 5102[d]; *see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). Defendant submitted an expert medical report finding normal ranges of motion, as well as the report of a radiologist who opined that the MRI of plaintiff's shoulder revealed no abnormalities.

In opposition, plaintiff raised a triable issue of fact, since his treating physicians found a tear in his right shoulder (*see Duran v Kabir*, 93 AD3d 566, 567 [1st Dept 2012], *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 492 [1st Dept 2010]), and recent range of motion limitations in his right shoulder (*see Jacobs v Rolon*, 76 AD3d 905 [1st Dept 2010]).

Since the Court of Appeals rejected "a rule that would make contemporaneous quantitative measurements a prerequisite to recovery," there was no requirement that the treating physician set forth any objective test that would have been used at that time (*see Perl v Meher,* 18 NY3d 208, 218 [2011]). Dr. Cortijo's report of an examination the day after plaintiff's accident established the requisite causation (*id*. At 217-218 ["a contemporaneous doctor's report is important to proof of causation" (emphasis omitted)]); plaintiff was not required to submit evidence of any quantified range of motion testing performed at that time (*see Biascochea v Boves*, 93 AD3d 548, 548-549 [1st Dept 2012]).

We note that if plaintiff prevails at trial on his serious injury claims, he will be entitled to recovery also on his non-serious injuries caused by the accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [2010]).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8163 The People of the State of New York, Ind. 627/01
Respondent,

-against-

Kyle Birch,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about January 19, 2011, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points under the risk factor for drug or alcohol abuse, because defendant's crimes were committed while under the influence of drugs and alcohol, and the evidence of such use was not excessively remote. Defendant's "abstinence," while incarcerated, from using substances that are prohibited in prison was insufficient to predict his postrelease behavior (*see People v Gonzalez*, 48 AD3d 284, 285 [2008], *lv denied* 10 NY3d 711 [2008]).

The court properly assessed 20 points under the risk factor

for unsatisfactory conduct, including sexual misconduct, while confined. Defendant's prison disciplinary record provided clear and convincing evidence that he repeatedly engaged in lewd behavior directed at female personnel.

Regardless of whether points should have been assessed under the risk factor for failure to accept responsibility, defendant would still be a level three offender, and we find no basis for a discretionary downward departure to level two (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]).

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8164-
8165 Gama Aviation Inc., et al., Index 651710/10
Plaintiffs-Appellants,

-against-

Sandton Capital Partners, L.P., et al.,
Defendants-Respondents.
- - - - -
KB Acquisition, LLC,
Counterclaim Plaintiff-Respondent,

-against-

Gama Aviation Inc., et al.,
Counterclaim Defendants-Appellants.

_____

Boies, Schiller & Flexner, Armonk (Daniel H. Bryan of counsel), for appellants.

Day Pitney LLP, New York (Alfred W. J. Marks of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 2, 2012, which, insofar as appealed from, denied the motion of plaintiffs-counterclaim defendants Gama Aviation Inc. and Gama Leasing Limited and counterclaim defendant Gama Holdings Limited (collectively Gama) to compel defendants Sandton Capital Partners, LP, Sandton Capital Partners, LLC, and KB Acquisition, LLC to produce certain documents, and granted defendants' motion to compel Gama to produce certain documents listed on its privilege log, unanimously modified, on the law and the facts and

in the exercise of discretion, to deny defendants' motion to compel, and to grant Gama's motion to compel to the extent of directing defendants to produce an unredacted version of DEF1205-06 and a version of the Purchase and Sale Agreement (PSA) that includes the names of the other borrowers besides Gama, the length of their loans, the outstanding amounts of their loans, and the amounts for which Key Equipment Finance, Inc. (KEF) sold these loans to KB Acquisition, LLC, and otherwise affirmed, without costs.

Gama's privilege log properly asserted the attorney-client privilege as to all of the documents at issue. We reject defendants' assertion that the privilege was waived because the communications were copied to, sent to, or authored by third-party Alireza Ittihadieh. Although attorney-client communications shared with a third-party generally are not privileged, "an exception exists for 'one serving as an agent of either attorney or client'" (*Robert v Straus Prob. v Pollard*, 289 AD2d 130 [1st Dept 2001], *quoting People v Osorio*, 75 NY2d 80, 84 [1989]). Here, the affidavit of Gama's principle shows that Ittihadieh was acting as Gama's agent and that Gama had a reasonable expectation that he would keep the communication

confidential (*see Osorio*, 75 NY2d at 84; *see also Stroh v General Motors Corp*., 213 AD2d 267, 268 [1st Dept 1995].

Gama's privilege log asserted the trial preparation priviege (*see* CPLR 3101[d][2]) as to all documents at issue except entry 313. We find that Gama's affidavit in opposition to defendants' motion adequately explained that these documents were prepared in anticipation of litigation, and that defendants failed to show the "substantial need" and "undue hardship" required to overcome the privilege (*see* CPLR 3101[d][2]). We also find that Gama did not waive the trial preparation privilege by copying these documents to its agent, Ittihadieh, who was highly unlikely to disclose confidential material to Gama's adversary (*see People v Kozlowski*, 11 NY3d 223, 246 [2008], *cert denied* ___ US __, 129 S Ct 2775 [2009]).

Gama also contends that entries 316, 319, 325-26, 332-33, 356-57, 361, and 368 constitute attorney work product, which, unlike trial preparation, is subject to an absolute privilege (*see e.g. Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1st Dept 1989]; *compare* CPLR 3101[c] *with* CPLR 3101[d][2]). However, Gama waived this argument (*see generally* CPLR 3122[b]). Upon review of Gama's original and revised privilege logs, we conclude that Gama deliberately chose to use the label "Trial Preparation Privilege" instead of "Work Product Doctrine" in its

revised log.

We turn now to Gama's motion to compel. Gama's complaint seeks reformation of a note between itself and nonparty KEF that was subsequently acquired by defendant KB, together with 14 other loans, via the PSA. The signed note reflects a term of 24 months. However, Gama claims that the term was 60 months, and it submitted affidavits by the individuals who negotiated the note for it and KEF respectively stating that the parties had agreed on a 60-month term with the option of resetting the interest rate after 24 months, and that the signed document did not reflect their agreement. The complaint alleges further that Gama and KEF engaged in negotiations from April through September 2010 to resolve this issue, but that defendants – who had begun negotiating in August 2010 to acquire a portfolio of loans from KEF – dissuaded KEF from reforming the Gama loan.

One of the affidavits submitted by Gama's principal states that the superior of the KEF employee with whom Gama negotiated told Gama's principal that the vast majority of Key Bank National Association's notes (apparently, KEF is an affiliate of Key Bank) had terms of five years or more and that shorter term notes were unusual. If the other loans that KEF sold to KB in the PSA had five-year terms, that would tend to support Gama's position.

In addition, KEF sold Gama's loan at a discount. If the

discount for Gama's loan was greater than the discount for the other loans, other factors (such as the creditworthiness of the borrower) being equal, that might indicate that – despite KEF's statement in the PSA that it "believes the relevant Credit Documents accurately reflect the agreement between [KEF] and Gama" – it knew there was a problem.

Thus, we direct defendants to produce a version of the PSA that includes the names of the other borrowers, the length of their loans, the outstanding amounts of their loans, and the amounts for which KEF sold these loans to KB. Since the parties have signed a protective order, the information about the other borrowers can be kept confidential. Furthermore, it will not be unduly burdensome for defendants to produce this information. Similarly, it will not be unduly burdensome for defendants to produce an unredacted version of DEF1205-06.

We do not find that unredacted drafts of the PSA or the unredacted negotiating history of the PSA would be relevant to

Gama's reformation, and tortious interference claims against defendants, or its unclean hands defense to KB's counterclaim for an injunction.

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

ENTERED: OCTOBER 2, 2012

CLERK

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

8166N-
8166NA Crystal Biton, Index 103927/98
Plaintiff-Appellant,

-against-

Baxter Healthcare Corporation, et al.,
Defendants-Respondents.

Crystal Biton, appellant pro se.

Sidley Austin LLP, New York (Maria D. Melendez of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 17, 2011, which denied plaintiff's motion to restore this action to the trial calendar, and order, same court and Justice, entered October 25, 2011, which denied plaintiff's motion to reargue and renew, unanimously dismissed, without costs. The Clerks of Supreme Court, New York and Bronx Counties, and the Clerk of this Court are directed to accept no filings from plaintiff, as against defendants, with respect to matters pertaining to her alleged personal injury arising from silicone breast implants, related claims arising therefrom, or the settlement agreement relating thereto, without the prior leave of their respective courts.

Having served the orders and notice of entry upon defendants by mail on October 27, 2011, plaintiff had until December 1, 2011

to file a notice of appeal, i.e., 35 days later (CPLR 5513[a], [d]). Since she did not file a notice of appeal until December 7, 2011, the appeal must be dismissed (*see Retta v 160 Water St. Assoc., L.P.*, 94 AD3d 623 [1st Dept 2012]). In addition, the order entered October 25, 2011 is not appealable as of right under CPLR 5701(a) because it did not resolve a motion made upon notice (*see Kalyanaram v New York Inst. of Tech.*, 91 AD3d 532 [1st Dept 2012]).

Were we to reach the merits, we would find that plaintiff's motion to restore was properly denied. After a delay of nearly 11 years, plaintiff failed to identify the allegedly "newly discovered" evidence upon which her motion was based.

We find that an injunction is warranted, in view of plaintiff's demonstrated proclivity for frivolous litigation and the vexatious nature of this litigation, as demonstrated by plaintiff's own submissions.

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

ENTERED: OCTOBER 2, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6434 409-411 Sixth Street, LLC, Index 570068/09
Petitioner-Respondent,

-against-

Masako Mogi,
Respondent-Appellant.

_____

De Castro Law Firm, Woodside (Steven De Castro of counsel), for appellant.

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

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about March 29, 2010, reversed, on the law and the facts, without costs, the holdover petition denied and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

Opinion by Renwick, J. All concur except Friedman and Catterson, JJ. who dissent in an Opinion by Catterson, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

6434
Index 570068/09

_____x

409-411 Sixth Street, LLC,
Petitioner-Respondent,

-against-

Masako Mogi,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Appellate Term of the Supreme Court, First Department, entered on or about March 29, 2010, which, in a nonprimary residence holdover proceeding, affirmed the judgment of the Civil Court, New York County (Jean T. Schneider, J.), entered on or about August 8, 2008, after a nonjury trial, awarding petitioner-landlord possession of the subject premises.

De Castro Law Firm, Woodside (Steven De Castro of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs, Joseph Burden, Sherwin Belkin, Magda L. Cruz and Alana Wrublin of counsel), for respondent.

RENWICK, J.

Petitioner landlord commenced this holdover proceeding to recover possession of a rent stabilized apartment located on East 6th Street, New York, New York, on the ground that respondent Masako Mogi (tenant) does not occupy the subject premises as her primary residence. Unlike the courts below, we find that the landlord has not established by preponderant evidence that the tenant has forfeited her principal New York residence of long standing.

The tenant occupies the subject studio apartment under a rent-stabilized lease entered into in 1980 and periodically renewed thereafter. By timely notice dated September 19, 2006, the landlord terminated the tenancy effective December 31, 2006, on the ground that the tenant had relocated to Westminster, Vermont and that she occupied the subject apartment less than 180 days a year during the preceding two-year period. When the tenant failed to surrender possession on January 1, 2007, this holdover proceeding ensued. In her answer, the tenant denied the landlord's allegations and averred that the property she owns in Vermont was not her primary residence, but was her summer-vacation home.

Holdover Proceedings

At trial on the holdover petition, the tenant testified as a

witness for petitioner as well as on her own behalf. On the landlord's case, the tenant stated that she has resided in the subject apartment since about 1980. Along with a bed, the tenant has a microwave oven, a stove, a coffee maker, medium sized refrigerator, a VCR, and small radio in the apartment. The tenant also maintained a phone line during the 2004-2006 period. In addition to herself, her friend Noriko Isogai had access to the phone, including when the tenant was not present in the New York apartment, as did her friend Earl Giaquinto, who watered the tenant's plants in the New York apartment when she was away.

Besides using her New York apartment as her living quarters, the tenant used the apartment for her business. In the period of 2004-2006, she worked as an English-to-Japanese translator on a per-assignment basis. The tenant's 2004 tax return reflected that she took a business deduction of $1,778 for utilities and $3168 as a "rent or lease" deduction for the apartment. She listed the apartment as her business address on such return. Since about 1990, the tenant has also owned a 1 ½ story cabin in Westminster Vermont, consisting of a ground floor with one large room and bathroom, a second floor loft, and a storage basement. The tenant shares the cabin with her friend, Isogai, with whom she has had a close relationship for many years. The second floor loft serves as the bedroom. The ground floor has a

kitchen, bathroom, dining area and living room. Unlike the tenant, Isogai uses the Vermont cabin as her exclusive residence.

During the 2004-2006 period, bills for electrical and phone service to the Vermont residence were sent to the Vermont address. Two telephone lines were maintained at the Vermont property. The Vermont electricity, gas, and telephone bills are all listed in the tenant's name. In 2004-2006, the tenant maintained a driver's licence issued by Vermont, the vehicle she co-owned with Isogai was registered in Vermont, and the vehicle was insured using an agent located in Westminster, Vermont. The vehicle, purchased in 2003, was never registered in New York.

The tenant is a citizen of Japan and a permanent resident of the United States. Each year between 2004 and 2006, she visited Japan for about one month. Her passport entries indicate that these trips took place in September 2004, April 2005, and March 2006, respectively.

The landlord also presented two witnesses who testified about the tenant's utility bills for the New York apartment during the relevant period. First, Susanne Briggs testified that she was a customer service representative for Con Edison (Con Ed). Pursuant to a subpoena, Briggs produced Con Ed records showing electrical and gas usage in the New York City apartment from January 2004 until February 2007. The amount of electricity

used and gas used for the apartment was recorded. Briggs noted that the invoices were always sent to the New York City address and there was never a request to suspend service.

Second, James Carey testified that he was the president of a company specializing in reading, reporting, and installing electrical meters in commercial and residential properties. As part of his monitoring of residential meters, he was familiar with "usage of electricity by apartment dwellers." Based on his experience and his knowledge of studies conducted by DHCR and HUD, Carey stated that the "low average" electricity usage for single-room, studio-type apartments, such as the subject one, was between 200 to 250 kilowatts per month. Commenting on the tenant's electricity usage at the New York apartment based on the 2004-2006 utility bills, which reflect between 50-150 kilowatt usage per month, Carey opined that such usage was "considerably below" the average.

Lastly, the landlord presented the testimony of Earl Giaquinto, who has been friends with Masako Mogi since 1984. When the tenant was in Vermont, Giaquinto watered the plants in her New York apartment and retrieved the mail. Giaquinto sometimes used the apartment's phone to call the tenant in Vermont about the mail she had received. Giaquinto estimated that he performed these activities at the tenant's New York

apartment about three times a month in the summer. But sometimes, he added, the tenant had rush jobs or computer and dental appointments, which would cause the tenant to come to New York more often. Overall, Giaquinto estimated, the tenant spends "most of her time in the city."

During his testimony, Giaquinto was asked about a call he received in September 2006 in which the caller, who asserted she had a package to deliver to the tenant, inquired about the tenant's whereabouts. The caller was actually a private investigator hired by the landlord, who specialized in "[n]on-primary residence investigations." The investigator, Joann Kunda, testified that, when she called Giaquinto on the pretext that she wanted to deliver a package to the tenant and had two addresses for her, one in New York and one in Vermont, Giaquinto answered, "she resides at both locations." According to Kunda, Giaquinto told her that the tenant "spent the majority of her time in . . . Vermont." Giaquinto, however, denied making such statement to Kunda. Instead, he testified that he told Kunda that the tenant was not at the New York address "at that time."

At trial, when the tenant was recalled as a witness on her own behalf, she testified that when she was in New York during 2004-2006, she often ate out or had "take-out." When she did prepare meals, it was done on the stove top, not the oven, or

without cooking, as in the case of sushi. In Vermont, she rarely ate out. The tenant purchased the Vermont property in 1989. She was sure that her electric or gas usage at the New York apartment was not "different in any way in 2004 through 2006 compared to before [she] had the Vermont property." In support of that assertion, the tenant's Con Ed bills for 1988 and 1989 were admitted into evidence. A separate document prepared by the tenant comparing those bills to the 2004-2006 bills was also admitted into evidence.

Noriko Isogai, who resides at the Vermont cabin, testified on the tenant's behalf. Isogai, who has known the tenant for about 25 years, described the Vermont cabin as located in a rural area, 20 minutes from the nearest train station. She spends most of her time there. Isogai could not provide precise dates as to how often the tenant came to visit her cabin for the 2004-2006 period. She did remember, however, that when the tenant came to the Vermont cabin she would "kind of like come, stay a few days, go back to New York." When the tenant would travel from New York, Isogai would either pick her up from a train station in Springfield, Massachusetts, 2 ½ hours away from the Vermont cabin, or she would pick her up in New York. During 2004 -2006 period, Isogai did not stay in the New York apartment when the tenant was not there, except for a two-week period in 2004 when

she stayed in the apartment alone when the tenant was in Japan.

In support of the tenant's position, three of her friends who reside in the New York apartment building testified on her behalf. One of these friends, Larry Wallach, has resided at the building for about 10 ½ years; his apartment is one floor above the tenant's fifth floor apartment. During the 2004-2006 period, Wallach saw the tenant in and around the building "probably one to two times a week, roughly." Wallach could not recall any time during that period (either the summer, the winter, or any time of the year), that he would not see the tenant for any extended period of time. Wallach had no personal knowledge of the precise dates the tenant would spend in the New York apartment.

The tenant's friend Howard Weil has resided in a fifth floor apartment at the building since 1969. The tenant's apartment was right across the hall from Weil's apartment. Weil did not know if the tenant "owned a house" in Vermont, but he knew that "she went up to Vermont to visit." During the period of 2004-06, Weil saw the tenant "[q]uite often" and "very frequently," as they sometimes dined or watched videos together. Weil did not recall any extended or prolonged period of time when he did not see the tenant. Although to Weil, the tenant "seems to be at the apartment most of the time," he was aware that she went to Japan "every now and then," but he did not know the duration of such

visits.

The tenant's friend Leonard Levine has resided in a second-floor apartment in the building for about 20 years, and has known the tenant since that time. During the period of 2004-2006, he "usually" saw the tenant in or around the building "weekly" on "average," sometimes two to three times in one week. Levine stated that the tenant was a "continuing presence," he "would always see her and more or less and she would never be away from my purview." He added, however, that "especially in the summer," he would go a week or two without seeing the tenant. While Levine often saw the tenant in and around the building, he did not meet with her on social occasions.

There were also post trial submissions. Among other things, the landlord relied upon the tenant's credit card statements and bank ATM transactions, for the 2004-2006 period, which were admitted into evidence at trial. Although there was no testimony regarding such exhibits at trial, the landlord argued that they demonstrated that the tenant "makes frequent transactions in and around the Vermont area"; "that by 2006, the [r]espondent was spending a majority of the time in Vermont" and "in 2004 and 2005, the [r]espondent did not spend a majority of time in New York."

The tenant countered by asserting in her posttrial

submission, inter alia, that:

> "[The tenant] and [Isogai] testified that they both made use of the bank account and credit card account. The bank account is jointly owned by them. The credit card is only in [the tenant's] name, but, aside from the testimony, it is clear that [Isogai] makes use of the account. For example, the credit card statements show transactions in the United States during all three periods when [the tenant] was undisputedly in Japan."

Posttrial Proceedings

After trial, Civil Court granted the landlord's petition, finding that the evidence established that the tenant did not have a substantial nexus to the New York apartment. Civil Court, however, did not find "particularly persuasive" the fact that the tenant's electrical usage in her New York City apartment was well below average, and that it was significantly lower than her usage in Vermont." In the court's view, these facts were not probative of whether the tenant did not use her New York apartment because it was undisputed that the tenant does not occupy the New York apartment "full time" while her companion occupied the Vermont house "full time"; and that the Vermont electric bills cover heat and hot water, while those utilities are provided by the landlord in New York.

Instead, in determining that the New York apartment was not the tenant's primary residence, the court found that:

> "The most persuasive evidence offered at trial was Ms. Mogi's banking and credit card records. These records include Ms. Mogi's credit, debit, and ATM transactions over the relevant period, and appear to give an accurate account of her location for most days between 2004 and October 19, 2006.
>
> . . .
>
> "Ms. Mogi spent 120 days during the relevant time period visiting her family in Japan. These days tell us nothing about her primary residence. Of the remaining 846 'known' days in the time period, Ms. Mogi appears to have spent 378, or 45%, in New York and 468, or 55% in Vermont.
>
> "Based primarily upon the banking and credit card records, I find that respondent did not spend 183 days per year in her New York apartment. Accordingly, final judgment is directed for petitioner."

While the court primarily based its determination on the banking and credit card records, the court made reference to other factors that indicated that the tenant's primary residence was in Vermont, including, inter alia, that the jointly held vehicle was registered in Vermont, and that both women held only Vermont driver's licenses. The court further found that the tenant's witnesses who testified that they regularly saw her in New York did not have "any detailed knowledge of when she was in New York and when she was in Vermont." The court also noted that the tenant "herself also testified that she could not identify dates when she was in New York and dates when she was in Vermont."

On appeal, the Appellate Term found that Civil Court "may

have placed undue emphasis on documents reflecting the credit card and bank transactions made by tenant and her companion." Nevertheless, the Appellate Term found that "any such error [did] not warrant reversal on this record." Instead, Appellate Term held that a fair interpretation of the evidence supported the Civil Court's finding that the New York apartment is not the tenant's primary residence. In this regard, contrary to Civil Court, which found nothing unusual about the tenant's low electricity use in the New York apartment, Appellate Term noted that the "[l]andlord established that there was negligible electricity usage in the apartment for more than two years prior to the commencement of this proceeding." The Appellate Term, however, affirmed based on additional factors which were similarly relied upon by Civil Court, including the tenant's Vermont driver's license and the jointly owned vehicle's Vermont registration. Appellate Term also took into account that the tenant "acknowledged that she spends a substantial amount of time in a house she owns in Westminster, Vermont ... where [her] long-time companion admittedly primarily resides." We granted the tenant's motion for leave to appeal to the Appellate Division, and we now reverse.

Analysis

In view of the considerable protections accorded tenants of

regulated units, the beneficiaries of these safeguards are required, as a quid pro quo, to actually and principally utilize their apartments for dwelling purposes *(see 542 E. 14th St. LLC v Lee*, 66 AD3d 18, 21-22 [1st Dept. 2009]; *Hughes v Lenox Hill Hosp.*, 226 AD2d 4 [1st Dept. 1996], *lv denied* 90 NY2d 829 [1997]). Thus, the governing statute provides that a landlord may recover possession of a rent-stabilized apartment if it "is not occupied by the tenant . . . as his or her primary residence" (Rent Stabilization Code [9 NYCRR] § 2524.4 [c]). "[P]rimary residence" is judicially construed as "'an ongoing, substantial, physical nexus with the . . . premises for actual living purposes'" *(Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008], quoting *Emay Props. Corp. v Norton*, 136 Misc 2d 127, 129 [App Term, 1st Dept. 1987]).

Although the statutes do not define "primary residence," the Rent Stabilization Code does provide that "no single factor shall be solely determinative," and lists "evidence which may be considered" in making the determination (9 NYCRR 2520.6 [u]; *see e.g. Katz*, 11 NY3d at 317*; Glenbriar Co. v Lipsman*, 5 NY3d 388, 392-393 [2005]; *Chelsmore Apts. v Garcia*, 189 Misc 2d 542, 543-544 [Civ Ct, NY County 2001], *affd* 2003 NY Slip Op 50621[u]). These factors include (1) the tenant's use or non-use of an address other than the address of the subject apartment on a tax

return, motor vehicle registration, driver's license, or other publicly filed document; (2) the tenant's use or non use of an address other than the address of the subject apartment as a voting address; (3) whether the tenant lived in the subject apartment for fewer than 183 days in a calendar year; and (4) whether the tenant subleased the apartment (9 NYCRR 2520.6 [u] [1], [2], [3], [4]).

Courts have also considered factors not included in 9 NYCRR 2520.6 (u). For example, a court may examine the tenant's entire tenancy history in the stabilized apartment to ascertain primary residence (*see 615 Co. v Mikeska*, 75 NY2d 987, 988 [1990]). A tenant's telephone and other utility bills that show how often the tenant used utilities in the apartment is probative of whether the tenant had the requisite physical nexus to the apartment (*see Carmine Ltd. v Gordon,* 41 AD3d 196 [1st Dept. 2007]*; Briar Hill Apts. Co. v Teperman*, 165 AD2d 519 [1st Dept. 1991]). Testimony from neighbors and building employees about the tenant's absence from or presence in the rent-stabilized apartment is yet another factor *(see e.g. Harran Holding Corp. v Fowler*, NYLJ, Apr. 28, 1987, at 5, col 4).

To prevail in a nonprimary residence proceeding, a landlord must establish by a preponderance of the evidence that during the relevant time period, the tenant did not occupy the subject

apartment as his or her primary residence (*Glenbriar Co.,* 5 NY3d at 392). The tenant may rebut the landlord's proof to establish "a substantial physical nexus to the apartment." (*id.* at 393, citing *Draper v Georgia Props*., 94 NY2d 809, 811 [1999]). In terms of the burden of proof, "proof sufficient to make a prima facie showing of nonprimary residence shifts the burden of going forward to the tenant, [but] the ultimate burden of persuasion remains on the landlord seeking eviction on the basis of nonprimary residence." (*Emel Realty Corp. v Carey*, 288 AD2d 163 [1st Dept. 2001]).

Here, even when "due regard" is given to the views of the trial judge (*300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 55 [1st Dept. 1997], quoting *Universal Leasing Servs. v Flushing Hae Kwan Rest*., 169 AD2d 829, 830 [2nd Dept. 1991]), we believe that, under any fair interpretation of the record, a clear preponderance of the probative and credible evidence supports the conclusion that the tenant was using the New York apartment as her primary residence for a substantial period of time prior to the service of landlord's notice of nonrenewal in September 2006.

Indeed, it is uncontested that the tenant has lived in the New York apartment for over 30 years (*see 615 Co. v Mikeska*, 75 NY2d at 988). Moreover, the tenant's testimony demonstrated that the New York apartment is fully furnished and she maintained a

full-time job in Manhattan during the relevant period. With respect to the tenant's Vermont house, the tenant's testimony demonstrated that the house serves not as her primary residence, but as a second residence that she uses on weekends, holidays and vacations. While the tenant undoubtedly has a long-term and deep connection to the Vermont house, it is nothing more than her weekend/vacation home, as corroborated by the testimony of Isogai, and New York co-tenants who saw her constantly in the New York apartment during the relevant time period.

Significantly, neither Civil Court, which heard the trial testimony, nor the Appellate Term, made any finding that these witnesses were incredible. As indicated, both Civil Court and Appellate Term were troubled by the fact that none of the tenants had "any detailed knowledge of when [the tenant] was in New York and when she was in Vermont." There is not, however, an absolute requirement that a tenant quantify the numbers of days he or she spent in the apartment each relevant year. What is significant here is that all the tenant's friends and co-tenants consistently testified of the tenant's constant presence in the New York apartment during the relevant period, which is sufficient for the purpose of establishing an ongoing, substantial and physical nexus with the regulated premises (*see 310 E. 23rd LLC v. Colvin*, 41 AD3d 149 [1st Dept. 2007]; *330 E. 34th St. Co v Habeeb*, 248

AD2d at 55). In our review of the record, we find no basis to reject the New York tenants' testimonies as incredible. In fact, the landlord failed to produce any witness who lived or worked in the New York apartment building during the relevant time period to rebut their testimony.

Likewise, there is simply no reason to find that the tenant's testimony was not credible. Unlike the Appellate Term, we are not troubled by the fact that the tenant "acknowledged that she spends a substantial amount of time in a house she owns in...Vermont...where [her] long-time companion admittedly primarily resides." For there is nothing inconsistent with the tenant having a primary residence in New York and concomitantly spending "a substantial" amount of time in Vermont with her long-time friend and companion. An apartment should not be decontrolled merely because its tenant decides to spend her weekends, holidays and vacation days in a second home that she shares with a long-term friend and companion.

Indeed, legitimate arrangements of this kind have been

consistently recognized by this Court *(see e.g. 310 E. 23rd LLC v. Colvin*, 41 AD3d at 149-150 [subject apartment was at all relevant times respondent's primary residence and that the house she owns in upstate New York is a second residence that she uses on weekends, holidays and vacations]). For instance, in *Glenbriar Co. v Lipsman* (11 AD3d 352 [1st Dept. 2004], *affd* 5 NY3d 388 [2005]), this Court found that a wife could consider New York City her primary residence even though both spouses resided together as “snowbirds,” part time in Florida, and part time in New York City, and the husband had "embraced Florida as his residence for its tax advantages and to preserve his assets in retirement." These types of arrangements are consistent with the restrictions of rent stabilization, which is designed to preclude the warehousing of apartments by those who establish primary residence elsewhere (*Katz*, 11 NY3d at 317-318); it was not intended to allow the eviction of an individual, like the tenant here, who travels extensively for personal reasons but who otherwise maintains a substantial physical nexus with her New York City apartment.

We find that the credibility of the witnesses, who established that the tenant has maintained a substantial physical nexus with her New York apartment, is not seriously undercut by the documentary evidence. As indicated by Appellate Term, Civil

Court’s reliance upon credit and debit card transactions to determine when the tenant was at her second home in Vermont was speculative, as both respondent and her companion (a Vermont resident) are authorized to use the cards. Further, even under the Civil Court’s speculative formula, and allowing some margin of error for same, it is significant that the tenant was in New York 45% of the time, which is not insignificant. As for the other factors relied upon by Appellate Term, the tenant appears to have adequately explained her low electrical consumption in New York (*see Briar Hill Apts. Co.,* 165 AD2d at 522-523), and it is not remarkable that her driver's license and vehicle registration were issued in Vermont, as the vehicle is co-owned with the tenant’s close friend.

In sum, this Court finds that the preponderance of the evidence establishes that the tenant occupied the subject New York apartment as her primary residence during the 2004 -2006 period. Inconclusive is the evidence the landlord introduced to buttress its theory that the tenant maintained her Vermont cabin rather than the subject apartment as her primary residence. The landlord’s evidence is explainable and is as likely, if not more likely, to support a finding that the tenant occupied the subject apartment as her primary residence. Given the documentary and testimonial evidence connecting the tenant to the subject

apartment, the landlord has not met its burden to persuade this Court that the tenant did not occupy the subject apartment as her primary residence during the 2004-2006 period.

Accordingly, the order of the Appellate Term of the Supreme Court, First Department, entered on or about March 29, 2010, which, in a nonprimary residence holdover proceeding, affirmed a judgment of Civil Court, New York County (Jean T. Schneider, J.), entered on or about August 8, 2008, after a nonjury trial, awarding petitioner-landlord possession of the subject premises, should be reversed, on the law and the facts, without costs, the holdover petition denied, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

All concur except Friedman and Catterson, JJ.
who dissent in a Opinion by Catterson, J.

CATTERSON, J. (dissenting)

I must respectfully dissent. As a threshold issue, the majority has applied an incorrect standard of review in holding in its opening paragraph that "the landlord has not established by preponderant evidence" that the tenant did not use the subject apartment as her primary residence. The generally accepted standard for appellate review in a nonprimary residence action is whether "it is obvious that the [fact-finding] court's conclusions could not be reached under any fair interpretation of the evidence." Claridge Gardens v. Menotti, 160 A.D.2d 544, 545, 554 N.Y.S.2d 193, 194 (1st Dept. 1990); see also 542 E.14th St. LLC v. Lee, 66 A.D.3d 18, 22, 883 N.Y.S.2d 188, 190 (1st Dept. 2009); AGCO Corp. v. Northrop Grumman Space & Mission Sys. Corp., 61 A.D.3d 562, 563-564, 878 N.Y.S.2d 20, 22 (1st Dept. 2009). Here, the majority's analysis does not depend on showing why it is *obvious* that "any fair interpretation of the evidence" cannot lead to the determination reached by Civil Court and affirmed by Appellate Term. Instead, it simply substitutes its own *different* interpretation of evidence such as the tenant's credit card transactions in Vermont and "negligible" electric usage at the subject apartment.

In any event, and for the reasons set forth in greater detail below, I also disagree if the majority, by holding that

the landlord did not establish the tenant's nonprimary use of the apartment by "preponderant evidence," means that the landlord did not satisfy its initial burden. In addition to the documentary evidence of the tenant's credit card transactions and "negligible" electric usage, two of the four statutory factors that may be weighed as evidence of nonprimary use point in favor of the landlord's position. Moreover, the tenant failed to rebut this documentary evidence with objective, empirical proof that she maintained a "substantial nexus" to the subject premises during the relevant period. Specifically, the testimony of her witnesses, who were other residents of the building, does not comport with the type of testimony that has been accepted by this Court to establish primary residence use of a rent-stabilized apartment. For example, the testimony of a tenant on which the majority relies and which includes the statement that the respondent tenant "would never be away from my purview" cannot be accepted as credible, but only as meaningless and useless hyperbole.

The record reflects that the tenant occupied a rent-stabilized apartment, owned by landlord, located on East 6th Street in Manhattan since 1980. Since 1989, she has also owned a residence in Vermont where her long-time companion resides permanently. In September 2006, the landlord served a notice of

non-renewal on the tenant on the ground she had not used the apartment as her primary residence in 2004-2006. By holdover petition, the landlord sought a final judgment of possession on nonprimary residence grounds. The tenant denied the allegation, and a nonjury trial was held in December 2007.

The Civil Court found in favor of the landlord, basing its decision primarily on the tenant's bank and credit card transactions. The court determined the tenant's location by counting the days between two Vermont transactions as time spent in Vermont, and days between two New York transactions as time spent by the tenant in New York. Accordingly, the court found that the tenant spent 45% of the relevant period in New York, and the remaining 55% in Vermont. Thus, the court concluded that the tenant resided in New York less than 183 days per calendar year. It also noted that the tenant owned a vehicle that was registered in Vermont, and the tenant held a Vermont driver's license. The court refused to credit testimony from witnesses regarding the tenant's "continual" presence in New York on the ground that neither the witnesses nor the tenant were able to identify specific dates or point to specific blocks of time when the tenant was in New York. Appellate Term affirmed, holding that a "fair interpretation of the evidence" supported the Civil Court's determination. The Appellate Term focused on the "negligible"

electric usage in the New York apartment and the Vermont address used by the tenant for her driver's license and vehicle registration. The Appellate Term also found it significant that the tenant's long-time companion resided at the Vermont house, and that the tenant acknowledged she spent a "substantial" amount of time at the Vermont residence.

For the reasons set forth below, I would affirm. As previously noted, it is well settled that in nonprimary residence actions, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions [cannot] be reached under *any fair interpretation of the evidence*." Claridge Gardens, 160 A.D.2d 545, 554 N.Y.S.2d at 194 (emphasis added); see also AGCO Corp., 61 A.D.3d at 563-564, 878 N.Y.S.2d at 22. This is especially true when the "findings of fact rest in large measure on considerations relating to the credibility of witnesses." Claridge Gardens, 160 A.D.2d at 545, 554 N.Y.S.2d at 194.

The landlord bears the initial burden of establishing by a preponderance of the evidence that the tenant is not occupying the subject apartment as his or her primary residence. See Glenbriar Co. v. Lipsman, 5 N.Y.3d 388, 804 N.Y.S.2d 719, 838 N.E.2d 635 (2005). If the landlord satisfies its initial burden, the tenant may rebut the evidence by demonstrating "a substantial

physical nexus to the apartment." 5 N.Y.3d at 393, 804 N.Y.S.2d at 722, citing Draper v. Georgia Props., 94 N.Y.2d 809, 811, 701 N.Y.S.2d 322, 323, 723 N.E.2d 71, 72 (1999). The tenant must satisfy this burden with "objective, empirical evidence." Emay Props. Corp. v. Norton, 136 Misc. 2d 127, 128-129, 519 N.Y.S.2d 90, 91 (App. Term, 1st Dept. 1987). However, the ultimate burden of persuasion remains with the landlord. Emel Realty Corp. v. Carey, 188 Misc. 2d 280, 282–283, 729 N.Y.S.2d 228, 230-231 (App. Term, 1st Dept. 2001 per curiam), affd, 288 A.D.2d 163, 733 N.Y.S.2d 188 (1st Dept. 2001).

The term "primary residence" has not been defined by statute. Katz Park Ave. Corp. v. Jagger, 11 N.Y.3d 314, 317, 869 N.Y.S.2d 4, 5, 898 N.E.2d 17, 18 (2008). However, the Rent Stabilization Code provides a list of factors that may be considered as evidence in determining whether a rent-stabilized apartment is a tenant's primary residence. See Rent Stabilization Code (9 N.Y.C.R.R.) § 2520.6 (u). The factors include (1) the tenant's use or nonuse of the apartment address on a tax return, motor-vehicle registration, driver's license, or other publicly filed document, (2) the tenant's use or nonuse of the apartment's address as a voting address, (3) whether the tenant has lived in the apartment for fewer than 183 days in a calendar year, and (4) whether the tenant has subleased the

apartment. See id.

In this case, in my opinion, the hearing court and the Appellate Term properly found that two of the four statutory factors undisputably favor a finding that the apartment was not the tenant's primary residence. See id. While the tenant, as a Japanese citizen, is not eligible to vote, and thus has no address for voter registration purposes, she listed her Vermont address on her driver's license and vehicle registration. Moreover, she listed the New York apartment address on a federal tax return only once in the relevant period and solely for the purpose of deducting her utilities and rent as a *business* expense. Additionally, in my opinion the Civil Court's determination that the tenant spent less than 183 days per calendar year for the relevant period in the New York apartment was a fair interpretation of the evidence of the tenant's credit card transactions. There was no evidence or any dispute to counter the assumption that the card traveled with tenant between New York and Vermont even though the tenant testified that her companion was authorized to use the credit and debit card. The tenant did not deny that she was in Vermont on any day when a Vermont transaction occurred, or provide evidence that she traveled to New York on any day in between two Vermont transactions: she did not maintain a parking space in New York,

did not purchase an E-Z Pass, or provide Amtrak travel receipts or tickets to show travel between Vermont and New York.

In addition to the evidence suggested by the four statutory factors, a landlord is permitted to present other evidence, such as electrical bills. See ACP 150 West End Ave. Assocs., L.P. v. Greene, 15 Misc. 3d 1112(A), 2007 N.Y. Slip Op. 50589[U](Civ. Ct., N.Y. County 2007); see also Janco Realty Corp. v. Lee, N.Y.L.J., July 16, 1987, at 11, col. 1 (App. Term, 1st Dept. 1987 per curiam) (telephone and other utility bills indicating frequency of use). Evidence of negligible electrical usage is a significant factor used by courts in nonprimary residence analyses. See Briar Hill Apts. Co. v. Teperman, 165 A.D.2d 519, 568 N.Y.S.2d 50 (1st Dept. 1991)(finding minimal electrical use); see also 156 E. 37th St. LLC v. Black, 25 Misc. 3d 1239(A), 2009 N.Y. Slip Op. 52496[U] (Civ. Ct., N.Y. County 2009) (noting low electrical consumption inconsistent with everyday living purposes). In Carmine Ltd. v. Gordon, (41 A.D.3d 196, 837 N.Y.S.2d 146 (1st Dept. 2007)), this Court held for the landlord primarily on the basis of the tenant's low electrical consumption. 41 A.D.3d at 198, 837 N.Y.S.2d at 148. In Carmine Ltd., the tenant's electrical records demonstrated that for four months, there was no electrical usage, and for seven months, the electrical usage did not exceed that which a refrigerator by

itself would consume according to testimony from a Consolidated Edison employee. See Carmine Ltd. v. Gordon, 9 Misc. 3d 138(A), 2005 N.Y. Slip Op. 51763[U] (App. Term, 1st Dept. 2005)(McCooe, J., dissenting), rev'd, 41 A.D.3d at 196; 837 N.Y.S.2d at 146. In this case, the landlord presented similarly compelling evidence of the tenant's "negligible" electrical usage during the relevant period.

Two witnesses testified about the tenant's electrical consumption. The first, a customer service representative for Consolidated Edison, produced 35 of the tenant's monthly bills (indicating actual usage in kilowatt hours and cost of consumption) from January 2004 until February 2007. The records reveal that for 33 of the 35 months, or 94% of the time, the tenant used between 55 and 133 kilowatt hours per month.

Further, the second witness, the landlord's expert on reading, reporting, and installing electrical meters for residential and commercial properties, testified that the tenant's electrical usage, at 50 - 150 kilowatt hours per month, was "considerably below" the average of 200 to 250 kilowatt hours for similarly-sized studio apartments in Manhattan where the landlord provides heat and hot water as it does in the tenant's case. The expert testified that a standard refrigerator alone consumes 140 kilowatt hours per month. In my opinion, the

tenant's explanation, which the majority accepts as adequate, cannot help her. That the tenant eats out or orders "takeout" in New York and does not cook in her oven does not explain why her electrical consumption during the relevant dates was either below, or roughly equal to, only that which a standard refrigerator alone uses. Indeed, in my opinion, a fair interpretation of such negligible consumption is that the tenant did not use her microwave, VCR, coffee maker, hair dryer, television or radio at any time during the relevant months. In other words she did not use the apartment for actual living purposes. Finally, the tenant's attempt to explain her low New York electrical consumption by offering records from 1988-1989 which show similar consumption is, I believe, a wasted effort. There is simply no evidence that she was primarily residing in the apartment during that period either even though that period, when she purchased the Vermont property, is not at issue in this case.

Further, contrary to the majority's conclusion, I believe that the testimony of the tenant's witnesses fails to provide the requisite objective, empirical evidence to show that the tenant maintained a substantial nexus to the subject apartment for the relevant period. The majority emphasizes that no one found that "these witnesses were incredible." In my opinion, that misses

the point: even if credible (and some of it as mentioned above was plainly not credible), the testimony was too vague to effectively rebut the evidence presented by the landlord. Of the three neighbors who testified on behalf of the tenant, the first lived on the sixth floor, one floor above the tenant. He stated he saw the tenant in New York during the relevant period "probably one to two times a week, *roughly*" (emphasis added). The second neighbor testified he lived across the hall from the tenant. He stated he saw the tenant "very frequently," that he shared meals with her, and watched films with her "occasionally." The third neighbor lived on the second floor. He testified he saw the tenant *roughly* twice a week, and that the tenant was "never ... away from my purview." None of the three neighbors stated how often, or when, the tenant was in New York. Moreover, although the tenant admittedly visited Japan for approximately one month each year in 2004-2006, none of the witnesses could recall those specific absences. More significantly, neither the tenant nor her long-time companion could specify any dates or periods of time when the tenant was in New York, and equally significantly could not produce any documentary evidence of travel between New York and Vermont whether by car or train or plane.

Generalized, sweeping statements from witnesses that they

saw the tenant “quite often,” or “roughly twice a week” are as meaningless as the hyperbolic claim that the tenant was “never ... away from my purview.” Indeed, precedent suggests such vague statements are insufficient to rebut any of the landlord’s documentary evidence. See e.g., 156 E. 37th St. LLC v. Black, 25 Misc. 3d 1239(A), 2009 N.Y. Slip Op. 52496[U] (Civ. Ct., N.Y. County 2009), supra.

The majority’s reliance on 300 E. 34th St. Co. v. Habeeb, (248 A.D.2d 50, 683 N.Y.S.2d 175 (1st Dept. 1997)), is misplaced. In Habeeb, the tenant demonstrated a substantial nexus to the subject apartment through witnesses who either lived with the tenant or visited the subject apartment daily and who testified to seeing the tenant in the subject apartment on a *daily* and *nightly* basis. 248 A.D.2d at 52, 683 N.Y.S.2d at 176. The majority’s reliance on 310 E. 23rd LLC v. Colvin (41 A.D.3d 149, 837 N.Y.S.2d 134 (1st Dept. 2007)), is equally misplaced. In Colvin, there is no reference to any testimony other than the tenant’s, thus the decision cannot stand for the proposition that vague testimony of friends and neighbors can establish a tenant’s substantial nexus for primary residential purposes.

Moreover, contrary to the testimony of the tenant and her witnesses, the landlord’s investigator testified that when she called the apartment, an acquaintance of the tenant who was

identified as a friend who visited the apartment to water plants and pick up phone messages answered and said that the "[tenant] resides at both locations" and that she "spent the majority of her time in Vermont." The majority is incorrect in stating that the tenant maintained a full-time job in Manhattan during the relevant period. The tenant, in fact, testified she was not employed, and worked only on an "[a]s-needed basis." Indeed, it appears that the tenant used the subject apartment as her business office. On her 2004 federal tax return, she took a business deduction for rent and utilities, and labeled the apartment as her business address. In addition, one witness testified the tenant would *occasionally* return to New York for "rush jobs." Thus, a fair interpretation of the evidence is that the tenant used the apartment during the relevant period as a business space and not for actual dwelling purposes as required by the Rent Stabilization Code. See Sommer v. Ann Turkel, Inc., 137 Misc. 2d 7, 10, 522 N.Y.S.2d 765, 767 (App. Term, 1st Dept. 1987) (stating the purpose of the Rent Stabilization Code is to protect "those tenants who actually require and actively use their apartments for *dwelling* purposes"(emphasis added)).

Finally, the landlord produced evidence to show that in 2001, the tenant was primarily residing in Vermont. The tenant sent a letter dated October 15, 2001, to the former landlord of

the building, stating "[i]n view of the September 11 WTC [a]ttacks and the ensuing situations, I am temporarily staying away from NYC" and requested that her "rent bill and other correspondence" be mailed to the Vermont address. The record contains no evidence of any notification that the tenant returned to use the New York apartment as a primary residence.

Given all of the foregoing, in my opinion, a fair interpretation of the evidence in this case leads to the conclusion that although the tenant moved into the subject apartment approximately 30 years ago, she relocated to Vermont after the events of 9-11 in 2001, and thereafter no longer used the New York apartment as her primary residence. The majority, in my opinion, neither attempts to nor does it establish that it is obvious that such conclusion *cannot* be reached under any fair interpretation of the evidence.

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

ENTERED: October 2, 2012

CLERK