SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 14, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Gische, Mazzarelli, Kahn, JJ.

3780 Ind. 2948/08
2922/11

The People of the State of New York,
Respondent,

-against-

Doran Allen,
Defendant-Appellant.

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

Doran Allen, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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On remittitur from the Court of Appeals (__ NY3d __, 2018 NY Slip Op 08537 [2018]), judgment, Supreme Court, Bronx County (Peter J. Benitez and Efrain Alvarado, JJ. at grand-jury related applications; Ralph Fabrizio, J. at jury trial and sentencing), rendered January 10, 2014, convicting defendant of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

We previously held that the verdict was based on legally

sufficient evidence, and was not against the weight of the evidence (152 AD3d 401 [1st Dept 2017]). We found that the evidence supported the conclusion that defendant intentionally aided the commission of the homicide and shared a community of purpose with the gunman, and that defendant intentionally participated by acting as a driver and by pointing out the victim. We reversed the judgment and remanded for a new trial, however, upon a finding that the presence of an unconstitutionally infirm murder charge had influenced the verdict.

The Court of Appeals, on appeal from the prior order, held that this Court erred in concluding that the improper presence of the murder count "loomed over the trial, and in some way influenced the verdict" (__ NY3d at __, 2018 NY Slip Op, *9; 152 AD3d at 403; *see People v Mayo*, 48 NY2d 245 [1979]). The Court held that the charges against defendant contained in the first indictment were valid and not obtained in violation of CPL 190.75(3), and thus, a spillover analysis rather than *Mayo* applied. The Court accordingly remitted the matter to this Court for a determination of the facts and issues raised but not determined on the prior appeal.

We find that defendant received the effective assistance of

counsel under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 711-712 [1998]; *People v Hobot*, 84 NY2d 1021, 1022 [1995]; *Strickland v Washington*, 466 US 668, 689-692, 694 [1984]).

Counsel was not ineffective for failing to request an instruction that if the jury convicted codefendant Alexander of intentional murder, it should acquit defendant of manslaughter. The court properly instructed the jury on the applicable principles of acting in concert liability, including that the jury "must find beyond a reasonable doubt that the particular defendant . . . intentionally aided that person or persons to engage in that conduct [and] [t]hat the particular defendant did so with the state of mind required for the commission of that offense." "The fact that [a] defendant and codefendant [are] convicted of different degrees of homicide does not undermine the inference of accessorial liability" (*People v Dedaj*, 303 AD2d 285 [1st Dept], *lv denied* 100 NY2d 580 [2003]; *People v Valentin*, 289 AD2d 172, 172-173 [1st Dept 2001], *lv denied* 97 NY2d 734 [2002]). For example, the jury may have concluded that Alexander intended to kill the victim, but defendant intended only to seriously physically injure him based on what he knew prior to the shooting, and acted in concert with the cooperating witness.

For the same reason, counsel was not ineffective for failing to object to the verdict as repugnant (*see People v Tucker*, 55 NY2d 1, 8 [1981]) based on the jury's acquittal of defendant of acting in concert with intent to kill the victim, and conviction of acting in concert with intent to cause him serious physical injury, while the jury convicted Alexander, one of the shooters, of intentional murder.

The record shows that counsel zealously represented defendant throughout the trial and sentencing.

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

ENTERED: FEBRUARY 14, 2019

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6049 In re Yvonne Porter, et al., Index 100546/16
Petitioners,

-against-

New York City Housing Authority,
Respondent.

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Yvonne Porter, petitioner pro se.

David I. Farber, New York City Housing Authority, New York, (Seth E. Kramer of counsel), for respondent.

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Petition, brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Andrea Masley, J.], entered January 13, 2017), seeking to annul determination of respondent, dated December 14, 2015, which, to the extent challenged, after a hearing, denied petitioner Yvonne Porter's grievance seeking succession rights as a remaining family member to the tenancy of her late mother, held in abeyance, and the proceeding remanded to respondent for further proceedings in accordance with this order.

Petitioner Yvonne Porter seeks succession rights to the apartment of her late mother, who lived in the Borinquen Plaza Houses, owned by respondent, New York City Housing Authority (NYCHA). She can qualify for succession rights by showing, in

addition to meeting the financial requirements, that she resided with her mother in the apartment continuously for a year or more before her mother's death, either with NYCHA's written permission or by showing that circumstances exist that relieve her of the written permission requirement (*see Matter of Russo v New York City Hous. Auth.*, 128 AD3d 570, 571 [1st Dept 2015]; *Matter of Gutierrez v Rhea*, 105 AD3d 481, 485-486 [1st Dept 2013], *lv denied*, 21 NY3d 861 [2013]; *Matter of Detres v New York City Hous. Auth.*, 65 AD3d 442, 443 [1st Dept 2009]). In reaching her determination adverse to Porter, the Hearing Officer failed to consider Porter's argument that she had met her burden by showing that she had lived in the apartment for the required period with the knowledge of the NYCHA project manager. Accordingly, we remand to respondent for a determination of this issue.

Factual and Procedural History

On January 31, 2014, Porter's request for succession rights was denied after an informal hearing before the Borough Manager. Porter then requested and was granted a formal hearing. On November 19, 2015, Hearing Officer Arlene Ambert took testimony from Porter, her son, a family friend, and Terry Gray, a NYCHA

employee who had worked in Borinquen Plaza since about 2013.[1]

It is undisputed that Porter’s mother, Hattie Speights, moved into an apartment in Borinquen Plaza II in or about 1976, with her family, including Porter. Porter testified that she moved out in or about 1989 and that she resided in the apartment again from about 2006 until 2008, with the knowledge of NYCHA management. Porter further testified that, in or about 2010, when Speights began to show signs of dementia, Porter moved back into the apartment to care for her mother full-time. Her mother’s descent into dementia took place over time. Porter testified that she cooked for her mother, made sure she ate, and assisted with all of her mother’s hygiene, hardly leaving the apartment for the next three years. She testified that her mother advised NYCHA Housing Manager Ferdinand Rios that Porter had moved back in and that Porter herself had several conversations with him, to the same effect, between November 2010

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[1]There had been three days of hearing before a different hearing officer, who then became unavailable. On November 19, 2015, the parties asked to proceed with a de novo hearing that day. Hearing Officer Ambert agreed, and returned all of the exhibits from the earlier hearing to the parties. Given this stipulation and ruling, this Court may not consider the transcript of the earlier hearing, included in respondent’s appendix. Nonetheless, the dissent improperly discusses the testimony from the earlier dates.

and July 2011. Documents admitted into evidence show that, as of 2010, Porter used her mother's address for her tax returns, her New York State identification and her pension plan, and that she placed the cable account for the apartment in her own name.

Porter testified that, at a meeting in or about July 2011 among herself, her mother, and Rios, in his office, she handed Rios her mother's completed "Permanent Permission Request" form. In the form, which was admitted into evidence, Speights requested that Porter be added to the household, and stated, "I am disabled and no longer able to live alone. I need my daughter to help me day and night." Porter also testified as follows about the meeting. At the time, her mother "had a lot of lucid moments," her dementia "wasn't so bad," and she knew what she was doing when she asked to add Porter to her household.[2] Porter gave Rios her pension paystub to document her financial eligibility. Rios handed the documents back to Porter and said that Porter "can't go on the lease. . . . but I know that you're there, you know, everything is fine the way it is." Rios also advised Porter and

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[2]Accordingly, contrary to our dissenting colleague's characterization of Porter's testimony about her mother's condition, Porter's observation that her mother was lucid that day was entirely consistent with her testimony that she was reluctant to interfere in the conversation between Rios and her mother.

her mother not to add Porter's information to the annual income affidavits.

There is no dispute that Rios did not give Porter and her mother a written decision with respect to the request.[3] This is not consistent with the requirements of the NYCHA Management Manual (the NYCHA Manual) and the form itself, which require that the project manager approve or deny a Permanent Permission Request in writing (*see also* Public Housing Law § 402-c [effective December 28, 2016, NYCHA is required to provide written denials of all requests entitling tenants to grievance hearings, including requests to add family members to the lease]).[4]

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[3]The dissent's speculative statements that Porter may have deliberately acquiesced in Rios's failure to give them a written decision and that Porter or her mother "voluntarily withdrew" the request have no support in the record, were not found by the Hearing Officer, and were not argued by NYCHA.

[4]Our dissenting colleague notes that the Permanent Permission Request form also provides that a tenant may request a grievance hearing to review the manager's decision, and faults Porter for not having sought a hearing immediately after the July 2011 meeting with Rios. However, Porter, who was not the tenant of record, did not have a right to request a grievance hearing. Moreover, under provisions of the NYCHA Manual, the right to a grievance hearing would only have been triggered by the written completion of the form as "disapproved," which Rios failed to do. As the Legislature recently recognized in enacting Public Housing Law § 402-c, "When NYCHA's denial precedes the ability of a resident to institute a grievance procedure, a baseless, verbal

Counsel for NYCHA had the opportunity to have Rios testify, but chose not to do so. Accordingly, there is no testimonial evidence contradicting Porter's testimony about the July 2011 meeting and any of her other contacts with Rios.

On December 16, 2011, Porter's mother executed a power of attorney giving Porter authority to act on her behalf, including with regard to real estate transactions, government assistance, legal actions, and personal and family care.

NYCHA records admitted into evidence establish that, on April 2, 2013, Terry Gray, a NYCHA employee, called the apartment and spoke with Porter about moving Porter's mother to a smaller apartment. Porter advised Gray that moving could be detrimental to her mother, and again asked that she be added to the household. Gray scheduled a meeting between Porter and Rios the next day. On April 3, 2013, a different NYCHA employee, Ayodeji Festus, met with Porter, instead of Rios. Porter told Festus that her mother should not be moved because of her age and health issues, and again stated that she would like to be added to the

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communication of that denial does not give residents adequate information to take full advantage of the grievance process. A written notice articulating the reasons for denial would give residents the ability to contest those reasons and equal footing in grievance proceedings" (Sponsor's Mem, Bill Jacket, L 2016, ch 335, 2016 NY Legis Ann at 194).

household as a permanent resident. Porter also told Festus that she had already obtained the Permanent Permission Request form, and Festus advised Porter to submit proof of her income and previous address.

Porter's mother died on September 9, 2013. Porter testified that, a few days later, Rios came to the apartment and told Porter that, if she was not going to move out, she needed to write him a letter stating why she should succeed to her mother's tenancy. Porter's letter to Rios dated December 11, 2013 was admitted into evidence. In it, Porter stated that she moved back to the apartment in 2010 to care for her mother, and that, in relevant part, "I would appreciate that you acknowledge your permission and awareness of us living with my mom."

At the end of the hearing, Porter's attorney argued that, under prevailing case law, remaining family members may be granted succession rights, based on a showing that they lived in the building with the knowledge and implicit approval of the project manager, citing "*McFarlan[e]*" (*v New York City Hous. Auth.*, 9 AD3d 289, 291 [1st Dept 2004]).

In her decision, the Hearing Officer denied petitioner's remaining family member grievance because a "tenant who wishes to have an additional person join or re-join the household on a

permanent basis must submit a written request to the development manager and receive written approval." The Hearing Officer found that Porter's testimony

> "reveals that the Property Manager did not grant permission for the Grievant to reside in the subject apartment. According to the Grievant, this disapproval was not challenged. The Grievant's explanation that because Mr. Rios did not state that she could not stay in the apartment and that the Grievant did not wish to interfere in the conversation between Mr. Rios and the Tenant to ask Mr. Rios to clarify or explain the disapproval is incredible in light of the evidence presented that the Tenant was suffering from dementia and that the Grievant was named as the Tenant's Attorney-in-fact by Power of Attorney."[5]

The Hearing Officer further found that, even if Porter had submitted a second Permanent Permission Request at her meeting with Festus on April 3, 2013 and it had been immediately approved, that would have been insufficient to meet NYCHA's requirement that a remaining family member reside with the tenant

[5]Contrary to the statement of our dissenting colleague, the Hearing Officer did not find that all of Porter's testimony was incredible. Rather, she found "incredible" only Porter's explanation for not interfering in the conversation between her mother and Rios. As discussed further below, the stated basis for this finding is not supported by substantial evidence because Porter did not have power of attorney for her mother in July 2011, and the only evidence of Speights's cognitive condition at that time was Porter's testimony that her mother was lucid and understood what she was doing during the July 2011 meeting.

for one year before the tenant's departure, since Porter's mother passed away approximately five months later. However, the Hearing Officer failed to make a determination on Porter's argument that she is excused from the written consent requirement because she resided with her mother in the apartment with the project manager's knowledge and/or tacit approval.

Acting pro se, Porter filed an article 78 petition challenging the Hearing Officer's determination. She argued that the determination was not supported by substantial evidence because, inter alia, the Hearing Officer found that Porter had a power of attorney to act on her mother's behalf in July 2011 despite the fact that her mother did not execute the power of attorney until December 2011. Porter also argued that NYCHA should have given her succession rights based on NYCHA's "verbal and implicit approval."

The article 78 court transferred the matter to this Court pursuant to CPLR 7804(g).[6]

Analysis

The Hearing Officer's finding as to Porter's explanation for

[6] The motion court also dismissed the petition as to Porter's adult son because he had not signed or verified the petition, but that ruling is not appealed.

why she did not seek clarification from Rios in July 2011 was based on her mistaken belief that Speights was unable to understand or speak for herself and that Porter had a power of attorney to act on her mother's behalf at that time. However, Porter did not have the power of attorney until December 2011, five months after the July 2011 meeting with Rios, and she testified that her mother was not totally debilitated, was lucid at the July 2011 meeting, and understood what she was doing when she asked that Porter be added to the household. Contrary to the dissent's claim, our scrutiny of the basis for the Hearing Officer's finding is entirely consistent with our obligation under *Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044 [2018]) to defer to administrative findings that are supported by substantial evidence. We find that the Hearing Officer's factual determination, in this one respect, is not supported by substantial evidence and is contradicted by the documentary and testimonial evidence.[7]

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[7]Contrary to our dissenting colleague's characterization of our holding today, we do not take issue with the Hearing Officer's other factual findings. We do not "annul," "disparage," or "re-weigh[]" those findings or remand for "further administrative factfinding." Rather, we remand only for a determination on the existing record of whether Porter is entitled to remaining family member status because she resided in the apartment with NYCHA's knowledge or consent for a year or

The Hearing Officer's decision failed to address one of Porter's primary arguments. This error is appropriately remedied by a remand (*see generally A.F.C. Enters., Inc. v New York City Tr. Auth.*, 79 AD3d 514 [1st Dept 2010]). At the hearing, Porter contended that she resided in the apartment with the project manager's knowledge and/or implicit approval, and thus is entitled to remaining family member status on that basis. The Hearing Officer did not address this claim, and, instead, rejected the petition solely because NYCHA had failed to give written permission for Porter to reside in the apartment.[8] However, in *McFarlane* (9 AD3d 289), this court stated that

> "[o]ne type of circumstance that *could* be of critical importance in establishing a right to be treated as a remaining family member despite the absence of notice or written consent would be a showing that the Authority was aware of the petitioner having taken up

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more before her mother's death.

[8]*Haug* (32 NY3d 1044 [2018], *supra*), cited by our dissenting colleague, has no application to this aspect of our ruling, since we are not finding that the Hearing Officer's determination was or was not supported by substantial evidence. Rather, we find that the record is inadequate for review by this Court because the Hearing Officer failed to make a determination on the issue raised by Porter. Furthermore, to the extent that the dissent cites to *Haug* for the proposition that hearsay is admissible at an administrative hearing, that principle is not applicable in this case, because the Hearing Officer did not cite to or rely on any hearsay evidence in reaching her determination.

> residence in the unit, and implicitly approved it" (9 AD3d at 291).

We have repeatedly stated since *McFarlane* that, where petitioner in a remaining family member grievance demonstrates that NYCHA "knew or implicitly approved of" petitioner's residence in a NYCHA apartment with the tenant, petitioner may be relieved of the written consent requirement (*see Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580, 581 [1st Dept 2011]; *see also Matter of Taylor v Olatoye*, 154 AD3d 634 [1st Dept 2017]; *Matter of Russo*, 128 AD3d at 571; *Matter of Gutierrez*, 105 AD3d at 485-486; *Matter of Filonuk v Rhea*, 84 AD3d 502, 503 [1st Dept 2011]; *Matter of Detres*, 65 AD3d at 443).

Respondent argues, and our dissenting colleague agrees, that granting the petition would be inconsistent with the principle that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (*Matter of Schorr v New York City Dept. of Hous. Preserv. and Dev.*, 10 NY3d 776, 779 [2008] [internal quotation marks omitted]; *see also Matter of Jian Min Lei v New York City Dept. of Hous. Preserv. & Dev.*, 158 AD3d 514, 515 [1st Dept 2018]). However, this argument is inapposite here.

As an initial matter, Porter has not argued estoppel.

Moreover, granting Porter's petition would not cause NYCHA to run afoul of its statutory duties, because there is no federal statute or regulation that requires that NYCHA's consent to a permanent residency request be in writing. Contrary to our dissenting colleague's assertion that the written consent requirement is "federally mandated," there is no federal law or regulation requiring written consent, and none of the cases cited by the dissent says that there is. The applicable federal regulation requires only that the primary tenant make a request (24 CFR 966.4[a][1][v]), which occurred here. The written consent requirement appears only in the NYCHA Manual. Moreover, contrary to the dissent's position, the lease does not adopt the provision from the NYCHA Manual but rather follows the federal regulation to permit occupancy without written consent by an individual who has been "authorized by the Landlord" and has remained "in continuous occupancy . . . since such authorization."

Accordingly, neither the letter of the applicable regulation, which does not require written consent (CFR 966.4[a][1][v]), nor the express purpose of the statutory scheme (42 USC § 1437[a][1][B], [4] ["It is the policy of the United States . . . to assist States . . . to remedy the . . . acute

shortage of decent and safe dwellings for low-income families . . . [and] that our Nation should promote the goal of providing decent and affordable housing for all citizens"]) would be thwarted by a determination that Porter is excused from the written consent requirement. As the Court of Appeals has recognized, affording succession rights to financially eligible family members is entirely consistent with a legislative goal of providing housing to low-income people (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 653 [2013]).

For this reason, this case is distinguishable from *Schorr*. In that case, petitioner was denied succession rights in a Mitchell-Lama apartment because he did not meet a statutory requirement that he have resided in the apartment for two years immediately before the primary tenant's departure (28 RCNY 3-02[p][3]). Accordingly, the Court of Appeals found that the building management's acquiescence in his occupancy could not estop the New York City Department of Housing Preservation and Development, which was unaware of petitioner's occupancy, from discharging its duty to ensure that residents comply with statutory requirements (*Schorr*, 10 NY3d at 778, n 2, 779). In contrast, here, as discussed above, there is no relevant

statutory requirement.

Respondent and the dissent also cite to cases in which we have held that even if NYCHA "was aware that petitioner was living in the apartment . . . respondent may not be estopped from denying petitioner's grievance" (*Matter of Andrade v New York City Hous. Auth.*, 132 AD3d 598, 598-599 [1st Dept 2015]). However, in these cases, NYCHA had a valid reason to deny the remaining family member grievance, aside from a lack of written consent. In most of these,[9] the tenant never requested that the petitioner be added as a permanent resident, in violation of the governing federal regulations (24 CFR 966.4[a][1][v]; *see Andrade*, 132 AD3d 598; *Matter of Gonzalez v New York City Hous. Auth.*, 112 AD3d 531 [1st Dept 2013]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* [upon petitioner's death] 20 NY3d 1053 [2013]; *Rosello v Rhea*, 89 AD3d 466 [1st Dept 2011]; *Matter of Edwards v New York City Hous.*

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[9]In other cases cited by respondent, the request was made less than one year before the tenant's death or departure, so that the requirement that petitioner have resided with the tenant for a continuous period of one year before the tenant's death or departure could not have been met (*see Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478 [1st Dept 2014]; *Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624 [1st Dept 2012]). However, those cases are not relevant here, in light of Porter's testimony and the documentary evidence showing that she resided with her mother for more than one year before her death.

Auth., 67 AD3d 441 [1st Dept 2009]).[10]

Because the Hearing Officer failed to address Porter's argument that she was entitled to remaining family member status on the basis that she resided with her mother with NYCHA's consent or approval, the record precludes an adequate review by this Court (*see Matter of City of New York v Contract Dispute Resolution Bd. Of the City of N.Y.*, 110 AD3d 647 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]; *A.F.C. Enters., Inc.*, 79 AD3d at 515). Therefore, we hold the petition in abeyance and remand the proceeding to NYCHA for a determination, on the existing record, of that issue (*see Gutierrez*, 105 AD3d at 485-486), and, should

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[10]Respondent and the dissent also cite to *Matter of Dancil v New York City Hous. Auth.* (123 AD3d 442 [1st Dept 2014]) and *Matter of Rahjou v Rhea* (101 AD3d 422 [1st Dept 2012]). The facts of these cases are not discussed in the published opinions. However, each case cites to *Adler* (95 AD3d 694), in which the petition was properly denied because no request had ever been made to add the petitioner as a permanent member of the household (*see Matter of Adler*, 31 Misc 3d 1205[A], 2011 NY Slip Op 50499[U] [Sup Ct NY County 2011]). In addition, the dissent cites to *Matter of McBride v New York City Hous. Auth.* (140 AD3d 415 [1st Dept 2016]). However, in that case, we noted that there was "no basis upon which to relieve petitioner of the written consent requirement" (*id.* at 416, citing *McFarlane*, 9 AD3d 289). Here, the Hearing Officer failed to address Porter's *McFarlane* argument.

NYCHA determine that Porter is excused from the written consent requirement, for a determination of Porter's income eligibility.

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

FRIEDMAN, J.P. (dissenting)

In this article 78 proceeding transferred to this Court pursuant to CPLR 7804(g), the primary question presented is whether an administrative determination rendered by respondent New York City Housing Authority (NYCHA), after an evidentiary hearing, is, "on the entire record, supported by substantial evidence" (CPLR 7803[4]). This is a highly deferential standard of review that, contrary to the majority's view, is plainly satisfied here.

Indeed, the Court of Appeals has very recently reiterated the extremely limited scope of judicial review under the substantial evidence standard:

> "Upon judicial review, the Appellate Division must accord deference to the findings of the administrative decision-maker. . . . [N]either the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence.
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> "We emphasize that the substantial evidence standard is a minimal standard. It is less than a preponderance of the evidence, and demands only that a given inference is reasonable and plausible, not necessarily the most probable. Stated differently, rationality is what is reviewed under the substantial evidence rule; substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Where substantial evidence exists, the reviewing court may

not substitute its judgment for that of the agency, even if the court would have decided the matter differently.

"Often there is substantial evidence on both sides of an issue disputed before an administrative agency. Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] [citations, alterations, ellipses and internal quotation marks omitted]).

Petitioner is challenging NYCHA's denial of her claim to succession, as a remaining family member (RFM), to her late mother's tenancy in a 5½-room apartment in an NYCHA residential complex. NYCHA's rules, adopted to comply with applicable federal law, require that petitioner's RFM claim be supported, in pertinent part, by proof that she resided in the apartment lawfully, *pursuant to NYCHA's written consent*, continuously for at least one year before her mother's death (*see* NYCHA Management Manual [hereinafter, the Manual], ch I, § XII[A][1], [2]).[1] Petitioner concedes that she never obtained NYCHA's written permission to join her mother's household at any point between November 2010, when she allegedly moved back into the apartment,

[1]I refer to the edition of the Manual dated December 12, 2012, which is reproduced in pertinent part in respondent's appendix and apparently was in effect at the relevant time.

and September 2013, when her mother died.[2] However, petitioner argues here, as she did through counsel before the NYCHA Hearing Officer, that the requirement of written consent should be excused based on her testimony that the NYCHA project manager had knowingly acquiesced to her occupancy since 2011.

In the decision rejecting petitioner's claim to succession rights, the NYCHA Hearing Officer found "incredible" petitioner's testimony that, at a meeting in July 2011, the project manager, while refusing to issue written consent to petitioner's occupancy of the apartment (such written consent being required by the lease and the Manual), had given oral consent to such occupancy. Thus, entirely without merit is the majority's characterization of the determination as deficient because the Hearing Officer "failed to consider [petitioner's] argument that she had met her burden by showing that she had lived in the apartment for the required period with the knowledge of the NYCHA project manager." *On the contrary, the Hearing Officer gave this argument due consideration and rejected the testimony on which it was based as "incredible."* While the majority is entitled to disagree with

[2]Although petitioner had resided in the apartment with NYCHA's authorization years before, it is undisputed that only her alleged continuous occupancy immediately preceding her mother's death is relevant to her claim to succession rights.

that assessment, CPLR article 78 does not empower us to annul an administrative determination based on a disagreement with the Hearing Officer's judgment of a witness's credibility, as the Court of Appeals just made eminently clear in *Haug*.

Moreover, the Hearing Officer had ample grounds on this record to discredit petitioner's testimony. Petitioner testified that, at the July 2011 meeting, she had not objected to the project manager's refusal to add her to the lease because she had not wished to interfere in the conversation between the project manager and her mother, who allegedly had also been present. The Hearing Officer found this testimony incredible because it was inconsistent with petitioner's previous testimony that, at the time of the alleged meeting, her mother had been afflicted with dementia.[3] Moreover, the Hearing Officer's disbelief of petitioner's testimony concerning the July 2011 meeting finds further support in an NYCHA employee's testimony that the agency has no record of any such meeting, although it is NYCHA's policy to make a record of all interviews with residents. In this regard, the NYCHA employee testified that the earliest reference

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[3]Indeed, petitioner testified that her mother's dementia, along with her other health problems, was the reason petitioner had moved back into the apartment in November 2010.

in the agency’s files to petitioner’s occupancy is the record of a discussion in April 2013 — only five months before her mother’s death — in which petitioner asked that she and her adult son be added to the household.

Inasmuch as the determination under review is based on the Hearing Officer’s findings of fact, we are bound to confirm the determination if those finding are, as previously noted, “on the entire record, supported by substantial evidence” (CPLR 7803[4]). As the foregoing summary of the most salient evidence should suffice to show, the substantial evidence standard — as authoritatively interpreted by the Court of Appeals (*see e.g. Haug*, 32 NY3d at 1045-1046) — is satisfied here. Further, even if we had the power to disturb NYCHA’s resolution of the factual issues presented to it (which we do not), as a matter of law, “estoppel is not available as a remedy to prevent a governmental agency from discharging its statutory duties” (*West Midtown Mgt. Group, Inc. v State of N.Y., Dept of Health, Off. of the Medicaid Inspector Gen.*, 31 NY3d 533, 541-542 [2018], citing, inter alia, *Matter of Schorr v New York City Dept. of Hous. Pres. & Dev.*, 10 NY3d 776, 779 [2008]). That a government agency, such as NYCHA, cannot be estopped to discharge its lawful duties is a blackletter legal principle that, contrary to the majority’s

mistaken view, the Court of Appeals has never abandoned, and to which this Court is therefore bound to adhere, notwithstanding statements — the majority of which are mere dicta — suggesting otherwise in a handful of cases cited by the majority.[4]

For the foregoing reasons (which are more fully elaborated below), I respectfully dissent from the majority's implicit annulment of NYCHA's evidence-based and entirely rational resolution of this matter, a determination that is entitled to confirmation as a matter of law.[5]

Legal Background

The Legislature created NYCHA to provide housing to low-income families in New York City, vesting the agency with the power to impose eligibility standards (*see* Public Housing Law §§ 3[2]; 37[1][w]; 156; 401). NYCHA, as a recipient of funding from the federal Department of Housing and Urban Development (HUD),

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[4]While the Court of Appeals recognized in *West Midtown Mgt.* that there are "rare exceptions" to the unavailability of estoppel against the government (31 NY3d at 541), no such exception applies in the context presented by this proceeding, as more fully discussed below.

[5]The majority, perhaps recognizing that the record affords no basis for annulling the determination under review, avoids stating that the determination is being annulled, but such an annulment is, in fact, the result of the majority's decision. This point will be further discussed below.

must comply with HUD regulations, which require NYCHA to "establish and adopt written policies for admission of tenants" (24 CFR 960.202[a][1]). HUD regulations mandate that NYCHA's leases with its tenants state, inter alia:

> "The composition of the household as approved by [NYCHA]. The family must promptly inform [NYCHA] of the birth, adoption, or court-awarded custody of a child. *The family must request [NYCHA] approval to add any other family member as an occupant of the unit*" (24 CFR 966.4[a][v] [emphasis added]).

The Manual provides that, for a new person to be added as a permanent member of a tenant's household (other than through "family growth," i.e., birth, adoption or an award of custody), "the tenant must make a written request to the Housing Manager by submitting" a document known as the "Permanent Residency Permission Request form" (Manual, ch I, § XI[B][2]). This rule applies to previously authorized household members "*who moved out* of the household and seek[] permission to rejoin the household" (Manual, ch I, § XI[B][2][a][2][c] ["Person Seeking to Rejoin the Family"]). The Manual elaborates on this point as follows:

> "A person in this category does *not* automatically obtain permanent residency permission by virtue of his/her former occupancy, notwithstanding NYCHA's actual or constructive notice of the person's return to the apartment. Such a person may obtain permanent residency permission *only* if the tenant requests

> permanent residency permission and the Housing Manager grants permanent residency permission in writing" (*id.*).

This requirement is set forth in the NYCHA lease signed by petitioner's mother.[6]

NYCHA's RFM policy "defines who may succeed to a lease as a remaining family member *after* a tenancy ends[,] i.e., the tenants/lessees move out of the apartment or die" (Manual, ch I, § XII). As here relevant, a person claiming RFM status (other than as an original member of the household or as a member added through family growth) must establish that he or she (1) "[o]btained *Permanent Residency Permission* (i.e.[,] *written permission*) from the Housing Manager" (*id.*, ch I, § XII[A][1][c]), (2) has "remain[ed] in continuous occupancy (i.e., [has been named] on all Occupant's Affidavits of Income) from the date of issuance of the Housing Manager's written Permanent

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[6]Specifically, paragraph 5(b) of the lease provides:

> "The Tenant shall obtain the written consent of the Housing Manager of the development in which the Leased Premises is [sic] located ('Development'), or such Housing Manager's designee, before allowing any person to reside in the Leased [P]remises other than a family member named in the Tenant's signed application or born or adopted into the household, or subsequently authorized by the Landlord, who remains in continuous occupancy since the inception of the tenancy, since birth or since subsequent authorization by the Landlord."

Residency Permission for *not less than one year immediately prior to the date the tenant vacates the apartment or dies*" (*id.*, ch I, § XII[A][2][a]), and (3) is otherwise eligible for public housing (*id.*, ch I, § XII[B]).

As referenced in the previous paragraph, to satisfy the continuous occupancy requirement for RFM status, a claimant must "be named on all affidavits of income from the time (s)he lawfully enters the apartment" (Manual, ch I, § XII[A][2]). This refers to the annual affidavit of income that a tenant is required to file, setting forth the name of each member of the household and his or her income. The affidavit-of-income forms executed by petitioner's mother, as tenant, from 2010 through 2013 include the following direction to the tenant:

> "List all occupants living in your apartment. Failure to do so may deprive them of all rights of occupancy. No person is allowed to reside in your apartment except authorized members of your family (which is based on authorized original family members who remain in continuous residence and births), unless written permission is REQUESTED by you and GRANTED by Property Management."

A claim for RFM succession rights is first raised with the manager of the development where the apartment is located. If the manager denies the claim, and the district office upholds the denial, the claimant may file a grievance and request an

evidentiary hearing before an impartial hearing officer. At such a hearing, "[t]he RFM claimant has the burden of proof to demonstrate that (s)he qualifies for a lease" (Manual, ch I, § XII[C][2]). "At the hearing, before the Impartial Hearing Officer, the RFM claimant must clearly demonstrate that (s)he:

- Meets the standards for '*Remaining Family Member*' status (per Section XII, A) *and*,
- Meets the criteria for '*Eligibility for a Lease/Occupancy of a NYCHA Apartment*' (per Sections XII. B.), *and*
- Is paying use and occupancy" (*id.*, ch I, § XII[D][5][b]).

The decision of the hearing officer is subject to review and possible revision by the NYCHA board, which renders the final administrative determination.

The Administrative Record

Petitioner's mother, Hattie Speights, who for many years had been the tenant of the subject apartment in the Borinquen Plaza Houses in Brooklyn, died on September 9, 2013, at the age of 82. By letter to Ferdinand Rios, the project's housing manager, dated December 11, 2013, petitioner asserted a claim for RFM succession rights to the apartment on her own behalf and on behalf of her

adult son, Tyvon Peterson (Tyvon).[7] After Rios denied the request, and the denial was upheld by the district management office, petitioner requested a formal hearing by letter dated February 19, 2014. The hearing on which the determination under review was based was held before Hearing Officer Arlene Ambert on November 19, 2015. Petitioner was represented by counsel at the hearing.[8]

Petitioner's Testimony

Petitioner testified that, after her mother, Hattie Speights, had colon surgery in 2006, she was left with a

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[7]NYCHA ultimately dismissed the claims of both petitioner and Tyvon. Although the subsequent pro se article 78 petition names both petitioner and Tyvon in the caption, the latter neither signed nor verified the petition. In the order transferring the proceeding to this Court, Supreme Court dismissed the petition insofar as purportedly brought by Tyvon, noting that petitioner lacks standing to pursue claims on Tyvon's behalf and that, as a non-attorney, she cannot represent him in this matter. Because Tyvon is no longer a party to this proceeding, I shall discuss evidence relating to his claim only insofar as it bears on petitioner's claim or her credibility.

[8]An earlier set of hearings was held before a different Hearing Officer on June 26 and December 12, 2014, and March 31, 2015. After those dates, the matter was reassigned to Hearing Officer Ambert and the parties stipulated to restart the hearing de novo. Accordingly, the determination under review was based solely on the evidence presented at the hearing of November 19, 2015. I summarize only the evidence that, in my view, bears upon the question of whether NYCHA's determination is supported by substantial evidence.

colostomy bag and had a full-time attendant for five days per week. Around the middle of 2010, Speights developed dementia. The decline in Speights's health prompted petitioner to move back into her mother's apartment in November 2010. Petitioner testified that she did "[e]verything" for her mother, who by that time was so diminished in capacity that she could not even make phone calls. Petitioner introduced into evidence a power of attorney, executed by Speights in December 2011, making petitioner her mother's attorney-in-fact.

Petitioner introduced into evidence the following documentation identifying her mother's apartment as her address: (1) tax returns for 2010, 2011 and 2012; (2) a July 2011 Verizon pension statement; (3) a June 2011 Time Warner Cable bill; (4) a New York State non-driver identification card issued to petitioner in February 2010; (5) a New York City Human Resources Administration Adult Protective Services notice of attempted visit.

Petitioner testified that, in April or May 2011, she had a conversation with Rios, the project manager, in which she told him that she had returned to reside permanently in the apartment. Petitioner subsequently obtained a Permanent Permission Request form (PPR) for the purpose of obtaining NYCHA's consent to her

residence in the apartment.

Petitioner testified that, in July 2011, she and her mother met with Rios in his office and presented him with a completed PPR, dated July 1, 2011, a copy of which was received into evidence.[9] According to petitioner, Rios looked at the PPR and acknowledged his awareness that petitioner was residing in the apartment. However, he told petitioner that she could not be placed on the lease, and gave the PPR back to petitioner, without filling out the portion to be completed by NYCHA. Petitioner testified that Rios told her, in substance: "I already know the situation. I know you been here, . . . but you can't go on the lease, but I know that you're there, you know, everything is fine

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[9]Petitioner testified that she had "filled out the majority of [the PPR] except for the places where my mother had to put her signature on my information there." When asked whether she had "read it to her [Speights] before she signed it," petitioner responded, "Yeah, she — I read it to her. She knew what was going on the form. I mean, she was a little shaky but it wasn't so bad. She had a lot of lucid moments at that time." The majority mischaracterizes petitioner's brief snippet of testimony that Speights still experienced "lucid moments" in July 2011 — given solely as evidence that Speights understood the purpose of the PPR at the moment she signed it — as a claim that Speights was lucid for all of "that day" on which she and petitioner met with Rios. No such testimony exists in the record. In fact, petitioner specifically testified that Rios, at the July 2011 meeting, was "speaking to someone that he was aware that was disabled, and my mother certainly was disabled . . . . My mother was — she had dementia."

the way it is."

Petitioner testified that she did not ask why Rios was rejecting the PPR because "[h]e was talking with my mom so I really didn't get involved, you know." Petitioner also claimed that she was unaware that she could have challenged Rios's rejection of the PPR, testifying that she "thought that his decision was final."[10] After the July 2011 meeting, Rios allegedly visited the apartment three times in connection with rent delinquencies and spoke to petitioner on each of those occasions.

In March or April of 2013, petitioner met with Housing Assistant Ayodeji Festus, who advised her that Speights needed to move to a smaller apartment, or "downsize," because she had two unoccupied bedrooms, but stated that if petitioner were added to the lease, she would be able to avoid downsizing. Petitioner claims that, at that time, Festos knew that petitioner was living in the apartment.

As noted, Speights died on September 9, 2013. A few days after the funeral, petitioner testified, Rios and anther NYCHA

[10]However, the PPR form that petitioner and her mother completed states, "If permanent permission is not granted (disapproved), you may request a grievance hearing to review the Development Manager's decision."

representative visited the apartment, asked petitioner whether she was about to move out ("You leaving?"), and told her that they were "going to take the apartment back" and that she would have "to write a letter proving that [she was there] for two years and why [she] [felt] that [she] should succeed [to] the apartment."

Petitioner was familiar with the affidavits of income completed by her mother. Petitioner or the home attendant helped Speights complete the affidavits. Petitioner explained that the affidavits of income for the years she was residing in the apartment did not list her as part of the household because Rios, at the July 2011 meeting, had instructed her not to put any information about herself on the affidavits.

Speights's affidavits of income for 2012 and 2013 set forth, as an emergency contact, Tyvon Peterson of 25 Boerum Street, who is identified as her "grandson." Petitioner — who was taking the position that her son Tyvon Peterson resided in Speights's apartment during this period — claimed that her mother, in completing these affidavits, had intended to refer to Tyvon's father, Tyrone Peterson, as an emergency contact. Petitioner claimed that her mother had misspelled Tyrone's first name, and was not referring to Tyvon. When it was brought to her attention

that the affidavits of income identified the contact as the tenant's "grandson," petitioner conceded that her mother might have meant Tyvon, but she could not explain why he was listed at the Boerum Street address.

Testimony of Housing Assistant Terry Gray

Terry Gray, a Housing Assistant or Specialist employed by NYCHA at Borinquen Plaza, authenticated various documents relating to Speights's tenancy, including (1) Speights's lease; (2) the "Tenant Data-Summary" forms pertaining to Speights; (3) Speights's affidavits of income executed in 2010, 2011, 2012 and 2013; and (4) NYCHA's tenant interview records pertaining to the subject apartment for the period between April 2008 and January 2014.

The tenant interview records placed into evidence do not make reference to petitioner's occupancy until the entry for April 2, 2013. That entry, and the one for the following day, read as follows (capitalization in original):

> "DETAILS ENTERED ON 20130402 BY TERRY GRAY, H.A. CALLED TOR [tenant of record] AND SPOKE TO HER DAUGHTER YVONNE [i.e., petitioner], WHO STATED HER MOTHER WOULD BE DEVASTATED IF SHE HAD TO MOVE DOWN TO THE CORRECT SIZE APT. TOR IS 82YS OLD. I EXPLAINED TO DAUGHTER THAT HER MOTHER MUST MOVE DOWN. RESIDENT DAUGHTER STILL FEELS HER MOTHER HAS RIGHTS TO REMAIN IN APT. APPOINTMENT MADE TO SPEAK WITH MANAGER ON 4/3/13.

> "DETAILS ENTERED ON 20130403 BY AYODEJI FESTUS, H.A. TOR'S DAUGHTER YVONNE PORTER IN THE OFFICE REGARDING UNDER OCCUPIED APT. SHE STATED THAT HER MOTHER CAN NOT DOWN SIZE BECAUSE OF HER AGE AND HEALTH ISSUES. SHE STATED THAT SHE HAS BEEN LIVING IN THE APT FOR OVER 30+ YEARS AND SHE MIGHT DIE IF SHE IS REMOVED FROM THE FAMILIAR ENVIRONMENT. SHE STATED THAT SHE WOULD LIKE TO ADD HERSELF AND HER SON TO THE HOUSEHOLD. SHE ALREADY OBTAINED THE PERMISSION REQUEST FORM. I ADVISED HER TO SUBMIT B/C S.S. CARD PROOF OF INCOME AND PROOF OF PREVIOUS ADDRESS."

Gray, who was familiar with Speights's tenant file, confirmed that the file did not contain any PPR forms seeking permission to add petitioner or Tyvon to the household dated before Speights's death on September 9, 2013. Further, Gray had spoken with Rios, the Housing Manager, and Rios had no recollection of petitioner or Tyvon. Gray also confirmed that NYCHA requires housing assistants and managers to enter the substance of all apartment-related conversations and transactions into a resident's file and that the interview records pertaining to the subject apartment did not include any notation of a request to add petitioner to the household until April 2013.

Decision of the Hearing Officer

The Hearing Officer rendered a decision, dated December 14, 2015, denying the grievances of both petitioner and Tyvon. In rejecting petitioner's claim, the Hearing Officer wrote:

> "The Grievant's [i.e., petitioner's] testimony

regarding the conversation with Mr. Rios in 2011 reveals that the Property Manager did not grant permission for the Grievant to reside in the subject apartment. According to the Grievant, this disapproval was not challenged. The Grievant's explanation that because Mr. Rios did not state that she could not stay in the apartment and that the Grievant did not wish to interfere in the conversation between Mr. Rios and the Tenant to ask Mr. Rios to clarify or explain the disapproval is incredible in light of the evidence presented that the Tenant was suffering from dementia and that the Grievant was named as the Tenant's Attorney-in-Fact by Power of Attorney (Exhibit 8).

"Considering the evidence in the light most favorable to the Grievant, even if the Permanent Permission Request form together with the required additional documentation had been submitted on April 3, 2013, the date the Grievant discussed the matter with Housing Assistant Festus (Exhibit D) and the request had been immediately approved by Management, the Grievant would have been residing in the subject apartment for approximately five (5) months with the permission of Management prior to the passing away of the Tenant on September 9, 2013 (Exhibit 1)."

The Determination of NYCHA

By notice dated January 15, 2016, NYCHA advised petitioner that, "[i]n accordance with the Hearing Officer's decision and disposition in this proceeding, the grievance . . . is not sustained." Petitioner, acting pro se, subsequently commenced this proceeding challenging the determination.

Discussion

NYCHA's Determination, Insofar as Based on Factfinding, Is Supported by Substantial Evidence

As noted at the outset of this writing, the substantial evidence standard of review applicable upon an article 78 challenge to an administrative determination made after an evidentiary hearing is extremely deferential. That standard is even "less than a preponderance of the evidence" (*Haug*, 32 NY3d at 1045 [internal quotation marks omitted]), and confers on this Court "no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence" (*id.* [internal quotation marks omitted]). We must confirm the determination so long as "[the] inference [drawn by the agency] is reasonable and plausible, [even if] not necessarily the most probable" (*id.* at 1046 [internal quotation marks omitted]). Under this "minimal standard" (*id*. at 1045 [internal quotation marks omitted]), NYCHA's rejection of petitioner's claim to RFM status plainly passes muster.

The heart of petitioner's claim is that the requirement of NYCHA's written consent to her occupancy of the apartment should be excused because of what allegedly transpired at the July 2011 meeting. At that meeting, according to petitioner, while Rios refused to issue written consent or to act on the PPR petitioner and her mother had given him, he orally told petitioner and her mother that petitioner could continue to reside in the apartment.

Assuming that proof of such conduct by Rios would excuse the requirement of written consent (which, as more fully discussed below, it would not), the NYCHA Hearing Officer found that petitioner's testimony concerning the July 2011 meeting was "incredible." While the majority might reasonably disagree with this finding of fact, upon a review of the entire record, substantial evidence to support the finding is readily apparent. To reiterate, "rationality is what is reviewed under the substantial evidence rule" (*id.* at 1046 [internal quotation marks and alterations omitted]), and, on this record, it cannot be said that the Hearing Officer's finding of fact was irrational.

Initially, contrary to the majority's mischaracterization of the Hearing Officer's decision, the articulated basis for the rejection of petitioner's account of the alleged July 2011 meeting was petitioner's own testimony that, as of the time of that meeting, her mother was already "suffering from dementia." Petitioner's admission of her mother's dementia at that time renders untenable her testimony that she failed to raise any objection to Rios's alleged refusal to put her on the lease because "[h]e was talking with my mom so I really didn't get involved." If Speights was demented at the time of the meeting — and petitioner herself testified that her mother's dementia was a

large part of her reason for having moved into the apartment the previous November — it is inconceivable that petitioner would have been passive at the meeting because (as petitioner also testified) her mother "was discussing [the matter] with [Rios] and he made her feel comfortable." Moreover, as previously noted, the PPR form that petitioner claims to have tendered to Rios at the meeting plainly states, "If permanent permission is not granted (disapproved), you may request a grievance hearing to review the Development Manager's decision." Thus, petitioner was on notice that Rios did not have the last word.

The Hearing Officer wrote that she found petitioner's account of the July 2011 meeting "incredible in light of the evidence presented that the Tenant was suffering from dementia and that [petitioner] was named as the Tenant's Attorney-in-Fact by Power of Attorney." The majority, in search of a rationale for setting aside this utterly rational determination, focuses on the Hearing Officer's reference to the power of attorney, while completely ignoring the Hearing Officer's primary reliance on petitioner's testimony that her mother had developed dementia by the time of the July 2011 meeting. Seizing on the fact that the power of attorney was not executed until December 2011, the majority baselessly takes the Hearing Officer's reference to that

document to mean that the Hearing Officer based her decision solely on "[the] mistaken belief that . . . [petitioner] had a power-of-attorney to act on her mother's behalf at that time [of the meeting]."

Contrary to the majority's characterization of her decision, the Hearing Officer placed primary reliance on petitioner's own sworn testimony that Speights had dementia at the time of the meeting.[11] Nowhere does the Hearing Officer's decision assert that the power of attorney existed at the time of the July 2011 meeting. On the contrary, in the decision's summary of petitioner's evidence, the Hearing Officer noted that the power of attorney had been executed in December 2011. Plainly, the power of attorney was referenced in the context of the credibility finding only to illustrate Speights's reliance on

[11]Although not mentioned by the majority, the petition alleges — inaccurately — that "[p]etitioner testified that her mother was lucid and still in charge of her conversations during the July 2011 meeting[.]" In fact, as previously noted, petitioner testified at the hearing that her mother had developed dementia in mid-2010, long before the July 2011 meeting. When asked "when [her mother] started to decline and get dementia," petitioner responded, "That was around the middle of 2010." Later during the hearing, as previously noted, petitioner testified — with specific reference to the July 2011 meeting — that Rios had been "speaking to someone that he was aware that was disabled, and my mother certainly was disabled . . . . My mother was — she had dementia."

petitioner as a result of her dementia, which — by petitioner's own account at the hearing — had existed since the middle of 2010. The essential basis of the Hearing Officer's credibility finding was the admitted fact of Speights's dementia at the time (which the Hearing Officer mentioned first), not the subsequently executed power of attorney.[12]

Attacking the Hearing Officer's credibility determination from another angle, the majority asserts that petitioner testified that her mother "was lucid at the July 2011 meeting." As previously discussed, this mischaracterizes petitioner's testimony, which was to the effect that, in July 2011, her mother still had "lucid moments" and was having such a moment when she signed the PPR, after petitioner filled out the document and explained it to her. Nowhere did petitioner testify that Speights was "lucid" at the July 2011 meeting. In fact, to reiterate, petitioner specifically complained at the hearing that, at the July 2011 meeting, Rios had been "speaking to someone that he was aware that was disabled, and my mother

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[12]Even if the Hearing Officer lost sight of the fact that the power of attorney was not executed until after the July 2011 meeting (and we have no basis on which to find that she made such a factual error), it would not change the fact that Speights's dementia at the time of the meeting, by itself, provides substantial evidence to support the Hearing Officer's finding.

certainly was disabled . . . she had dementia." Thus, whether or not Speights was temporarily experiencing a "lucid moment[]" during the July 2011 meeting (and there is no evidence that she was), the Hearing Officer was entitled to discredit petitioner's testimony that she deferred at the meeting to her elderly and (by petitioner's own account) cognitively disabled mother. While it might also be reasonable for the majority to reach a different conclusion, the credibility determination was for the Hearing Officer, and not this Court, to make. So long as that determination is rational (as it plainly is), we have no authority to disturb it.

Further, substantial evidence review requires us to determine whether the administrative determination is supported by substantial evidence "on the entire record" (CPLR 7803[4]).[13] In this regard, the Hearing Officer's finding is supported by additional evidence from the administrative record.

First, petitioner was not identified as a member of the

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[13]Because this Court's task under CPLR 7803(4) is to scour the "entire record" to determine whether the administrative determination is supported by substantial evidence, that the Hearing Officer "did not cite to or rely on" a particular piece of record evidence supporting her decision (as the majority claims) is irrelevant to our duty to consider that evidence in reviewing the decision.

household on any of Speights's affidavits of income from the relevant period.

Second, the alleged July 2011 meeting is not reflected anywhere in the interview record relating to the subject apartment, although NYCHA policy calls for a record to be made of all substantive interactions between management and residents. Indeed, not only is there no notation of the meeting itself, but also the record of petitioner's discussion with Housing Assistant Festus on April 3, 2013, does not reflect that petitioner ever mentioned to Festus the alleged July 2011 meeting with Rios.[14]

Third, Housing Assistant Gray testified that Rios told her that he had no recollection of petitioner. The majority appears to dismiss the lack of corroboration for petitioner's testimony from these sources as resulting entirely from Rios's determination not to create a record of his oral acquiescence to petitioner's occupancy of the apartment, the sole evidence for which is petitioner's self-serving testimony that Rios told her

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[14]It also bears mention that, even after the April 2013 discussion with Festus (in which Festus specifically invited petitioner to submit a PPR to add herself to the lease), petitioner still did not submit a PPR at any time before her mother's death the following September. This suggests that petitioner's failure to file a PPR before April 2013 may have been attributable to her own oversight or calculation, rather than to Rios's alleged instructions.

at the July 2011 meeting not to make reference to herself in filling out her mother’s affidavits of income. The Hearing Officer, however, was not required to assume that Rios was guilty of such faithlessness to his employer — especially in the absence of any apparent motive he might have had to act in such a fashion. The majority itself suggests no such motive.

The Hearing Officer’s rejection of petitioner’s testimony concerning the alleged July 2011 meeting finds additional support in petitioner’s testimony concerning the reference to Tyvon Peterson as an emergency contact in two of Speights’s affidavits of income. Again, petitioner and her son Tyvon were co-grievants at the hearing, claiming that Tyvon had also resided in Speights’s apartment during the period at issue. This claim was contradicted by the reference in two of Speights’s affidavits of income to a person identified as “Tyvon Peterson,” with an address at 25 Boerum Street, as an emergency contact. As previously noted, petitioner at first insisted that the person to whom her mother had intended to refer had been Tyvon’s father, Tyrone Peterson, who lived at 25 Boerum Street. Petitioner relented, however, when it was pointed out to her that the affidavits plainly identified the emergency contact as the tenant’s “grandson.” The Hearing Officer was entitled to give

this testimony whatever weight she saw fit in considering petitioner's credibility as a whole.

In an attempt to justify its upsetting of NYCHA's rational determination, the majority states that "there is no testimonial evidence contradicting [petitioner's] testimony about the July 2011 meeting and any of her other contacts with Rios." The majority's apparent assumption that the Hearing Officer was not entitled to reject petitioner's testimony based on hearsay or circumstantial evidence is simply wrong, as the Court of Appeals has just reiterated. Even in the absence of contradictory evidence, the Hearing Officer was entitled to discredit petitioner's self-serving and uncorroborated testimony on any rational grounds — which, as just discussed, were plainly available here. Further, "hearsay is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds" (*Haug*, 32 NY3d at 1046).

In *Haug*, the Court of Appeals concluded that the respondents' determination was supported by hearsay evidence, as well as by conduct conceded by the petitioner that "could have [been] reasonably interpreted . . . as consciousness of guilt,"

supporting the conclusion that "his version of the events was not credible" (*id.*). In this case, the version of the relevant events to which petitioner testified was not substantiated by the documentary record or corroborated by Rios's recollection, as recounted to Gray. Moreover, the Hearing Officer had ample grounds on which to discredit petitioner's self-serving testimony, including her claim to have deferred to her dementia-afflicted mother at the July 2011 meeting and her dubious testimony concerning the use of Tyvon as her mother's emergency contact. Here, as in *Haug*, "it was the province of the [H]earing [Officer] to resolve any conflicts in the evidence and make credibility determinations," and this Court has no warrant to "engag[e] in a re-weighing of the evidence . . . [or to] substitute[] its own factual findings for those of respondent[]" (*id.* at 1046-1047).

Although it was petitioner who bore the burden of proof at the hearing, the majority appears to fault NYCHA for having "had the opportunity to have Rios testify, but [having] chose[n] not to [call him]." Aside from the fact that Gray's testimony that Rios had told her that he had no recollection of any interaction with petitioner was (as stated in *Haug*) fully "admissible as competent evidence in an administrative proceeding" (*id.* at

1046), the majority ignores the fact that Rios had, in fact, already given testimony consistent with Gray's recounting of his lack of recollection. Specifically, at the initial aborted hearing on petitioner's grievance, Rios had appeared and testified that he had no recollection of any interaction with petitioner. Thus, at the hearing de novo before Hearing Officer Ambert, the parties were well aware of the probable substance of the testimony Rios would give if he were called, and neither side thought it worthwhile to call him.[15]

No Basis Exists for the Majority's Remand to NYCHA; the Determination Should Either be Confirmed or Annulled

The foregoing, I believe, more than suffices to show that the majority seriously mischaracterizes the Hearing Officer's decision when it asserts that Hearing Officer "failed to make a determination on [petitioner's] argument that she is excused from

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[15]I make reference to Rios's testimony (which was not part of the record on which the determination was made) only to rebut the majority's attempt to fault NYCHA for its decision not to call Rios as a witness at the de novo hearing. There is nothing "improper[]" in my discussing this testimony for the purpose of rebutting the majority's use of NYCHA's choice not to call Rios at the de novo hearing to bolster the result the majority reaches, when the majority knows that Rios's testimony at the de novo hearing would have added nothing substantial to the record. To reiterate, Gray's testimony at the de novo hearing about her conversation with Rios, although hearsay, constituted admissible evidence in this administrative proceeding.

the written consent requirement because she resided with her mother in the apartment with the project manager's knowledge and/or tacit approval." Manifestly, in rejecting petitioner's testimony about the July 2011 meeting as "incredible," the Hearing Officer made such a finding, albeit one with which the majority disagrees. Whether or not the majority's disagreement is reasonable, the Hearing Officer's findings of fact and credibility, as adopted by NYCHA, are controlling, so long as those findings are supported by substantial evidence. "Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*Haug*, 32 NY3d at 1046 [internal quotation marks omitted]).

Since the Hearing Officer plainly did "address [petitioner's] argument that she was entitled to remaining family member status on the basis that she resided with her mother with NYCHA's consent or approval," the majority is simply wrong in stating that "the record precludes an adequate review by this Court," on which ground it remits the proceeding back to NYCHA for further evidentiary proceedings. Indeed, the majority contradicts its statement concerning the supposed inadequacy of

the existing record by critically scrutinizing the Hearing Officer's discrediting of petitioner's account of the July 2011 meeting, albeit without establishing an infirmity in this finding under the substantial evidence standard. The majority doubles down on the contradiction in stating that it finds that the Hearing Officer's determination "is not supported by substantial evidence and is contradicted by the documentary and testimonial evidence."[16]

The majority plainly recognizes that the Hearing Officer rejected the evidence on which petitioner based her claim that NYCHA had given oral "consent or approval" to her occupancy of the apartment, and finds the record sufficient to disparage the Hearing Officer's weighing of the evidence. If the majority

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[16]The majority asserts that the Hearing Officer did not reject "all" of petitioner's testimony but only her "explanation for not interfering in the conversation between her mother and Rios." Plainly, the Hearing Officer found that petitioner's implausible explanation for deferring to her infirm mother at the July 2011 meeting discredited petitioner's account of that meeting, which was the basis on which petitioner asserted that the written consent requirement should be excused. Assuming (as the majority does) that the written consent requirement can be excused, Rios's oral assent to petitioner's residence in the apartment at the meeting would support petitioner's claim, regardless of which of the two women Rios had been addressing. The question of whether petitioner deferred to her mother at the July 2011 meeting has no significance apart from its bearing on the credibility of petitioner's claim that Rios orally assented at that meeting to petitioner's residing in the apartment.

truly believes that the existing record is bereft of substantial evidence to support the Hearing Officer's factfinding (and assuming that the majority is correct that the law permits the excuse of the requirement of written consent under petitioner's version of the facts), the majority should simply grant the petition and annul NYCHA's determination. By instead purporting to hold the proceeding "in abeyance" while remitting for further administrative factfinding on an issue that NYCHA has already addressed, the majority appears to be seeking to insulate its de facto annulment of NYCHA's determination from review by the Court of Appeals.

Regardless of the Resolution of the Factual Issue, the Determination Was Correct as a Matter of Law

For the foregoing reasons, no basis exists for the majority's de facto annulment of the Hearing Officer's rejection, on the facts, of petitioner's claim that Rios orally consented to her occupancy of the apartment. However, regardless of the veracity of petitioner's testimony to that effect, NYCHA's denial of her RFM claim was correct, as a matter of law. As the Court of Appeals reiterated just last year, "[W]ith rare exceptions [none applicable here, as more fully discussed below], estoppel is not available as a remedy to prevent a governmental agency

from discharging its statutory duties” (*West Midtown Mgt.*, 31 NY3d at 541-542; *see also Schorr*, 10 NY3d at 779 [same]; *Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990] [same]; *Columbus 95th St., LLC v New York State Div. of Hous. & Community Renewal*, 81 AD3d 269, 281 [1st Dept 2010] [“it is well settled that estoppel cannot serve to bar a governmental agency from exercising its governmental functions”]).

Under the foregoing case law, even if (as petitioner claims) Rios knowingly acquiesced in her occupancy of the apartment for at least one year before her mother’s death, such acquiescence would in no way diminish NYCHA’s right, and duty, to deny petitioner RFM status on the ground that she failed to obtain written permission for her occupancy, as required by NYCHA’s rules (*see Schorr*, 10 NY3d 776 [the landlord’s acquiescence in the continued residence in a Mitchell-Lama apartment by the son of the tenants of record after the tenants of record vacated did not estop the landlord or the relevant city agency to deny the son succession rights, for which he did not qualify]; *Matter of Jian Min Lei v New York City Dept. of Hous. Preserv. & Dev.*, 158 AD3d 514, 515 [1st Dept 2018] [following *Schorr* in the context of a similar claim to succession rights to a Mitchell-Lama

apartment]).

The majority dismisses the principle that estoppel does not lie against a government agency by asserting that petitioner “has not argued estoppel.” On the contrary, petitioner’s counsel specifically argued at the hearing, in reliance on *Matter of McFarlane v New York City Hous. Auth.* (9 AD3d 289 [1st Dept 2004]) (a decision I discuss below) that, based on Rios’s oral consent at the July 2011, NYCHA should be precluded from enforcing its written-consent requirement. This is plainly an estoppel argument, whether or not the word “estoppel” was used.

The majority further argues that granting the petition would be consistent with the case law I cite “because there is no federal statute or regulation that requires that NYCHA’s consent to a permanent residency request be in writing.” While it is true that federal law does not mandate that an agency’s consent to the addition of a new household member (which consent federal regulations *do* require) be in writing, the fact remains that NYCHA’s own rules (implemented in order to comply with federal law) require that the consent be memorialized in writing. To preclude NYCHA from enforcing its own rule on this point against petitioner — in effect, to require NYCHA to give one individual preferential treatment vis-a-vis other housing applicants, many

of whom may be in greater need, based on the preferred individual's uncorroborated account of the statements and conduct of one NYCHA manager in her particular case — is to apply estoppel against the government, contrary to the teaching of the Court of Appeals and against the weight of this Court's own authority. Whether the requirement in question is embodied in a statute, a regulation or (as here) an agency's internal rule-book, the principle that estoppel does not lie against the government serves to ensure that the government deals with all persons fairly, equitably and consistently, without giving anyone inappropriately preferential treatment. Here, preferential treatment is essentially what petitioner seeks.[17]

Any estoppel rationale for disturbing NYCHA's determination is untenable under the Court of Appeals' firm commitment, confirmed only months ago in *West Midtown Mgt.* (31 NY3d at 541-542), to the principle that a governmental agency cannot be

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[17]Contrary to the majority's assertion, paragraph 5(b) of Speights's lease (quoted in full at footnote 6 above) expressly requires the tenant to "obtain the written consent of the Housing Manager . . . . before allowing any person to reside in the Leased premises." The exception for persons "authorized by the Landlord" subsequent to the tenant's original application obviously means persons for whom written consent was previously given — otherwise the same paragraph's "written consent" requirement would be meaningless.

estopped to carry out its duties.[18] While this principle may be subject to "rare exceptions" (*id.* at 541), the majority does not identify — nor am I aware of — any such exception recognized by the Court of Appeals that would apply to this case. There is an exception potentially applicable "in unusual factual situations to prevent injustice" (*id.* at 542 [internal quotation marks omitted]), but this exception is limited to "the rarest cases" (*id.* [internal quotation marks omitted]).

Although petitioner's situation naturally evokes a substantial measure of sympathy, this matter — in which petitioner seeks "to bypass the 250,000-household waiting line" for NYCHA housing (*Matter of Aponte v Olatoye*, 30 NY3d 693, 698 [2018]) and to override that agency's policy of "prioritizing children in need and persons facing homelessness when allocating its insufficient stock of public housing" (*id.*) — is "not one of those rare cases where . . . estoppel would be warranted to prevent an injustice" (*West Midtown Mgt.*, 31 NY3d at 542). Assuming the truth of petitioner's testimony about the July 2011 meeting (which the Hearing Officer rejected as "incredible"),

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[18]Indeed, by citing *Schorr* for this proposition with approval in *West Midtown Mgt.* (31 NY3d at 542), the Court of Appeals confirmed that the principle continues to have full application in the governmental housing program context.

Rios made no promise that she would receive RFM status at the end of her mother's tenancy. Rather, Rios simply told petitioner that she could remain in the apartment to take care of her mother — a promise that was kept in full, as no effort was made to end petitioner's occupancy until after her mother's passing.[19]

Further, the PPR form that petitioner filled out and allegedly tendered to Rios at the July 2011 meeting gave her notice that, if Rios denied the request for permanent residency, she would have the right to "request a grievance hearing to review [his] decision." Nevertheless, by her own account, petitioner (or, adopting the majority's supposition that petitioner's mother was "lucid" at the meeting, Speights) simply acquiesced when Rios handed the PPR back to her without acting on it.[20] Had petitioner (or her mother, the signatory of the PPR)

[19]The limited nature of Rios's alleged promise is confirmed by petitioner's letter to Rios, dated December 11, 2013, requesting RFM status, in which she wrote, "You advised us that I couldn't get on the permanent lease. You authorized me to move in to care for my mother. . . . My mom had the understanding that we [petitioner and Tyvon] would be there as long as she needed us because her condition was declining." Similarly, in petitioner's subsequent letter requesting a grievance hearing, she wrote, "Mr. Rios said that I could not go on the permanent lease. . . . I was allowed to move in and no time frame was discussed."

[20]As previously discussed, in her testimony at the hearing, petitioner explained her passivity at the July 2011 meeting as due to her deference to her mother — who, according to

at that point insisted that Rios act on the PPR one way or the other, and then pursued her request through higher administrative channels and, if necessary, the courts (as petitioner is doing now, on her own initiative, with regard to her claim for RFM status), the claim might well have prevailed and, upon her mother's death in September 2013, petitioner would have succeeded to the tenancy. Even if her account of the July 2011 meeting is accurate, petitioner lost this opportunity due to her own (or her mother's) deliberate inaction. Contrary to the majority's assertion, there is nothing "speculative" in my saying this — it is the necessary implication of petitioner's own testimony, taken at face value.[21]

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petitioner's own testimony, was already suffering from dementia at the time. The Hearing Officer quite reasonably found that this testimony rendered petitioner's entire account of the July 2011 meeting "incredible." But if Speights really was lucid and making her own decisions at the meeting (which seems to be how the majority interprets the record), then it was Speights who decided not to press the matter when Rios handed back the PPR, and the same conclusion follows — the PPR was withdrawn. It also bears mention that, assuming that the July 2011 meeting occurred substantially as described by petitioner, there may well have been an element of calculation in the acquiescence (whether by petitioner or her mother) to Rios's failure to act on the PPR. Had petitioner been added to the household, the inclusion of her income in calculating the rent would have resulted in a higher rent.

[21]The majority refers to a statute enacted long after the relevant events took place, Public Housing Law § 402-c (effective

As the majority necessarily concedes, ample precedent from this Court stands for the proposition — consistent with the general rule stated in *West Midtown Mgt.* (31 NY3d at 541-542) and *Schorr* (10 NY3d at 779) — that a claimant to succession rights to an NYCHA apartment cannot invoke estoppel to avoid the requirement that the claimant show that NYCHA gave written consent to his or her occupancy of the apartment as a member of the previous tenant's household (*see Matter of McBride v New York City Hous. Auth.*, 140 AD3d 415, 416 [1st Dept 2016]; *Matter of Andrade v New York City Hous. Auth.*, 132 AD3d 598 [1st Dept 2015]; *Matter of Dancil v New York City Hous. Auth.*, 123 AD3d 442 [1st Dept 2014]; *Matter of King v New York City Hous. Auth.*, 118 AD3d 636 [1st Dept 2014]; *Matter of Gonzalez v New York City Hous. Auth.*, 112 AD3d 531 [1st Dept 2013]; *Matter of Rahjou v Rhea*, 101 AD3d 422 [1st Dept 2012]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]; *Rosello v Rhea*, 89 AD3d 466 [1st Dept 2011]; *Matter of Edwards v New York City Hous. Auth.*, 67 AD3d 441 [1st

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December 28, 2016), which requires that NYCHA put in writing any denial of a request that would entitle a tenant to a grievance. While this seems to me to be a salutary law, it was not in effect at any time relevant to this case.

Dept 2009]).[22]

The majority attempts to distinguish the bulk of the cases cited in the foregoing paragraph on the ground that in each there supposedly was "a valid reason to deny the remaining family member grievance, aside from a lack of written consent" to the claimant's occupancy. This attempted distinction does not bear scrutiny, as none of these decisions states that the lack of written consent to the occupancy, by itself, would not have been sufficient to deny the claim. Similarly without merit is the majority's argument that most of these cases are distinguishable because "the tenant never requested that the petitioner be added as a permanent resident." Assuming that the majority's characterization of the cases is accurate, the instant case is not materially different. As previously discussed, according to petitioner's testimony, at the July 2011 meeting, she and her mother voluntarily withdrew the PPR seeking written consent to her occupancy after Rios handed it back to them, without acting

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[22]The majority attempts to distinguish *McBride* (140 AD3d 415 [1st Dept 2015]) on the ground that, while in that case we found that there was "no basis upon which to relieve petitioner of the written consent requirement" (*id.* at 416), "[h]ere," according to the majority, "the Hearing Officer failed to address [petitioner's] *McFarlane* argument." As I have already argued at length, the Hearing Officer did address that argument, and rejected it.

on it, while telling them that petitioner could stay in the apartment to care for her mother but could not be placed on the lease. Having chosen to drop the PPR at that point, petitioner should not be accorded more favorable treatment than an occupant who never requested NYCHA's permission to join a tenant's household permanently.

In seeking to relieve petitioner of the consequences of her decision (by her own account) to withdraw her request for written approval of her occupancy, the majority relies on *McFarlane* (9 AD3d 289 [1st Dept 2004]) (the decision cited by petitioner's counsel at the hearing), and on six subsequent decisions by this Court citing *McFarlane*. *McFarlane* contains dicta suggesting that the requirement of written consent may be excused where NYCHA has "implicitly approved" the occupancy (*id.* at 291). Initially, even if *McFarlane* and each of the cases citing it specifically held that the written consent requirement may be excused, we would be bound to follow the binding (and recently reaffirmed) contrary holding of the Court of Appeals that estoppel cannot be invoked to bar the performance of a governmental function.[23]

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[23]In this case, of course, the governmental function that the majority seeks to bar NYCHA from performing is the latter's enforcement of its rule, incorporated in its tenants' leases, that its written consent must be obtained for the addition of a

However, the language from *McFarlane* on which the majority relies is (as just noted) dicta, and the same is true of the relevant portions of four of the six subsequent cases cited by the majority in this regard.[24] To the extent the remaining two cases

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new adult member of a tenant's household. That rule, to reiterate, was adopted to conform to the federal mandate to NYCHA that its tenants request its approval for any additional occupant of an apartment (24 CFR 966.4[a][v]).

[24]In fact, in *McFarlane* we *confirmed* NYCHA's denial of a claim for RFM status on the ground that the petitioners therein had "failed to apply for and obtain the written consent of management to become a permanent member of the tenant family during the . . . [prior] tenancy" (9 AD3d at 289). The language of the case on which the majority relies — speculating that, in the absence of written consent to the occupancy of a claimant to RFM status, it "*could* be of critical importance . . . that [NYCHA] was aware of the petitioner having taken up residence in the unit, and implicitly approved it" (*id.* at 291) — had no bearing at all on the result we reached. As *McFarlane* notes, "neither of the petitioners offered evidence showing that the agency was aware of their presence" in the subject apartment before the deaths of the tenants of record (*id.*). Similarly, as just noted, in four of the six cases citing *McFarlane* on which the majority relies, the citations of *McFarlane* came by way of dicta (*see Matter of Taylor v Olatoye*, 154 AD3d 634, 634 [1st Dept 2017] [in confirming the denial of RFM status, the decision cites *McFarlane* after noting that "(t)he record affords no basis for relieving petitioner of the written consent and income affidavit requirements"]; *Matter of Gutierrez v Rhea*, 105 AD3d 481, 486 [1st Dept 2013] [the denial of RFM status was annulled, and the matter remanded for a new hearing, because the record showed that "NYCHA's purported denial of (the petitioner's deceased mother's) 2004 request to add (the petitioner) to her household was not supported by substantial evidence," in that the mother had been "deprived of the opportunity to which she was entitled to compile and present evidence of her son's rehabilitation"]; *Matter of Echeverria v New York City Hous.*

arguably held that the written consent requirement may be excused by NYCHA's acquiescence to the claimant's occupancy, I believe that we should instead follow the contrary holding of the Court of Appeals, of our more recent decision in *McBride* (140 AD3d at 416), and of the clear weight of authority in this Court.

Conclusion

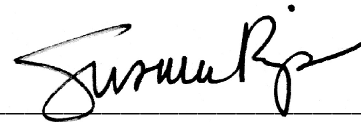
In closing, I again note my recognition of the sympathetic nature of petitioner's claim to succeed to her mother's tenancy. However, the families on "the 250,000-household waiting line" for NYCHA housing (*Aponte*, 30 NY3d at 698) are no less deserving of sympathy. The question here is whether petitioner should be permitted to jump to the front of that line — thereby overriding NYCHA's policies of "prioritizing children in need and persons facing homelessness" (*id.*) — based on her claim that the NYCHA property manager acquiesced in her occupancy after she and her mother dropped their request for the requisite written approval.

Auth., 85 AD3d 580, 581 [1st Dept 2011] [in confirming the denial of RFM status because the petitioner "did not enter the apartment lawfully, and never received written permission for permanent occupancy from housing management," we noted that the petitioner "failed to demonstrate that respondent knew or implicitly approved of her residency"]; *Matter of Filonuk v Rhea*, 84 AD3d 502, 503 [1st Dept 2011] [in confirming the denial of RFM status, we noted that "there is no evidence that NYCHA knew or implicitly approved of (the petitioner's) occupancy in the apartment" before the previous tenant's death]).

NYCHA, after a hearing at which petitioner was represented by counsel, rejected her testimony about her interaction with the property manager and denied her claim. Upon our review under CPLR article 78, I see no basis for setting aside this determination, which is both supported by substantial evidence and compelled by the principle that NYCHA cannot be estopped to enforce the requirement that its written approval be requested and granted for additions to a tenant’s household. Nor do I see any basis for the majority’s remanding the matter back to NYCHA for a further hearing on an issue that the agency has already addressed.

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

ENTERED: FEBRUARY 14, 2019



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Sweeny, J.P., Gische, Kahn, Oing, Singh, JJ.

8021 Ana L. Ortiz, Index 304309/13
Plaintiff-Appellant,

-against-

Elvis Boamah, et al.,
Defendants-Respondents.

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Omrani & Taub, P.C., New York (Michael A. Taub of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 14, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, to the extent of reinstating the serious injury claim relating to the permanent consequential or significant limitation in use of a body function or system, and otherwise affirmed, without costs.

On its motion for summary judgment, defendants prima facie established that plaintiff did not suffer a serious injury to her thoracic or lumbar spine as a result of the subject accident (Insurance Law § 5102[d]). Defendants submitted plaintiff's medical records and the affirmed report of an orthopedist who,

following examination and review of the medical records, found that plaintiff had preexisting conditions and no evidence of injuries caused by trauma (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). No imaging had been conducted of plaintiff's thoracic spine and the orthopedist stated that his examination showed that the thoracic spine was normal, except for scoliosis. As to plaintiff's lumbar spine, the orthopedist stated that plaintiff's own MRI reports revealed degenerative stenosis and spondylosis and plaintiff's medical records revealed preexisting arthritis and scoliosis. The orthopedist opined that there was no indication that plaintiff suffered any separate injury to her lumbar spine or that her preexisting and degenerative conditions had been aggravated by the accident. Defendants also argued that plaintiff sought no treatment after the accident and failed to explain her gaps in treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff raised a triable issue of fact that the injuries to, at least, her lumbar spine were caused by the underlying motor vehicle accident. She also adequately explained any gap in treatment.

Plaintiff was operating her motor vehicle when it was struck by a taxi operated by defendant Adjin and owned by defendant Boamah. Plaintiff, who was 70 years old, alleged that the accident "caused, created, exacerbated and/or reactivated" injuries to her lumbar spine. These injuries included various disc herniations and posterior spondylosis that eventually required an L4-5 laminectomy, interbody cage fusion, and pedicle screw fixation. Although she did not seek medical treatment by EMTs at the scene of the accident, plaintiff began experiencing neck and back pain a few days afterwards. Approximately three weeks after the accident, plaintiff sought treatment. An MRI revealed, inter alia, scoliosis, degenerative disc disease, and spondylolisthesis. Plaintiff continued treatment, which included physical therapy, until April 2011, when her treating physician recommended discontinuing the physical therapy, as it was no longer beneficial, and returning only when needed. At the time of discharge, however, her treating physician documented that plaintiff still experienced pain and there was tenderness on the lumbar spine.

In July 2012 plaintiff presented to a hospital's emergency department, where she reported experiencing chronic back pain for the prior two months. Subsequent medical imaging showed, inter

alia, degenerative disc disease, spondylolisthesis, and multilevel disc bulges and herniations. She had surgery two months later in September.

Since plaintiff's own medical records showed evidence of a preexisting degenerative condition in her spine, she was required to address those findings and explain why her symptoms were not related to the preexisting condition (*Giap v Hathi Son Pham*, 159 AD3d 484, 485 [1st Dept 2018]). An explanation that the plaintiff was previously asymptomatic and the accident aggravated an underlying pre-existing condition, rendering the plaintiff symptomatic, is sufficient to raise an issue of fact as to causation (*id.* at 486 ["To the extent plaintiff's physicians asserted that plaintiff Pham had degenerative joint disease which was common for her age, that she was previously asymptomatic, that the accident aggravated her underlying degenerative joint disease, and that trauma increases the rate of disc desiccation, rendering her now symptomatic, this was sufficient to raise an issue of fact as to causation"] [internal quotations marks omitted]; *see McIntosh v Sisters Servants of Mary*, 105 AD3d 672, 673 [1st Dept 2013]).

Plaintiff submitted the reports of both her treating neurosurgeon and treating chiropractor, each of whom

independently opined that because she had no history of symptoms or medical treatment for her spine before the accident, her injuries were caused, or at least aggravated by the motor vehicle accident. Plaintiff's neurosurgeon noted that although plaintiff has chronic degenerative spinal stenosis and spondylolisthesis, she had no prior history of back pain and leg pain. He opined that "[i]t is not unusual for such a chronic pathology to become aggravated by a relatively mild-to-moderate trauma." He further opined, within a reasonable degree of medical certainty, that the motor vehicle accident aggravated plaintiff's latent asymptomatic age related degenerative spine conditions and was the cause of her symptoms. Plaintiff's chiropractor also opined that because plaintiff did not seek medical treatment for her preexisting back conditions prior to the accident, the accident had activated, accelerated, or aggravated those conditions as well as causing additional damage. This is sufficient to raise an issue as to causation (*McIntosh*, 105 AD3d at 673).

Additionally plaintiff has adequately explained any gap in treatment. "[A] plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" *(Pommells,* 4 NY3d at 574; *Giap*, 159 AD3d at 486). Therefore, a gap in

treatment may be dispositive on a serious injury threshold motion, unless it is explained (*Pommells*, at 574; *cf. Rubensccastro v Alfaro*, 29 AD3d 436 [1st Dept 2006]).

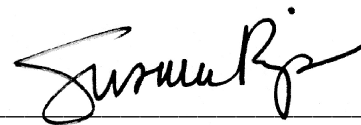
Plaintiff sought continuous, albeit different modalities of treatment since the accident, including chiropractic care for four years following her surgery. The only possible gap in treatment occurred during the 15 month period from the first time plaintiff stopped physical therapy until the time she was treated in the hospital emergency department for back pain. However, plaintiff has provided a reasonable explanation for this gap in treatment. In 2011, her condition, while improved, had not completely abated but her physician saw no further benefit to continuing physical therapy (*see Wenegieme v Harriott*, 157 AD3d 412, 412-413 [1st Dept 2018]["Plaintiff's gap in treatment is not dispositive, as she explained that, after 11 months of therapy, her physician told her any further treatment would palliative in nature. Moreover, her physician stated that her condition remained persistent throughout treatment"]). She continued to take over-the-counter medication throughout, and sought intervention only as the pain increased. Significantly, her decision to present at the emergency room was not triggered by the course of this litigation and led to the decision to seek

surgery (*cf. Vaughan v Baez*, 305 AD2d 101 [1st Dept 2003] [medical expert was not treating physician and sole examination occurred after summary judgment motion]).

Dismissal of the 90/180-day claim was appropriate, however, since no triable issue of fact existed as to whether she was confined for the appropriate period. Plaintiff testified that she was confined to bed for only one week following the accident (*see e.g. Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]).

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

ENTERED: FEBRUARY 14, 2019



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Renwick, J.P., Richter, Mazzarelli, Webber, Kern, JJ.

8250 Despina Filarakos, Index 160795/14
Plaintiff-Respondent,

-against-

St. John the Baptist Greek
Orthodox Church, et al.,
Defendants-Appellants.

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Goldberg Segalla LLP, New York (Stewart G. Milch of counsel), for appellants.

Patterson & Sciarrino, LLP, Bayside (Marc D. Citrin of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered March 27, 2018, which, upon reargument, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

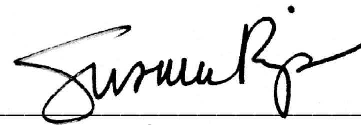
Plaintiff, who was volunteering at defendant church, was injured when, while decorating the church for Easter, she fell from the stepladder she was using. Defendants established that they did not supervise or control the means and methods by which plaintiff and her fellow volunteers decorated (*see Stringer v Musacchia,* 11 NY3d 212, 217 [2008]*; Lichtenthal v St. Mary's Church*, 166 AD2d 873, 874 [4th Dept 1990]).

Defendants also established that they neither created the alleged defective condition or had actual or constructive notice of the alleged defective stepladder (*see Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-131 [2d Dept 2008]). Defendants presented testimony that the stepladder had been used many times over the years without incident, and further, that there had been no complaints regarding the use of the stepladder. Thus, there is nothing in the record to show that defendants were aware of the existence of any defect prior to the accident (*see Kesselbach v Liberty Haulage*, 182 AD2d 741 [2d Dept 1992]). As to constructive notice on the part of defendants, plaintiff testified that when she initially took the stepladder it appeared to be secure. Plaintiff's expert opined that the alleged defect was latent and not readily discernable. Thus, there is nothing in the record to show that defendants had

constructive notice of any defect prior to the accident (*see* *Chowdhury*, 57 AD3d at 129-131).

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

ENTERED: FEBRUARY 14, 2019



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Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8378 The People of the State of New York, Ind. 648N/15
Respondent,

-against-

O'Neil Palmer,
Defendant-Appellant.

Christina A. Swarns, Office of the Appellate Defender, New York (Angie Louie of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Abraham Clott, J.), rendered July 20, 2016,

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.

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

ENTERED: FEBRUARY 14, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8379 Philippa Okoye formerly known as Philippa Jayne Burke, Index 656270/16
Plaintiff-Appellant,

-against-

deVere Group Ltd.,
Defendant,

deVere USA, Inc. et al.,
Defendants-Respondents.

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Katz Melinger, PLLC, New York (Kenneth J. Katz and Nicole Grunfeld of counsel), for appellant.

Finestein & Malloy, L.L.C., New York Russell M. Finestein of counsel and Michael D. Malloy, of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for deVere USA, Inc., respondent.

Law Office of Alexander Sakin, LLC, New York (Alexander Sakin of counsel), for Benjamin Alderson, respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on or about November 20, 2017, which, to the extent appealed from, granted defendants deVere USA, Inc. and Benjamin Alderson's motion to dismiss the complaint and denied plaintiff's motion for summary judgment, unanimously modified, on the law, to deny defendants' motion as to the cause of action for breach of contract, grant plaintiff's motion for summary judgment on that cause of action, and remand the matter for a determination of

plaintiff's reasonable attorneys' fees, and otherwise affirmed, without costs.

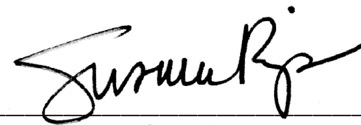
Defendants admit that they did not successfully tender the payment they owed plaintiff until at least 51 days after the deadline to which they had agreed in the parties' settlement agreement. This admitted failure to make timely payment under a settlement agreement fulfills the elements of a cause of action for breach of contract (*see Kimso Apts., LLC v Gandhi*, 129 AD3d 670, 672 [2d Dept 2015], *lv denied* 26 NY3d 916 [2016]; *see also Mill Rock Plaza Assoc. v Lively*, 224 AD2d 301, 301 [1st Dept 1996]).

Plaintiff having prevailed on her central claim that defendants breached the settlement agreement, she is entitled to reasonable attorneys' fees under the terms of the agreement (*Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]). That she prevailed on only one cause of action does not

change the result (*see Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d 179, 180 [1st Dept 2005]).

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

ENTERED: FEBRUARY 14, 2019



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Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8380 In re Kayo I.,
Petitioner-Respondent,

-against-

Eddie W.,
Respondent-Appellant.
- - - - -
In re Eddie W.,
Petitioner-Appellant,

-against-

Eddie W.,
Petitioner-Respondent.

____

Robert J. Adinolfi, Flushing, for appellant.

Davis Polk & Wardwell, New York (Connie Dang of counsel), for respondent.

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Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about October 17, 2016, which, after a hearing, modified the parties' 2010 stipulation to award petitioner mother (petitioner) sole legal custody of the subject child, to order supervised visitation for respondent father, and to permit petitioner to travel to Japan with the child without respondent's consent, unanimously affirmed, without costs.

The determination that an award of sole custody to petitioner is in the best interests of the child has a sound and

substantial basis in the record, which shows that, under the circumstances, joint legal custody is no longer viable (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Raymond A. v Lisa M.H.*, 115 AD3d 553 [1st Dept 2014]). In reaching its determination, the court properly considered respondent's use of physical discipline (*see Matter of Joseph R. [Jasmine M.G.]*, 137 AD3d 420 [1st Dept 2016]), in violation of court orders, and the child's resulting reluctance to be alone with his father (*see Matter of Roelofsen v Tiberie*, 64 AD3d 603 [2d Dept 2009]). To the extent respondent claims that petitioner interfered in his relationship with the child, petitioner was acting on the child's behalf (*see e.g. Matter of Jillian EE. v Kane FF.*, 165 AD3d 1407 [3d Dept 2018]).

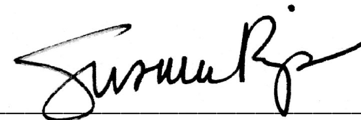
In light of the foregoing, the court properly ordered that respondent's visitation be supervised (*see Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 642 [1st Dept 2012]), and recommended family therapy.

The court providently exercised its discretion in permitting petitioner, the custodial parent, to travel to Japan with the child for one month each year, upon 6 weeks notice to the father but without obtaining respondent's prior consent (*see Matter of Li Ka Ye v Wai Lam Sin*, 138 AD3d 994 [2d Dept 2016]; *Matter of*

Noella Lum B. v Khristopher T.R., 123 AD3d 531 [1st Dept 2014]). The provision of the 2010 stipulation that requires respondent's consent is inconsistent with petitioner's having sole legal custody. Moreover, there is no evidence to support respondent's claim that petitioner intends to abscond to Japan with the child.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8382 In re Whitney Trilling, Index 101593/16
Petitioner,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents.

____

Robert J. Anderson, New York, for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for New York City Department of Housing Preservation and Development, respondent.

____

Determination of respondent Department of Housing Preservation and Development (HPD), dated July 28, 2016, which, after a hearing, issued a certificate of eviction upon a finding that the Mitchell-Lama apartment leased to petitioner was not her primary residence, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Debra A. James, J.], entered August 8, 2017), dismissed, without costs.

Substantial evidence supports HPD's determination that petitioner failed to maintain the subject apartment as her

primary residence (*see generally 300 Gramatan Ave Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]), as required by the rules applicable to tenancies in Mitchell-Lama apartments (*see* 28 RCNY § 3-02[n][4]). Petitioner conceded at the hearing that she did not spend an aggregate of 183 days in the apartment in the year preceding commencement of the eviction proceeding (*see* 28 RCNY § 3-02[n][4][iv]). Rather, over a period of at least six years, from 2009 until 2015, petitioner made annual trips of one month or less to the apartment for the purpose of recertification. During that same period, petitioner resided in California and Nebraska, and in 2014, obtained a Nebraska driver's license. Although it is undisputed that in the beginning of 2009 petitioner sustained an eye injury while living and working in California, for which she initially sought treatment in California, the record supports the hearing officer's determination that petitioner did not make serious efforts to occupy the apartment until her primary residency was questioned in 2015, thus undermining her claim of medical excuse for her absence.

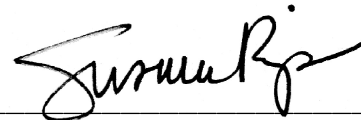
Contrary to petitioner's contention, the hearing officer did not abuse her discretion by issuing a certificate of eviction, rather than imposing a probationary period, as nonprimary

residency is not curable (*see Matter of O'Quinn v New York City Dept. of Hous. Preserv. & Dev.*, 284 AD2d 211, 212 [1st Dept 2001]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8383 The People of the State of New York, Ind. 550/16
Respondent,

-against-

Lonnie Knight,
Defendant-Appellant.
- - - - -
The Legal Aid Society, Bronx Defenders,
and Brooklyn Defender Services,
Amici Curiae.

____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), and Milbank, Tweed, Hadley & McCloy, LLP, New York (Christopher J. Spelman of counsel), for appellant.

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

The Legal Aid Society, New York (Martin J. LaFalce of counsel), for amici curiae.

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at motions; Robert M. Mandelbaum, J. at jury trial and sentencing), rendered March 16, 2017, as amended June 16, 2017, convicting defendant of criminal possession of a weapon in the third degree and theft of services, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to two to four years, and otherwise affirmed.

The challenged statutes defining and prohibiting possession of gravity knives (*see* Penal Law §§ 265.00[5], 265.01[1], 265.02[1]) are not unconstitutionally vague, either facially or as applied to defendant, because they provide “notice to the public and clear guidelines to law enforcement as to the precise characteristics that bring a knife under the statutory proscription” (*People v Herbin*, 86 AD3d 446, 446-47 [1st Dept 2011], *lv denied* 17 NY3d 859 [2011]; *see Copeland v Vance*, 893 F3d 101 [2d Cir 2018]). Police testimony established that defendant’s knife met the statutory definition in that it could be opened by the centrifugal force produced by a wrist motion, and that it locked into place. To establish this strict liability offense, the People were not required to prove “that defendant[] knew that the knife in [his] possession met the statutory definition of a gravity knife” (*People v Parilla*, 27 NY3d 400, 404 [2016]). To the extent that defendant is also arguing that the verdict was not based on legally sufficient evidence or was against the weight of the evidence, we reject those arguments.

Defendant’s claim that his conviction violated his Second Amendment right to bear arms is unavailing because defendant (who, we note, has multiple felony convictions) was convicted

under Penal Law § 265.02(1), which criminalizes possession of weapons by persons previously convicted of crimes. States are broadly empowered to prohibit convicted criminals from possessing weapons (*see District of Columbia v Heller*, 554 US 570, 626 [2008]; *People v Johnson*, 111 AD3d 469, 470 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]). Accordingly, defendant lacks standing to claim that Penal Law § 265.01(1)'s absolute prohibition of possession of gravity knives, by anyone, violates the Second Amendment (*see People v Di Raffaele*, 55 NY2d 234, 241 [1982]; *People v LaPage*, 25 Misc 3d 890, 896 [St Lawrence Ct 2009]). We do not reach any other Second Amendment issues.

The trial court correctly rejected defendant's request that the jury be given the "opportunity" to experiment with defendant's knife to determine whether it had the characteristics of a gravity knife. At trial, defendant offered no explanation of how such an experiment could be performed safely by jurors (*see People v Kelly*, 11 AD3d 133, 144, 147 [1st Dept 2004], *affd* 5 NY3d 116 [2005]). Moreover, the jurors observed an officer's in-court demonstration of how the knife operated. In any event, the deliberating jury never requested to experiment with the knife or even look at it, and the court was under no obligation to invite the jury to do either of these things.

By reading the statutory definition, the court properly instructed the jury on the meaning of the term gravity knife (*see People v Berrier*, 223 AD2d 456 [1st Dept 1996], *lv denied* 88 NY2d 876 [1996]). The court was not required to include additional language requested by defendant concerning the type or amount of centrifugal force needed to open the knife.

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 14, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8384 The People of the State of New York, Ind. 2451/06
Respondent,

-against-

Yovany Ramos-Mondroy,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 29, 2010, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 18 years to life, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Conceicao*, 26 NY3d 375, 381 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. At the plea colloquy, there was nothing to warrant an inquiry into whether defendant's mental condition impaired his ability to understand the proceedings. The court specifically noted, based on its own observations, that

defendant appeared to be mentally competent. We find that the record provides no basis for a contrary conclusion.

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

ENTERED: FEBRUARY 14, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8387 Nextera Energy, Inc., Plaintiff-Appellant, Index 652484/17

-against-

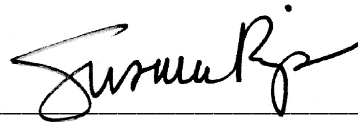
Greenberg Traurig, LLP, Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 11, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 16, 2019,

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8388 In re Kayla C., and Others,

Dependent Children Under
the Age of Eighteen Years, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Faith J., et al.,
Respondents-Respondents.

____

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for appellant.

Law Offices of Elisa Barnes, New York (Elisa Barnes of counsel), for Faith J., respondent.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Stephanie C., respondent.

Larry S. Bachner, New York, attorney for the child Kayla C.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children McKenzie G., Melanie G., Kylie D. and Christian D.

____

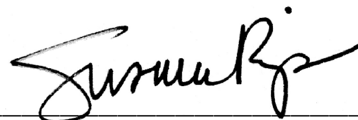
Order, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about August 9, 2017, which granted respondents mothers unsupervised visitation with their respective children under certain conditions, unanimously affirmed, without costs.

The Family Court's determination to grant these two mothers unsupervised visitation with their respective children, subject

to compliance with precautionary measures specifically tailored to protect the children from harm, should not be disturbed as the orders have a sound and substantial basis in the record (*see Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610, 610 [1st Dept 2016]; *Linda R. v Ari Z.*, 71 AD3d 465, 465-466 [1st Dept 2010]). There is no evidence in record that either of the mothers had perpetrated the sexual abuse or posed any other safety risk to the children. In addition, the court took specific precautions to prevent endangering the children by prohibiting other people from being present during the visits, requiring that the visits take place in the community, prohibiting the children from being left with anyone other than their mothers during the visits, and limiting visitation to twice weekly for a three hours a visit (*see Matter of Anthony M.P. v Ta-Mirra J.H.*, 125 AD3d 868, 868-69 [2d Dept 2015]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8390 Danuta Michaluk, as Administratrix of the Estate of Jan Michaluk, Deceased, et al., Index 805304/13
Plaintiffs-Appellants,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

____

Hogan & Cassell, LLP, Jericho (Michael Cassell of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

____

Order, Supreme Court, New York County (George J. Silver, J.), entered May 16, 2018, which, in this action alleging medical malpractice and wrongful death, granted defendant's motion to dismiss the complaint pursuant CPLR 3126(3), unanimously reversed, on the law and the facts, without costs, and the motion denied.

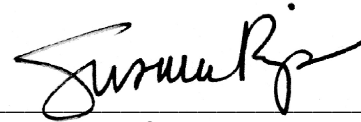
The court improvidently exercised its discretion in determining that dismissal of the complaint was warranted. Defendant failed to make a clear showing that plaintiffs' failure to timely comply with their discovery obligations was wilful,

contumacious or in bad faith (see *Ellis v Park*, 93 AD3d 502 [1st Dept 2012]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222-223 [1st Dept 2003]). The record does not show that the delay in conducting the deposition of a certain doctor was clearly attributable to plaintiffs or that defendant has been prejudiced by the delay (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 319 [1986]). Although the parties blame each other for why the deposition of the witness was not completed on or before November 28, 2017, as required by the September 2017 order, the record shows that it did not go forward on December 28, 2017, because plaintiffs' counsel was injured in a motor vehicle accident two weeks earlier, which is a reasonable excuse for their failure to proceed. Since defendant never sought to compel disclosure or to have preclusionary language added to any of the parties' compliance orders, its motion to dismiss pursuant to CPLR 3126(3) was premature given the lack of evidence that plaintiffs' delay in conducting the deposition was willful, contumacious or due to bad faith (*see W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011]). Furthermore, warnings in prior court orders that the deposition

was not to be adjourned is not notice to plaintiffs that dismissal of the complaint may result should it not go forward (*see Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [1st Dept 2012]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8391- Index 158840/14
8392 Marshall Maor, et al.,
Plaintiffs-Respondents,

-against-

One Fifty Fifty Seven Corp. doing
business as Russian Tea Room, et al.,
Defendants-Appellants.

____

Jackson Lewis, P.C., New York (John J. Porta of counsel), for appellants.

Virginia & Ambinder, LLP, New York (LaDonna Lusher of counsel), for respondents.

____

Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered April 13, 2018, which, inter alia, denied defendants' motion for summary judgment dismissing plaintiff Marshall Maor's cause of action to recover withheld gratuities under Labor Law § 196-d, and granted plaintiff Maor's motion to certify a class and to amend the complaint to add Gina Garcia as an additional named plaintiff, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the Labor Law § 196-d claim as against defendant RTR Funding Group, Inc. (RTR Funding), to limit the class members to similarly situated workers who were assigned by nonparty Ambitious Staffing f/k/a Ambitious Six (Ambitious) to provide catering services for events

organized and run by defendant One Fifty Fifty Seven Corp d/b/a the Russian Tea Room (One Fifty Fifty Seven) between 2008 and December 31, 2010, and otherwise affirmed, without costs.

Between 2008 and 2010, Maor and Garcia worked as catering staff for specific events at the Russian Tea Room under the direct supervision of Russian Tea Room managers. Although they were assigned to work the events by Ambitious, a third-party staffing agency, triable issues of fact exist as to the degree of control that One Fifty Fifty Seven and its principal, Gerald Lieblich, exercised "over the results produced or the means used to achieve the results" (*Bynog v Cipriani Group*, 1 NY3d 193, 199 [2003]; *see Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d 596, 598 [2d Dept 2011]). The record contains evidence tending to show more than incidental control (*cf. Matter of Yoga Vida, Inc. [Commissioner of Labor]*, 28 NY3d 1013 [2016]; *Zeng Ji Liu v Bathily*, 145 AD3d 558, 559 [1st Dept 2016]). However, nothing in the record supports the contention that RTR Funding, a separate corporate entity, was involved in the catered events at issue.

Maor's motion for class certification was properly granted, but only to the extent that the class is limited to the period during which he and additional plaintiff Garcia worked at catered events at the Russian Tea Room staffed by Ambitious from 2008

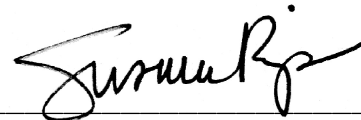
through 2010. As to such a class, plaintiffs meet the requirements of CPLR 901(a) and demonstrate that a class action is more desirable and feasible than requiring individual members to prosecute separate actions (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). The record shows that Maor is familiar with the action and has no conflict of interest with other class members, who may opt out (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399-400 [2014]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 [1st Dept 1991]). However, questions of law and fact differ for the time period after Maor and Garcia worked at Russian Tea Room events, because the Department of Labor's Hospitality Wage Order came into effect on January 1, 2011 (12 NYCRR 146-2.18[b] [creating "rebuttable presumption that any charge in addition to . . . specified materials or services . . . is a charge purported to be a gratuity"]; *compare Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Maldonado v BTB Events & Celebrations, Inc.*, 990 F Supp 2d 382, 392-395 [SD NY 2013]). Accordingly, the class is narrowed to include members whose claims are governed by the standard applicable before that date.

Maor's motion, to the extent that it sought to amend the complaint to add Garcia as a plaintiff, was properly granted

(CPLR 3025[b]). Defendants "cannot demonstrate prejudice resulting directly from [any] delay" in moving to add Garcia, who was identified as a putative plaintiff and deposed by defendants (*Hunt v Godesky*, 189 AD3d 854, 854 [2d Dept 1993]; *see Sidor v Zuhoski*, 257 AD2d 564 [2d Dept 1999]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8393 The People of the State of New York, Respondent, Ind. 1519/16

-against-

Jose Gross also known as
Jose A. Grossseverino,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Michael R. Sonberg, J.), rendered December 20, 2016,

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.

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

ENTERED: FEBRUARY 14, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8394-
8395 J-Bar Reinforcement, Inc., Index 650404/16
650294/17

Plaintiff-Respondent,

-against-

Crest Hill Capital LLC,
Defendant-Appellant.

- - - - -

J-Bar Reinforcement, Inc.,
Plaintiff-Respondent,

-against-

Mantis Funding, LLC,
Defendant-Appellant.

____

MCShapiro Law Group P.C., Great Neck (Mitchell C. Shapiro of counsel), and Carter Ledyard & Milburn LLP, New York (Jacob H. Nemon of counsel), for appellants.

Raymond J. Markovich, New York, for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 5, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment in lieu of a complaint against defendant Crest Hill Capital LLC for its default on a note, and denied Crest Hill's cross motion to, inter alia, dismiss the action, or for a stay of proceedings until the senior creditors had been paid, unanimously reversed, on the law, with costs, plaintiff's motion denied, and

Crest Hill’s cross motion granted to the extent of dismissing the action. The Clerk is directed to enter judgment accordingly. Order, same court and Justice, entered October 6, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff’s motion for summary judgment in lieu of complaint, and denied defendant Mantis Funding LLC’s cross motion to dismiss the action, unanimously reversed, on the law, with costs, plaintiff’s motion denied, and defendant’s cross motion granted. The Clerk is directed to enter judgment accordingly.

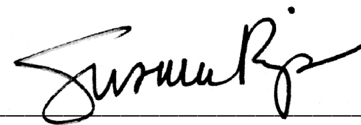
Plaintiff held a promissory note executed by the respective defendants. The note was executed at a time when defendants had other creditors, and thus plaintiff executed a Subordination Agreement whereby plaintiff’s right to payment was subordinated to the senior creditors. Specifically, the Subordination Agreement provided that plaintiff “will not now or hereafter directly or indirectly (i) ask, demand, sue for, take or receive payment of all or any part of the Subordinated Indebtedness or any collateral therefor, and [defendants] will not be obligated to make any such payment, and the failure of [defendants] so to do shall not constitute a default by [defendants] in respect of the Subordinated Indebtedness.”

Unlike subordination agreements that “merely order the

priority of plaintiffs' rights as against other creditors and have no bearing on plaintiffs' rights against defendant" (*Lipsky v Ajax Elec. Motor Corp.*, 225 AD2d 1055, 1056 [4th Dept 1996]; *see Kornfeld v NRX Tech.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *Imtrac Indus. v Glassexport Co.*, 1996 WL 39294, 1996 US Dist LEXIS 1022 [SD NY 1996]), the plain, unambiguous language of the subject Subordination Agreement limited plaintiff's right to demand or sue for payment, or declare a default prior to satisfaction of the senior debt. The commercial reasonableness of this agreement is irrelevant where there is no ambiguity (*see Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC*, 20 NY3d 438, 445-446 [2013]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8397 The People of the State of New York, Ind. 5264/16
Respondent,

-against-

Alexander Sanchez,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack 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 (Robert M. Stolz, J.), rendered August 9, 2017,

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.

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

ENTERED: FEBRUARY 14, 2019

____
CLERK

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

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8398-
8399N In re Scott Balber, Index 350007/17
Petitioner-Appellant,

-against-

Elise Zealand,
Respondent-Respondent.

____

Kaminer Kouzi & Associates LLP, New York (Jennifer Kouzi of counsel), for appellant.

Advocate, LLP, New York (Jason A. Advocate of counsel), for respondent.

____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered June 29, 2017, which awarded respondent mother $35,000 in interim counsel fees; and order, same court and Justice, entered April 12, 2018, which, to the extent appealed from as limited by the briefs, awarded her additional interim counsel fees of $85,000, unanimously affirmed, without costs.

Supreme Court appropriately relied on Domestic Relations Law § 237(b) in awarding the mother fees on her initial application, and could have relied on it again in its second award. The statute's plain language disproves appellant father's arguments about the statute's inapplicability to custody disputes between unmarried parents, as it contemplates a fee award to a "spouse"

or “parent” in custody proceedings either arising under Domestic Relations Law § 240 or otherwise. *Brentrup v Culkin* (167 Misc 2d 211 [Sup Ct, NY County 1996]), which held that § 240 does not apply to children of unmarried parents, only highlights the wider breadth of § 237, which covers not only § 240 proceedings, but other custody proceedings as well.

Pierot v Pierot (49 AD2d 838 [1st Dept 1975]), cited by *Brentrup*, did not concern custody. Unlike here, it concerned parties who were once married. Moreover, as it predated the Equitable Distribution Law, it is superceded.

This and other courts have accordingly awarded counsel fees to an unmarried parent in a custody dispute on Domestic Relations Law § 237(b) grounds (*see e.g. Matter of Brookelyn M. v Christopher M.*, 161 AD3d 662 [1st Dept 2018]; *Matter of Renee P.-F. v Frank G.*, 161 AD3d 1163 [2d Dept 2018], *lv denied* 2018 NY Slip Op 90461 [2018]; *Evgeny F. v Inessa B.*, 127 AD3d 617 [1st Dept 2015]; *Matter of Ralph D. v Courtney R.*, 123 AD3d 635 [1st Dept 2014]; *Allen v Farrow*, 197 AD2d 327 [1st Dept 1994], *lv denied* 86 NY2d 709 [1995]). Family Court Act article 4, as the father contends, is limited to support proceedings; however, the mother did not base her pendente lite application on Family Court Act § 438. In any case, the issue is academic since the $85,000

fee award was authorized under Domestic Relations Law § 237(b).

The $120,000 total award, far less than the $225,000 total fees requested, was well within the court’s discretion (*see Matter of Thomas B. v Lydia D.*, 120 AD3d 446 [1st Dept 2014]). The father conceded he was the more affluent party, and the court providently exercised its discretion so as “to further the objectives of litigational parity” (*O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]). It expressly took into consideration the very issues raised by the father on appeal, including that the mother had made most of the motions in the case, that she did not include, in her scheduled assets, the diamond engagement ring he had given her, that she had tried to involve the Administration for Children’s Services based on unfounded allegations, and that she had further proliferated the litigation by commencing an action in Connecticut and serving subpoenas unlikely to result in relevant discovery. The court properly took these factors into consideration in awarding her only 53% of the fees she sought.

The father faults the mother for not saving more money to pay her own fees, but even if she “had the funds to pay her attorneys, that is not in itself a bar to an award of counsel fees” (*Anna-Sophia L. v Paul H.*, 52 AD3d 313, 315 [1st Dept 2008]). He reasonably complains about her failure to timely

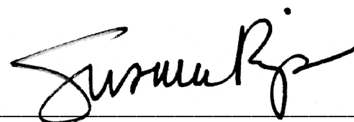
disclose her job offer to the court, but her lack of candor had no apparent impact. The court expressed skepticism that she had been seeking employment as diligently as she claimed, and thus at least impliedly rendered its decision with her earning potential in mind (*Saunders v Guberman*, 130 AD3d 510 [1st Dept 2015]).

An evidentiary hearing was not required before making these interim awards (*Brookelyn M.*, 161 AD3d at 663).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8401N Thomas Kuriakose, Index 162579/15
Plaintiff-Respondent,

-against-

Motor Vehicle Accident Indemnification Corporation,
Defendant-Appellant.

____

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for appellant.

Law Office of Stephen B. Kaufman, P.C., Bronx (John V. Decolator of counsel), for respondent.

____

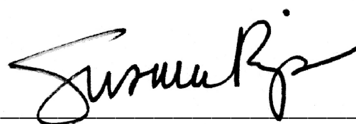
Order, Supreme Court, New York County (Adam Silvera, J.), entered March 27, 2018, which, inter alia, in this action for personal injuries sustained when plaintiff pedestrian was struck by an unidentified vehicle, directed plaintiff to respond to interrogatories, unanimously affirmed, without costs.

The court's discovery order was a provident exercise of discretion, despite the fact that a prior court had denied plaintiff's motion for a protective order seeking a video deposition (*see generally Daniels v City of New York*, 291 AD2d 260 [1st Dept 2002]). The court providently fashioned a remedy tailored to the discovery issue at hand where plaintiff currently

lives in India and expresses to have difficulties, both physical and financial, in traveling here for a deposition (*see e.g. Fielding v Klein Dept. Stores*, 44 AD2d 668 [1st Dept 1974]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8402 The People of the State of New York, Ind. 3628/12
Respondent,

-against-

Richard Diaz,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Benjamin M. Rose of counsel), and Dechert LLP, New York (David N. Kelley of counsel), for appellant.

Richard Diaz, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered September 11, 2015, convicting defendant, after a jury trial, of robbery in the second degree and criminal impersonation in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims relating to colloquies regarding defendant's absence from trial and to an incident involving a juror are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since

defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

With regard to counsel's candid responses to the court's inquiries about defendant's absence from court, counsel's conduct was consistent with his ethical duties, and he neither became a witness against his client nor was otherwise ineffective (*see People v Maisonette*, 234 AD2d 27 [1st Dept 1996], *lv denied* 89 NY3d 1013 [1997]). Furthermore, defendant had no legitimate interest in absconding from trial. Accordingly, to the extent the record permits review, it does not establish that counsel's conduct was either unreasonable or prejudicial.

Defendant did not preserve his contention that the court should have discharged a juror or conducted further inquiry into whether the juror was grossly unqualified on account of his

failure to disclose a pending criminal case against him, and we decline to review this claim in the interest of justice. As an alternative holding, we find the claim to be without merit. The court conducted a sufficient inquiry into the matter, which provided no basis for a finding that the juror was grossly unqualified (*see People v Mejias*, 21 NY3d 73, 79-80 [2013]; *People v Buford*, 69 NY2d 290, 299 [1987]).

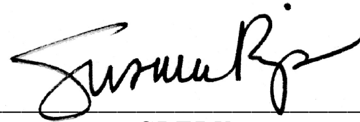
As noted, defendant's contention that his attorney rendered ineffective assistance by failing to object to the juror's continued participation is likewise unreviewable on the existing limited record. To the extent the record permits review, we find that counsel acted reasonably, in light of the court's own extensive inquiry, the lack of any evidence of gross disqualification, and the possibility that the juror's own status as a defendant might have rendered him more favorable to the

defense. Furthermore, defendant has not established any prejudice.

We have considered and rejected defendant's pro se claims.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8403 In re Gail Hanna, Index 150140/18
Petitioner-Appellant,

-against-

The New York State Board of Parole,
Respondent-Respondent.

____

Kramer Levin Naftalis & Frankel, New York (Elise C. Funke of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (Blair J. Greenwald of counsel), for respondent.

____

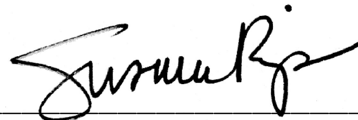
Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered May 30, 2018, which denied petitioner's application to annul respondent's denial of parole, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's denial of parole was not arbitrary and capricious considering, as required, all of the relevant statutory factors, including the serious nature of petitioner's offense (*Matter of Silmon v Travis*, 95 NY2d 470, 477 [2000]). Contrary to petitioner's contention, there was official

opposition to her parole application (*contra Matter of Smith v New York State Bd. of Parole*, 34 AD3d 1156, 1157 [3d Dept 2006]), and the Parole Board members did not improperly apply their personal beliefs to the issues of petitioner's mental health or her insight into her offense (*Silmon*, 95 NY2d at 477).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8404 In re Damaris D., and Another,

Children Under the Age
of Eighteen Years, etc.,

Durven D.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent,

Stephanie D.,
Respondent.

____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

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

____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 30, 2017, which determined that respondent father neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence, establishing that respondent's actions posed an imminent danger to the children's emotional and physical well-being (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]).

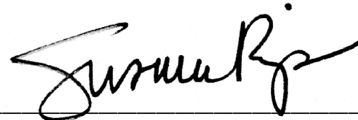
The caseworker testified that one of the children saw respondent and the mother engage in numerous physical altercations, which frightened her. Respondent confirmed that the children exhibited signs of fear when he and the children's mother fought. The children's mother also testified that she and respondent had a history of hitting each other in the children's presence (*see Matter of Elijah T. [Melvin G.]*, 154 AD3d 635, 636 [1st Dept 2017]). The record shows that, during one of the altercations, not only did the children witness the domestic violence, but the then four-year- old child also became involved in the altercation when she attempted to intervene, and respondent picked her up and threw her into a chair (*see Matter of Kenny J.M. [John M.]*, 157 AD3d 593 [1st Dept 2018]).

Respondent argues that he is the victim of the domestic violence. However, we note Family Court's prior findings of neglect against respondent concerning the subject children and their half-siblings. Respondent also admitted that he has not participated or completed a batterer's program, anger management, and a mental health evaluation, as previously ordered by Family

Court. Contrary to respondent's arguments, there is no basis in the record for disturbing Family Court's credibility determinations (*see Matter of Frantrae W.*, 45 AD3d 412 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8405-
8406 Index 100256/11

Joseph B. Mitchell, et al.,
Plaintiffs-Appellants,

-against-

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

____

Giuliano McDonnell & Perrone, LLP, Mineola (Matthew M. Gorden of counsel), for appellants.

Fabiani, Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents.

____

Orders, Supreme Court, New York County (Lucy Billings, J.), entered August 9, 2017, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs.

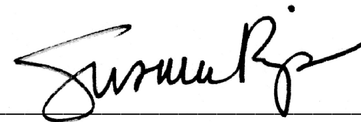
There is no viable Labor Law § 240(1) claim where, as here, "plaintiff simply lost his footing while [descending] a properly secured, non-defective extension ladder that did not malfunction" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]). Furthermore, inasmuch as the ladder was placed in compliance with 12 NYCRR 23-1.21(b)(4)(i), dismissal of the Labor

Law § 241(6) claim was warranted.

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

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8407 Anthony Penza, Index 109597/11
Plaintiff-Appellant,

-against-

Olaf Quoohs, et al.,
Defendants-Respondents,

"John Doe", etc.,
Defendant.
- - - - -
[And a Third-Party Action]

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

Rubin, Fiorella & Friedman LLP, New York (Stewart B. Greenspan of counsel), for Olaf Quoohs and Eric Quoohs, respondents.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Miles A. Linefsky of counsel), for Edmund Sylvester and Anne Sylvester, respondents.

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 7, 2016, which, to the extent appealed from as limited by the briefs, granted defendants Olaf Quoohs and Eric Quoohs's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action as against them, unanimously affirmed, without costs.

Plaintiff and his company were hired by defendants Edmund Sylvester and Anne Sylvester to remove trees situated along their

property line or between their property and the Quoohses' property. Plaintiff was injured when he fell from the roof of the third-floor terrace of the Quoohses' property, which he was standing on so that he could reach branches of the trees.

The record demonstrates that the Labor Law causes of action were correctly dismissed as against the Quoohses, because plaintiff was not the Quoohses' employee when he was injured (*see Stringer v Musacchia*, 11 NY3d 212, 215-216 [2008]). Plaintiff had not agreed to remove the trees in return for compensation from the Quoohses, and the Quoohses did not direct or supervise the manner or method of plaintiff's work and would not decide whether the tree removal had been completed satisfactorily.

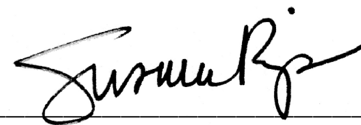
The record also demonstrates that, contrary to plaintiff's contention, the Quoohses cannot be held liable to plaintiff on the ground that they allowed him access to their property to perform his work for the Sylvesters. Before plaintiff undertook the tree removal work, the Quoohses had given the Sylvesters instructions regarding access to their property by other contractors performing work for the Sylvesters; one such instruction was that the contractors were not permitted access to the roof of the third-floor terrace. With respect to plaintiff's work, plaintiff testified that he never told Olaf Quoohs that he

would be going onto the third-floor-terrace roof, Olaf Quoohs testified that no one told him that the Sylvesters' contractors would have to go onto the third-floor-terrace roof to remove the trees, and Edmund Sylvester testified that he did not believe that plaintiff had permission to be on the third-floor-terrace roof.

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

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8408-
8409 The People of the State of New York, Ind. 423/14
Respondent,

-against-

Carlos Torres,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Judith S. Lieb, J.), rendered July 13, 2015, as amended November 22, 2015, convicting defendant, after a jury trial, of criminal sexual act in the second degree, rape in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 14 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The fact that the jury acquitted defendant of charges involving additional incidents does not warrant a different conclusion (*see People v Rayam*, 94

NY2d 557 [2000]).

The court properly denied, on the ground of untimeliness, defendant's request for a missing witness charge relating to a friend of the victim's family. Although defendant was made aware at the end of jury selection that the People did not plan to call this witness, defendant waited until both sides had rested to make his request. Accordingly, the request was untimely (*see People v Carr*, 14 NY3d 808[2010]). Moreover, the record also supports the court's alternative grounds for denying the request (*see generally People v Gonzalez*, 68 NY2d 424, 428 [1986]).

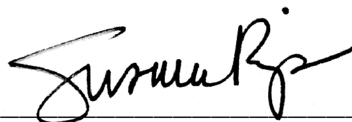
The court providently exercised its discretion in precluding defendant from attempting to elicit that the teenaged victim had previously been sexually molested by her stepfather or father. This evidence was properly excluded under both the Rape Shield Law (CPL 60.42) and general principles of relevance. Defendant offered nothing but vague and unreliable information to support the claimed prior molestation, which the victim and her mother denied (*see People v Tohom*, 109 AD3d 253, 274 [2d Dept 2013], *lv denied* 22 NY3d 1203 [2014]). Furthermore, defendant presented a tenuous theory of relevance that had little or no bearing on the victim's credibility (*see People v Segarra*, 46 AD3d 363 [1st Dept 2007], *lv denied* 10 NY3d 816 [2008]). To the extent that

defendant is raising a constitutional claim, it is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8410 In re Eileen Ghastin, Index 651855/17
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

____

Eileen Ghastin, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered September 11, 2017, which denied the petition to vacate a hearing officer's Education Law § 3020-a arbitration award dated March 27, 2017, suspending petitioner four weeks without pay, granted respondent's cross motion to dismiss the petition and dismissed the proceeding, unanimously affirmed, without costs.

There is no basis to disturb the hearing officer's credibility determinations that during the May 17, 2016 incident, petitioner violated Chancellor's Regulation A-421 by cursing at a student and threatening to kill him while other students were present. Indeed, respondent's witnesses gave interlocking and closely corroborating testimony establishing her statements. The

fact that the hearing officer found their testimony more credible than petitioner's is not a basis to find that his determinations were arbitrary and capricious (*see Matter of Brito v Walcott*, 115 AD3d 544, 545 [1st Dept 2014]). In addition, petitioner made no showing as to how a four-week suspension without pay is so shockingly disproportionate to the offense that it constitutes an abuse of discretion given her proven misconduct which could have resulted in violence (*see Matter of Brizel v City of New York*, 161 AD3d 634, 635 [1st Dept 2018]).

Although petitioner had about 19 years of service at the time of the hearing with no known disciplinary record before the incident, the record shows that she failed to acknowledge the gravity of her misconduct, continued to deny any wrongdoing and showed a lack of remorse for her actions (*see Matter of Haas v New York City Dept. of Educ.*, 106 AD3d 620, 621 [1st Dept 2013]). She also failed to present clear and convincing proof that the hearing officer was biased against her (*see Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792, 792 [1st Dept 2012]).

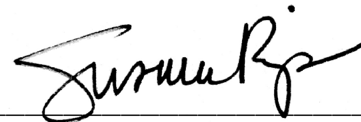
We further find that petitioner has waived the issue of whether the hearing officer lacked jurisdiction to decide the matter because she did not raise the issue during the arbitration (*see Matter of DeMartino v New York City Dept. of Transp.*, 67

AD3d 479, 479 [1st Dept 2009]). That she raised the issue in her petition to the Supreme Court is of no moment.

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

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8411 Hiram Ramirez, Index 305821/11
Plaintiff,

-against-

Almah, LLC,
Defendant.
- - - - -
Almah LLC,
Third-Party Plaintiff-Appellant,

-against-

Structure Tone, et al.,
Third-Party Defendants-Respondents.
- - - - -
Almah LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Plumb Door of New York City, Inc.,
also known as Plumb Door N.Y.,
Second Third-Party Defendant-Respondent.

____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for Structure Tone, respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for Port Morris Tile & Marble Corp., respondent.

McMahon, Martine & Gallagher, LLP, Brooklyn (Andrew D. Showers of counsel), for Plumb Door of New York City, Inc., respondent.

____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),

entered on or about April 6, 2018, which, insofar as appealed from as limited by the briefs and stipulation, granted the motion by third-party defendant Plumb Door of New York City, Inc. a/k/a Plumb Door N.Y. (Plumb Door) for summary judgment dismissing defendant's contractual and common-law indemnification and contribution claims against it, granted the motion by third-party defendant Port Morris Tile & Marble Corp. (Port Morris) for summary judgment dismissing defendant's contractual indemnification claims against it, and granted third-party defendant Structure Tone's motion for summary judgment dismissing defendant's common-law indemnification and contribution claims against it, unanimously modified, on the law, to deny the motions by Port Morris and Plumb Door for summary judgment dismissing defendant's contractual indemnification claims against them, and otherwise affirmed, without costs.

Plaintiff was employed by Port Morris as a truck driver and was required to unload construction materials from his truck in the loading dock of a building owned by defendant, then transport them on pallet jacks and skids through a vestibule and onto freight elevators to be taken to a construction site on the 41st floor of the building. The only path from the loading dock to the vestibule was through a set of two swinging doors, installed

by Plumb Door on October 18, 2010. While plaintiff and his coworker were attempting to move an empty pallet jack through the doors to the loading dock after delivering materials, plaintiff was allegedly struck by one of the swinging doors. He admitted that he had not previously observed any problem with the doors.

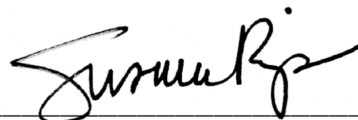
The court should have denied the summary judgment motions by Port Morris and Plumb Door seeking dismissal of defendant's contractual indemnification claims against them. Contractual provisions broadly require those third-party defendants to indemnify defendant for claims arising from the performance of their work. Plaintiff's accident arose from his performance of his work as an employee of Port Morris (*see e.g. Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]), and Plumb Door installed the allegedly defective door less than two months before the accident. The extent of the indemnification will depend on the extent to which defendant's negligence is found to have proximately caused the accident (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548 [1st Dept 2013]). Since the indemnification provisions are limited to the extent of the law, defendant may be entitled to indemnification even if it is found partially negligent (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]).

We decline to review Plumb Door's unpreserved challenge to the validity of its indemnification agreement, which is not a purely legal argument clear from the face of the record but depends on facts not brought to defendant's attention below (*see Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 441 [1st Dept 2018]).

The court properly granted the motions by Structure Tone and Plumb Door for summary judgment dismissing the common-law indemnification and contribution claims against them. "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence ... on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]), and the only claims ever asserted against defendant sought to hold it liable for its own negligence rather than vicariously liable (*see e.g. Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536 [1st Dept 2012]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8412 The People of the State of New York, SCI 3102/10
Respondent,

-against-

Hiram Ortega,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence, of the Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered June 8, 2017,

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.

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

ENTERED: FEBRUARY 14, 2019

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CLERK

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

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8413-
8413A In re Nisha S.,
Petitioner-Respondent,

-against-

Sharif Ajaye L.,
Respondent,

The Children's Law Center,
on behalf of Anatalya L.,
Nonparty Appellant.
- - - - -
In re Camille H.,
Petitioner-Respondent,

-against-

Sharif Ajaye L., et al.,
Respondents,

The Children's Law Center, on behalf
of Anatalya L.,
Nonparty Appellant.

____

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child, appellant.

Sanctuary For Families, New York (Sadie H. Diaz of counsel), and Cohen & Gresser, LLP, New York (Alexandra Wald, Daniel Mandell and Thomas Bezanson of counsel), for Camille H., respondent.

____

Orders, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about March 7, 2017, which, to the extent appealed from as limited by the briefs, vacated final orders, entered on or about December 22, 2016, upon petitions by the mother and

paternal grandmother of the subject child, awarding custody of the child to her mother and visitation to her grandmother, and dismissed the petitions without prejudice nunc pro tunc to December 22, 2016, for failure to name a necessary party, unanimously reversed, on the law, without costs, and the final orders of custody and visitation reinstated.

The court erred in vacating the final orders awarding custody of the subject child to her mother and visitation to her paternal grandmother on the ground that the presumption of legitimacy had been rebutted (*see Matter of Ariel G. v Greysy C.*, 133 AD3d 749 [2d Dept 2015]). The record demonstrates that the custody and visitation awards are in the child's best interests (*see* Family Court Act § 418; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]).

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

ENTERED: FEBRUARY 14, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8414 The People of the State of New York, Ind. 5093/08
Respondent,

-against-

Lisa Hannan,
Defendant-Appellant.

Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (James A. Yates, J. at plea; Jill Konviser, J. at sentencing), rendered January 3, 2017,

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.

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

ENTERED: FEBRUARY 14, 2019

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CLERK

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

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8415-
8415A-
8415B-
8415C — Index 114344/10

Michael J. Kartanowicz, Jr., et al.,
Plaintiffs-Respondents,

-against-

Beyer Blinder Belle, Architects
and Planners, LLP, et al.,
Defendants-Appellants,

Hegarty & Sons,
Defendant.

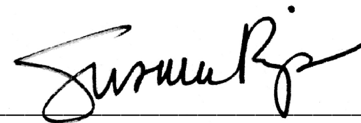
____

An appeal having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (W. Franc Perry, III, J.), entered on or about June 11, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 17, 2019,

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8416 Carlos De La Rosa, Index 308121/12
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants,

Isabel J. Miec, et al.,
Defendants.

____

Lawrence Heisler, Brooklyn, (Timothy J. O'Shaughnessy of counsel), for appellants.

Cellino & Barnes, Buffalo (John E. Lavelle of counsel), for respondent.

____

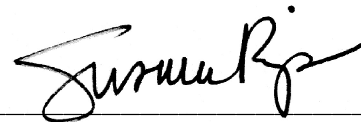
Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 13, 2018, which denied defendants New York City Transit Authority and Miguel A. Green's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants demonstrated that the accident occurred because a car traveling 40 to 50 miles per hour crossed the double yellow line into oncoming traffic, and that its driver was looking down at his phone and did not respond to the sound of the bus driver honking before hitting the bus on which plaintiff was a passenger

(*see Morales v Chuquillanqui*, 159 AD3d 605 [1st Dept 2018]; *Cropper v Stewart*, 117 AD3d 417 [1st Dept 2014], *lv denied* 24 NY3d 914 [2015]). The bus was unable to move into the right lane because of double parked vehicles. Thus, even crediting the affidavit of plaintiff, in which he states that the bus was moving between 40 and 50 miles per hour, and not the 20 miles per hour as testified to by the driver, defendants cannot be held liable; the speed of the bus was not a factor in the collision (*see Caro v Chesnick*, 155 AD3d 447, 448 [1st Dept 2017]).

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

ENTERED: FEBRUARY 14, 2019



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Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8417 Metrosearch Recoveries, LLC, Index 158027/16
Plaintiff-Appellant,

-against-

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

____

Trenk & Trenk, LLC, New York (Daniel Trenk of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondents.

____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered October 2, 2017, which, to the extent appealed from as limited by the briefs, inter alia, granted defendants' CPLR 3211 motion to dismiss plaintiff's defamation claims, and imposed, sua sponte, sanctions on plaintiff for bringing a frivolous action, unanimously modified, on the law and the facts, to vacate the sanctions, and otherwise affirmed, without costs.

The IAS court properly found that a press conference was sufficiently related to the performance of defendant Stringer's duties that the statements made therein were absolutely privileged (*see Lombardo v Stoke*, 18 NY2d 394, 400-402 [1966]).

The IAS court also properly found that the allegations could not give rise to any inference which would support a finding of

malice, either in the sense of reckless disregard of the truth or of a statement motivated solely by spite (*see Liberman v Gelstein*, 80 NY2d 429, 437-439 [1992]).

Finally, the court erred in awarding sanctions, both because plaintiff was not given a reasonable opportunity to be heard on this issue (*see* Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1[d]) and because plaintiff's arguments were not so clearly meritless as to be deemed frivolous.

Based upon this Court's holding as to privilege, we need not reach the other arguments raised by plaintiff.

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

ENTERED: FEBRUARY 14, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8418 Desiree LaRosa, et al., Index 158243/13
Plaintiffs-Respondents,

-against-

Corner Locations, II, L.P., et al.,
Defendants-Respondents,

Moishe Gift Inc.,
Defendant-Appellant,

Nylar Holding, LLC,
Defendant.

____

The Chartwell Law Offices, LLP, New York (Andrew J. Furman of counsel), for appellant.

Zalman Schnurman & Miner, P.C., New York (Marc H. Miner of counsel), for Desiree LaRosa and William LaRosa, respondents.

Gambeski & Frum, Elmsford (Eugene Grimes of counsel), for Corner Locations II, L.P., and Halstead Management Company, LLC, respondents.

____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 23, 2018, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Moishe Gift Inc. (Moishe) for summary judgment dismissing the complaint and the cross claim for common-law indemnification against it, unanimously affirmed, without costs.

Plaintiff Desiree LaRosa was injured when she tripped and fell over the edge of a metal cellar door located on the public

sidewalk in front of premises owned by defendant Corner Locations (Corner) and leased by Moishe. The court properly denied Moishe's motion for summary judgment because there are issues of fact as to whether it made special use of the cellar door in the sidewalk for its business and failed to maintain it in good repair (*see Navaretto v 995 Westchester Ave. LLC*, 35 AD3d 267, 268 [1st Dept 2006]). Although Corner, as the owner of the premises, had a nondelegable duty to maintain and repair the sidewalk abutting the premises (Administrative Code of the City of New York § 7-210), the property owner and tenant both may be held liable as joint tortfeasors for failure to fulfill their respective maintenance obligations (*see Olivia v Gouze*, 285 App Div 762, 765-766 [1st Dept 1955], *affd* 1 NY2d 811 [1956]).

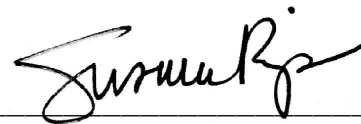
Moishe also did not establish entitlement to dismissal of the cross claim based on the fact that Corner owes a nondelegable maintenance duty, since Moishe may be held liable to Corner for damages resulting from a violation of Moishe's obligations to repair and maintain the sidewalk and its special use of the sidewalk (*see Wahl v JCNYC, LLC*, 133 AD3d 552 [1st Dept 2015]).

Furthermore, under the facts and circumstances of this case, the court properly found that questions exist as to whether the

alleged defect was trivial as a matter of law (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY2d 66, 77-78 [2015]). Conflicting evidence as to the height differential between the level of the sidewalk and the cellar door frame, plaintiff's testimony that there was heavy pedestrian traffic blocking her view of the sidewalk, and the photographs showing a sharp edge on the door frame, prevent a finding that the condition did not constitute a tripping hazard (*see e.g Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500 [1st Dept 2011]; *George v New York City Tr. Auth.*, 306 AD2d 160 [1st Dept 2003]; *Simos v Vic-Armen Realty, LLC*, 161 AD3d 1023 [2d Dept 2018]).

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8419- Index 158592/16
8420 In re Cheryl Wilson,
Petitioner-Respondent,

-against-

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

____

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for appellant.

Stewart Lee Karlin Law Group, PC, New York (Stewart Lee Karlin of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 12, 2017, granting the petition brought pursuant to CPLR article 78, seeking to annul respondent's determination, dated July 15, 2016, which discontinued petitioner's employment, and reinstating her to the position of tenured teacher with back pay, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 30, 2018, which settled respondent's motion to reargue by amending the July 12, 2017 judgment to state that the amount earned by petitioner during the period of July 15, 2016 to present would be deducted from the amount of back pay owed by respondent for the period July 15, 2016 to present, unanimously

dismissed, without costs, as abandoned.

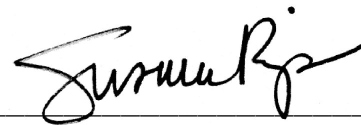
Petitioner was hired in 2011 by the DOE to serve as a special education teacher. Her initial 3-year probationary period was set to expire on September 2, 2014. However the DOE and petitioner entered into a written agreement extending her probation until September 8, 2015. In March 2015, the DOE temporarily reassigned petitioner from her teaching duties to a clerical job. The DOE did not provide her with any decision regarding her tenure by the expiration of her probationary period. In March 2016, the DOE reassigned her back to her teaching duties. Following an incident with the principal on April 12, 2016, petitioner took an unapproved leave of absence, and on June 15, 2016, the DOE notified her that it was discontinuing her probationary service as of July 15, 2016.

"Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" (*Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 187 [1995]). Here, petitioner obtained tenure by estoppel when she continued to be employed by the DOE and failed to receive any notice regarding the DOE's

decision regarding her future by the expiration of her probationary period on September 8, 2015. In addition, the DOE failed to indicate to petitioner that the temporary assignment to perform clerical duties for the Committee on Special Education would not count toward her probationary period. Thus, petitioner's decision to accept the temporary reassignment did not "serve to disrupt that teacher's probationary period, nor . . . lead to an increase in the length of that probationary period" (*Ricca v Board of Educ. of City School Dist. of City of N.Y.*, 47 NY2d 385, 394 [1979]; *see also Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d 554, 560 [1st Dept 2008]).

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

ENTERED: FEBRUARY 14, 2019



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Sweeny, J.P., Webber, Kahn, Kern, JJ.

8421N Samuel T. Cohen, etc., Index 652724/13
Plaintiff-Appellant, 652725/13
652758/13
-against- 652793/13
652854/13
Saks Incorporated, et al., 653036/13
Defendants-Respondents. 652817/13
\- - - - -
Thomas H. Jennings, etc.,
Plaintiff-Appellant,

-against-

Saks Incorporated,
Defendants-Respondents.
\- - - - -
Robert Oliver, etc.,
Plaintiff-Appellant,

-against-

Saks Incorporated, et al.,
Defendants-Respondents.
\- - - - -
Joshua Teitelbaum, etc.,
Plaintiff-Appellant,

-against-

Saks Incorporated, et al.,
Defendants-Respondents.
\- - - - -
Jack Oliver, etc., et al.,
Plaintiffs-Appellants,

-against-

Saks Incorporated, et al.,
Defendants-Respondents.
\- - - - -

Sharon Golding, etc.,
Plaintiff-Appellant,

-against-

Saks Incorporated, et al.,
Defendants-Respondents.

\- - - - -

Michelle Sabattini, etc.,
Plaintiff,

-against-

Saks Incorporated, et al.,
Defendants.

____

Brower Piven, New York (David A.P. Brower of counsel), for Samuel T. Cohen, appellant.

Levi & Korsinsky, LLP, New York (Eduard Korsinsky of counsel), for Thomas H. Jennings, appellant.

Brodsky & Smith, LLP, Mineola (Evan J. Smith of counsel), for Robert Oliver, appellant.

Bernstein Liebhard LLP, New York (Joseph R. Seidman, Jr., of counsel), for Joshua Teitelbaum, appellant.

Safirstein Metcalf LLP, New York (Peter Safirstein of counsel), for Jack Oliver and Wanda Oliver, appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Daniel Tepper of counsel), for Sharon Golding, appellant.

Wilkie Farr & Gallagher LLP, New York (Tariq Mundiya of counsel), for Saks Incorporated, Hudson's Bay and Harry Acquisition Inc., respondents.

Wachtell Lipton Rosen & Katz, New York (Peter C. Hein of counsel), for Fabiola Arredondo, Robert B. Carter, Michael S.

Gross, Donald E. Hess, Marguerite W. Kondracke, Jerry W. Levin, Nora McAnniff, Stephen I. Sadove, and Jack L. Stahl, respondents.

____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 3, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for leave to amend the complaint, unanimously modified, on the law and the facts, to grant the motion except as to the allegations that the Saks defendants breached their duty of loyalty, and otherwise affirmed, without costs.

Plaintiffs, shareholders of defendant Saks Incorporated, allege that the board of directors of Saks breached its fiduciary duties in connection with the $2.9 billion acquisition of Saks by defendant Hudson's Bay Company (the merger) insofar as the sale price failed to account for the significant value of Saks's flagship store in Manhattan. Plaintiffs seek leave to amend the complaint to add new allegations against the Saks defendants and an aiding and abetting breach of fiduciary duty claim against Saks's financial advisor during the merger, Goldman Sachs.

The majority of plaintiffs' proposed new allegations and claims are not palpably insufficient or clearly without merit under the law of Tennessee, where Saks was incorporated, and leave to amend is granted as to those allegations and claims (*see*

Hart v General Motors Corp., 129 AD2d 179, 182 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]; *Matter of Allion Healthcare Inc.*, 28 Misc 3d 1228[A], 2010 NY Slip Op 51519[U], *6 [Sup Ct, Suffolk County 2010]; *see also* CPLR 3025[b]). The fact that the documentary record is inconclusive with respect to the truth or falsity of many of these allegations does not mandate dismissal, as plaintiffs are not required to prove their allegations at this stage (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

To the extent plaintiffs allege that the Saks defendants breached the duty of loyalty by virtue of the accelerated vesting of equity and change of control benefits they received in connection with the merger, these allegations are palpably insufficient. The directors' interests were aligned with those of the shareholders to obtain the highest value for their stock, and the change of control benefits stemmed from their employment agreements, which were negotiated years before any merger was contemplated and therefore did not arise by virtue of the Merger (*see Chasen v CNL Hospitality Props., Inc.*, No CT-002739-03 [Tenn Cir Ct Sep. 13, 2006]; *City of Pontiac Gen. Empls.' Retirement Sys. v Thomas Nelson, Inc.*, No. 06-501-I [Tenn Ch May 4, 2007]).

Although the releases in the parties' stipulation of

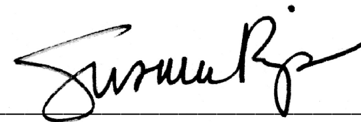
settlement are sufficiently broad to cover the new allegations and claims, they do not pose an independent basis for denying the motion to amend, because, while class action settlements may generally be binding on the named plaintiffs even before judicial approval, the terms of the instant stipulation make clear that the releases do not become effective until after court approval, which has not yet occurred.

While plaintiffs' promise to support the stipulation and cooperate in seeking court approval is not an unenforceable statement of intention to do something in the future, it is nonetheless unenforceable. Plaintiffs and their counsel owe fiduciary duties to absent class members and thus cannot be required to support a settlement that is contrary to the best interests of those class members (*see Wyly v Milberg Weiss Bershad & Schulman, LLP*, 12 NY3d 400, 412 [2009]; *Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488, 497 [2017]; *Blanchard v Edgemark Fin. Corp.*, 175 FRD 293, 298 [ND Ill 1997]).

In light of the foregoing, we need not reach plaintiffs' arguments with respect to rescission, vacatur, or the necessity of a preliminary approval determination.

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

ENTERED: FEBRUARY 14, 2019



CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8422N The Board of Managers of the 184 Thompson Condominium,
Plaintiff-Appellant,

Index 153466/13
154401/13
453015/15

-against-

B. Geller Restoration, Inc.,
Defendant-Respondent.

\- - - - -

[And Other Actions]

____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Camacho Mauro Mulholland, LLP, New York (Yashana McAuley-Parrish of counsel), for respondent.

____

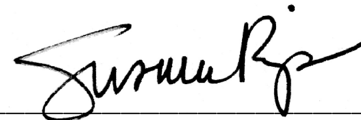
Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 17, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff’s motion to strike the answer for noncompliance with discovery orders, unanimously affirmed, without costs.

The motion court did not abuse its discretion by denying plaintiff’s motion (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). The record establishes that a material item of discovery (i.e., the project file) was omitted from defendant’s initial response to plaintiff’s discovery demand. Defendant’s omission does not

establish that it acted in bad faith or that its conduct was willful or contumacious. Once plaintiff specifically requested the project file, it was produced within a month. Moreover, there is no evidence that plaintiff was prejudiced by defendant's conduct, and defendant complied with all other discovery demands.

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

ENTERED: FEBRUARY 14, 2019



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Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.

8423N Kindred Healthcare, Inc., Index 653225/16
Plaintiff-Respondent,

-against-

SAI Global Compliance, Inc.,
Defendant-Appellant.

____

Barton LLP, New York (Randall L. Rasey of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Seth D. Allen of counsel), for respondent.

____

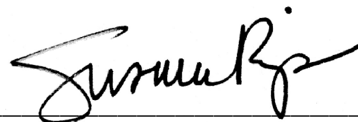
Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered June 21, 2018, which denied defendant SAI Global Compliance, Inc.'s letter motion to compel production by plaintiff Kindred Healthcare, Inc. of a memorandum, based on the common interest doctrine, and granted permission to appeal pursuant to CPLR 5701(c), unanimously affirmed, without costs.

The motion court properly held that a legal memorandum prepared by plaintiff's General Counsel, and addressed to its Chief Executive Officer, which provided a summary and analysis of its pending litigation matters, including the litigation at issue, and subsequently shared with potential merger partners during the due diligence period pursuant to a common interest agreement, was privileged and protected from disclosure.

The common interest privilege is an exception to the traditional rule that the presence of a third-party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. The common interest doctrine is a limited exception to waiver of the attorney-client privilege, and requires that: (1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected. The record, here, demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]).

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

ENTERED: FEBRUARY 14, 2019



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