SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 20, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9488 Hermitage Insurance Company, Index 101241/11
Plaintiff-Appellant,

-against-

Sabina Zaidman, et al.,
Defendants-Respondents,

DCD Marketing, Ltd.,
Defendant.

Law Office of Steven G. Fauth LLC, Tarrytown (Suma Samuel Thomas of counsel), for appellant.

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for Sabina Zaidman, respondent.

Baron Associates P.C., Brooklyn (Bruce Baron of counsel), for Grace Zaidman, respondent.

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 26, 2012, which, in this insurance coverage dispute, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and granted defendant Grace Zaidman's cross motion for summary judgment declaring that plaintiff is obligated to defend

and indemnify defendant Sabina Zaidman in the underlying personal injury action, unanimously modified, on the law, to deny the cross motion and to vacate the declaration, and otherwise affirmed, without costs.

Despite the familial relationship between Sabina, the insured, and Grace, the injured party, the court erred in finding as a matter of law that Sabina's lengthy delay in notifying plaintiff insurer of the underlying accident was excusable (*cf. Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750-751 [1995], *affg* 207 AD2d 816 [2d Dept 1994]). Indeed, an issue of fact exists as to whether Sabina reasonably believed that no claim would be asserted against her, given that she knew that her daughter Grace had "sustain[ed] severe and permanent" injuries, described as "severe head injuries," as a result of Grace's fall on her property, had spent days with Grace in the hospital, and had cared for Grace during the "months" following the accident.

An issue of fact also exists as to whether plaintiff gave the insureds written notice disclaiming coverage, as required by Insurance Law § 3420(d)(2) (*see generally Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127-128 [1st Dept 1999]). The affidavit of plaintiff's claims manager does not suffice as proof of mailing because it is not based on personal knowledge,

and it is devoid of any representation that plaintiff has a standard office procedure for mailing notices such as the disclaimer at issue (*compare Kaufmann v Leatherstocking Coop. Ins. Co.*, 52 AD3d 1010, 1012 [3d Dept 2008]; *Jonathan Woodner Co. v Higgins*, 179 AD2d 444 [1st Dept 1992], *lv denied* 80 NY2d 756 [1992]). Further, although the certified mail receipt for the letter is signed, the insureds deny signing it, and in fact, the signer's one-word name does not appear to be the insureds'.

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

ENTERED: JUNE 20, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9793 The People of the State of New York, Respondent, Ind. 3618N/08 1153/08

-against-

Benny Garay, Defendant-Appellant.

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Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Adam J. Bernstein of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 23, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him to time served, unanimously affirmed.

Defendant's constitutional challenges to his attorney's momentary absence from a brief discussion (characterized by defendant on appeal as a "hearing") about whether to replace an ill juror are unpreserved (*see People v Narayan*, 54 NY2d 106, 112-113 [1981]), and we decline to review them in the interest of justice. Unlike the situation in *People v Strothers* (87 AD3d 413 [1st Dept 2011]), the circumstances accorded counsel ample opportunity to preserve this issue. As an alternative holding,

we reject defendant's claims on the merits. First, there had been an off-the-record discussion of the juror issue that included all counsel including defendant's counsel. Second, when the matter was discussed on the record, the codefendant's counsel, who had spoken with defendant's counsel, conveyed to the court the defendants' joint position in favor of retaining the juror if possible, and the absence of any "conflict" between the defendants on this single issue is manifest. Finally, defendant's counsel arrived in the courtroom before the ill juror was actually replaced by an alternate, and did not request to be heard any further. Based on all of these factors, we find no violation of defendant's rights to counsel or to a fair trial (*see Hunte v Keane*, 1999 WL 754273, *5-*8, 1999 U.S. Dist. LEXIS 146.71, *19-*22 [ED NY Aug. 24, 1999]).

The court properly denied defendant's suppression motion without granting a hearing. Defendant's allegations failed to raise a legal basis for suppression (*see People v Burton*, 6 NY3d 584, 587 [2006]). The detailed information provided by the People apprised defendant that his arrest was based on his complicity in a drug-selling operation over the course of a long-term police investigation, and specifically upon his driving a person who had allegedly conducted a series of drug sales.

Defendant's assertion that at the time of his arrest he had not "engaged in any criminal conduct," and that he was "dropping off a family member" were insufficient to raise any factual dispute requiring a hearing (*see e.g. People v Jones*, 95 NY2d 721, 729 [2001]; *People v Vermont*, 96 AD3d 573 [1st Dept 2012], *lv denied* 19 NY3d 1002 [2012]).

Defendant did not preserve his specific argument concerning the court's ruling on courtroom closure during the testimony of undercover officers (*see People v Alvarez*, 20 NY3d 75, 81 [2012], and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The trial court narrowly tailored the courtroom closure to the portion of the proceedings implicating overriding safety interests, namely, during the testimony of the two undercover officers (*see People v Echevarria*, 89 AD3d 545, 546 [1st Dept 2011], *revd on other grounds* 21 NY3d 1 [2013]). Further, the court made an exception for defendant's family members to attend. It can thus "be implied that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated

interest" (*People v Ramos*, 90 NY2d 490, 504 [1997]). *Presley v Georgia* (558 US __, 130 S Ct 721 [2010]) does not oblige a trial court to engage in an on-the-record review of all alternatives before deciding upon a limited closure.

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

ENTERED: JUNE 20, 2013

CLERK

Andrias, J.P., Saxe, Renwick, Freedman, JJ.

10028-
10029 Rachel Gonzalez,
Plaintiff-Appellant,

-against-

40 West Burnside Avenue LLC, et al.,
Defendants-Respondents,

Associated Supermarket,
Defendant.

Index 305543/09

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

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 11, 2011, as amended by order entered May 16, 2012, which granted defendants-respondents' (collectively, the owners) motion to dismiss the complaint as against them and denied plaintiff's cross motion for leave to depose nonparty James Reilly, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, and the matter remanded for further proceedings in accordance with this decision.

In August 2008, plaintiff Rachel Gonzalez, a 22-year-old, recent high school graduate, broke her clavicle and lost consciousness when she tripped on a sidewalk adjacent to the

building owners' premises in the Bronx. She was taken to a hospital, treated, and released after a few hours. Plaintiff received follow-up medical treatment and, as of December 2008, still felt lingering effects that included shoulder pain and migraine headaches.

In September 2008, plaintiff retained a law firm to represent her for a personal injury action. The firm's engagement letter instructed plaintiff not to speak to anyone about the matter except her doctor or the law firm, and to refer all inquiries to the firm.

In December 2008, however, James Reilly, an agent of the building owners' insurer, General Star Management Co./General Star Indemnity Co. (General Star), came to plaintiff's home. At that time, plaintiff gave Reilly a written, three-page account of the accident, which included her statement that "[a]t the time of this interview I am not represented by an attorney."

In March 2009, Reilly again met with plaintiff and, in exchange for $1,500, she executed a release of all claims against the owners and General Star relating to her accident. Plaintiff did not inform her lawyers about her meetings with Reilly.

In June 2009, plaintiff's attorneys commenced this action in Supreme Court, Bronx County, asserting negligence claims against

the owners, a grocery store on the ground floor of the premises, and another tenant.

In December 2010, the owners moved to dismiss the complaint under CPLR 3211(a)(5) based on the release. Plaintiff opposed the motion and cross-moved for permission to depose Reilly. Plaintiff argued that the release should be set aside because she had been fraudulently induced to sign it. Plaintiff submitted an affidavit stating that, when she spoke with Reilly in December 2008, she told him that she had an attorney, but Reilly told her to provide him with a written statement that she was not represented "because it would help settle [her] case." Plaintiff further averred that when she spoke with Reilly in March 2009, he told her that he had "investigated [her] claim" and had determined that the owners were not liable for her accident because the grocery store was solely responsible for maintaining the sidewalk in front of the premises. According to plaintiff, Reilly told her that the owner was willing to pay her $1,500 for a release, and she accepted the offer in reliance on Reilly's misrepresentations.

Based on the foregoing, plaintiff argued that the release should be set aside as having been procured by fraud. Plaintiff contended that Reilly had fraudulently induced her to sign the

release by misrepresenting that the owners could not be held liable for her injuries when in fact they could be liable under Administrative Code of the City of New York § 7-210.

Plaintiff added that she should be afforded discovery about the events leading to her signing of the release, and accordingly requested leave to depose Reilly.

In its August 2011 order, as amended in May 2012, Supreme Court granted the owners' dismissal motion based on the release and denied plaintiff leave to depose Reilly. The court found that plaintiff could not establish that she had justifiably relied on Reilly's alleged misrepresentations because she was then represented by counsel and had the means to investigate Reilly's claims. The court denied leave to depose Reilly without further explanation.

Under the particular facts of this case, dismissal of the causes of action against the owners at the pleading stage was premature because plaintiff has alleged facts showing that her release may have been fraudulently obtained. To make out the basic elements of a fraudulent inducement claim, a plaintiff must establish that the reliance on the false representation was justified (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Whether the

plaintiff could justifiably rely on the false representation is an issue of fact (*Black v Chittenden*, 69 NY2d 665, 669 [1986]; *Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009]). "The question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (*DDJ Mgt., LLC v Rohne Group L.L.C.*, 15 NY3d 147, 155 [2010]). Moreover, "[w]here fraud . . . in the procurement of a release is alleged, a motion to dismiss should be denied" (*Bloss v Va'ad Harabonim of Riverdale*, 203 AD2d 36, 37 [1st Dept 1994]).

A plaintiff's reliance on a misrepresentation may be justified even if the plaintiff is represented by counsel (*see McKenney v Kapin*, 53 AD2d 603, 603 [2d Dept 1976] [the plaintiff, who was represented by counsel, justifiably relied on misrepresentations that the defendants made when counsel did not constructively participate in the transaction]).

Here, the description of the circumstances that led to the execution of the release, together with plaintiff's explanation of why she agreed to sign the release and accept the minimal settlement that Reilly offered her, merits further investigation.

Accordingly, this action is remanded for a hearing or further proceedings in connection with plaintiff's fraudulent inducement claim and leave to depose nonparty James Reilly is granted.

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

ENTERED: JUNE 20, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Clark, JJ.

10059 In re Meryl Brodsky, et al., Index 118316/06
Petitioners-Appellants,

-against-

New York City Campaign Finance Board,
Respondent-Respondent,

Computer Share,
Garnishee.

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Busson & Sikorski, P.C., New York (Robert S. Sikorski of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered July 16, 2010, which, to the extent appealed from as limited by the briefs, in a turnover proceeding pursuant to CPLR 5225(b), directed the sale of stock held by petitioner judgment debtor Meryl Brodsky, unanimously affirmed, without costs.

The turnover proceedings at issue on this appeal arise from an audit completed by respondent New York City Campaign Finance Board determining that petitioners were required to return $35,415 following the 2005 primary election. Petitioner Meryl Brodsky was a candidate for New York City Council in the

election, and formed an election committee, petitioner "Elect Meryl Brodsky to the City Council 2005" (Committee). That Committee participated in respondent's public financing matching funds program. At the end of the campaign, respondent conducted an audit of the Committee and determined that the Committee needed to return $35,415.

Petitioners filed the underlying article 78 petition challenging respondent's determination as arbitrary and capricious and arguing that the Committee's treasurer, petitioner Feisnot, was not personally liable for any repayments to respondent. In an order entered on or about June 27, 2007, the court denied the petition to set aside respondent's determination and ordered petitioners Brodsky and Committee to repay respondent. The court, however, found petitioner Feisnot was not personally liable for the repayment. Petitioners appealed to this Court and we affirmed (57 AD3d 449 [1st Dept 2008]).

Petitioners Brodsky and Committee then returned $26,010 of the requested funds. However, when petitioners failed to repay the remaining amount, respondent, by an order to show cause, moved pursuant to CPLR 5225(b) for an order directing a garnishee, Computershare, to sell sufficient shares of Exxon-

Mobil owned by Brodsky to pay the remaining $13,290.40.[1] On July 16, 2010, the motion court granted the order, requiring Computershare to sell a sufficient number of Brodsky's shares to satisfy the judgment. On appeal, Brodsky contends that she, as the candidate, is not personally liable for the repayment of campaign funds (*see New York City Campaign Finance Bd. v Ortiz*, 38 AD3d 75, 77 [1st Dept 2006]).

An issue raised for the first time on appeal is unpreserved for review and this Court has the discretion to decline to consider the issue (*Stryker v Stelmak*, 69 AD3d 454, 454 [1st Dept 2010]). As the issue of Brodsky's personal liability is raised for the first time on appeal, it is unpreserved for review (*see Feliz v Fragosa*, 85 AD3d 417, 418 [1st Dept 2011]).

Further, even if properly before this Court, Brodsky would still be barred from asserting this defense. Under the doctrine of law of the case, "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court" *(Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, ___ AD3d ___ , 2013 NY Slip Op 1926 *4 [1st Dept 2013] [internal

[1]This amount includes interests and fees as calculated by defendant.

quotation marks omitted]).

Here, Brodsky contends that the issue of her personal liability was never explicitly decided in the June 27, 2007 order and therefore the doctrine of law of the case does not apply. Brodsky's argument is without merit. In the first appeal, we affirmed the motion court's determination that Brodsky and the Committee had to repay respondent the requested amount. Although Brodsky did not explicitly argue that she could not be held personally responsible, she could have raised this claim in the first appeal and failed to do so. Indeed, in her original article 78 petition Brodsky concedes that both she and the Committee are liable for the return of the campaign funds.

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

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

ENTERED: JUNE 20, 2013

CLERK

Andrias, J.P., Moskowitz, DeGrasse, Feinman, JJ.

10387-
10388 Index 100478/10

Verina Hixon,
Plaintiff-Appellant,

-against-

12-14 East 64th Owners Corp., et al.,
Defendants-Respondents,

John Doe, etc., et al.,
Defendants.

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Richard A. Klass, Brooklyn, for appellant.

Davidoff Hutcher & Citron LLP, New York (Gary I. Lerner of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 21, 2011, which amended the court's prior order entered October 13, 2011 to reflect that the amended complaint was dismissed upon defendants-respondents' motion to dismiss, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 27, 2012, which, upon reargument, adhered to the original determinations, unanimously dismissed, without costs, as academic.

The complaint sets forth two causes of action: breach of a proprietary lease against defendant 12-14 East 64 Owners Corp. (the co-op) and breach of fiduciary duty against the individual

defendants, the co-op's board members. The claims against the co-op that accrued before December 7, 2006 were discharged by operation of a release executed on that date. There is no merit to plaintiff's claim that the release did not apply to her instant causes of action.

In all other respects, the complaint fails to state a cause of action against the co-op. Plaintiff alleges that the co-op breached the proprietary lease by bringing a nonpayment and a holdover proceeding against her. After a joint trial, the Civil Court of the City of New York, Housing Part (Schneider, J.), directed the entry of a money judgment in favor of the co-op on the nonpayment petition and dismissed the holdover petition. The Appellate Term modified to the extent of reducing the money judgment (*12-14 E. 64th Owners Corp. v Hixon*, 38 Misc 3d 135(A) [App Term, 1st Dept 2013]). To the extent discernible, the complaint alleges that after the December 2006 release, the co-op breached the proprietary lease's covenant of quiet enjoyment by bringing the nonpayment and holdover proceedings in bad faith.[1] This claim is facially insufficient because it is not alleged

[1]Paragraph 10 of the proprietary lease provides that "[t]he Lessee . . . shall quietly have, hold and enjoy the apartment without any let, suit, trouble or hindrance from the Lessor . . . ."

that any of the co-op's post-release conduct substantially and materially deprived plaintiff of the beneficial use and enjoyment of her apartment (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]). It does not avail plaintiff to label this cause of action as a breach of the implied covenant of good faith and fair dealing. That "implied obligation is only 'in aid and furtherance of other terms of the agreement of the parties'" (*Trump on the Ocean, LLC v State of New York*, 79 AD3d 1325, 1326 [3rd Dept 2010] [citations omitted], *lv dismissed and denied* 17 NY3d 770 [2011]). Moreover, plaintiff's cause of action against the co-op is barred by the doctrine of collateral estoppel insofar as it is based on the commencement and maintenance of the nonpayment proceeding.

The breach of fiduciary duty cause of action is based on allegations of actions taken by the board members in (1) preventing plaintiff from repairing water damage to her apartment, (2) refusing to make such repairs themselves, (3) denying her an opportunity to defend herself against allegations of objectionable conduct, (4) terminating her shareholder and leasehold interests and (5) wrongfully prosecuting the summary proceedings. These claims are not actionable because they stem solely from the co-op's alleged breaches of the proprietary lease

as opposed to torts committed by the co-op or its board members. A director is not personally liable for a corporation's breach of an agreement merely by virtue of his or her decisions or actions that resulted in the corporation's promise being broken (*Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). Moreover, the complaint does not allege that the co-op or the individual defendants engaged in tortious conduct (*see e.g. Fletcher v Dakota, Inc.*, 99 AD3d 43, 56 [1st Dept 2012], citing *American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171-172 [1st Dept 1996]). We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10405 The People of the State of New York, Ind. 2450/08
Respondent,

-against-

Beneto Gumbs,
Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 6, 2009, as amended October 15, 2009, convicting defendant, after a jury trial, of assault in the first degree and two counts of criminal trespass in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The verdict was based on legally sufficient evidence. The element of serious physical injury was satisfied by evidence supporting the conclusion that the wounds inflicted by defendant caused serious disfigurement to the victim (*see People v McKinnon*, 15 NY3d 311, 315-316 [2010]). Photographs of the victim's wounds, taken about a week after the crime, were received in evidence. The testimony of the victim and his

treating physician, viewed as a whole, support the inference that at the time of trial a year later, the scars remained seriously disfiguring under the *McKinnon* standard. The record also supports the conclusion that defendant was criminally liable for the full extent of the victim's disfigurement (*see e.g. Matter of Anthony M.*, 63 NY2d 270, 280 [1984]; *People v Stewart*, 40 NY2d 692, 697 [1976]; *People v Kane*, 213 NY 260, 270 [1915]).

The court responded meaningfully to the jury's narrowly tailored request for a readback of testimony (*see People v Almodovar*, 62 NY2d 126, 131-132 [1984]). The court reasonably interpreted the note as calling for the doctor's description of the victim's wounds, but not any expert opinions, and after the readback the jury did not make a followup request. In any event, in the circumstances presented, defendant was not "seriously prejudiced" (*People v Lourido*, 70 NY2d 428, 435 [1987]) by the absence of readback as to certain opinions by the doctor that were favorable to defendant on issues such as whether the injuries were life-threatening. These opinions did not relate to the theory of disfigurement and were not exculpatory with regard to that issue.

The court properly adjudicated defendant a second violent felony offender. "To obtain a hearing, a defendant must do more

than make conclusory allegations that his prior conviction was unconstitutionally obtained. He must support his allegations with facts" (*People v Konstantinides*, 14 NY3d 1, 15 [2009]). Defendant only submitted the sentencing minutes for his predicate felony conviction, in which the attorney then representing defendant vaguely criticized the performance of a prior attorney in the predicate case. This fell far short of requiring a hearing (*see id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10406- Index 23348/05
10406A Kazi A. Hossain,
Plaintiff-Appellant,

-against-

Jacob Selechnik, et al.,
Defendants-Respondents.

_____

Harry L. Klein, Brooklyn, for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Steven Lesh of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered April 30, 2012, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendants Jacob Selechnick and 347 LLC, and bringing up for review an order, same court and Justice, entered January 18, 2012, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion for summary judgment dismissing the complaint as against Selechnick and 347 LLC, unanimously affirmed, with costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law. They submitted evidence showing that a time of the essence closing was scheduled for June 30,

2005, that plaintiff and his attorney were notified of the closing, that the Referee was ready, willing and able to close, and that plaintiff failed to appear, resulting in a default and the forfeit of his deposit pursuant to the terms of sale (*see 225 5th, LLC v Volynets*, 96 AD3d 429 [1st Dept 2012]; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378 [1986]).

Plaintiff failed to raise a triable issue of fact. His self-serving statement that he did not know about the closing contradicts his earlier sworn statement admitting awareness of the closing date (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). Further, the adjournment of the closing date beyond the 10-day limit mentioned in the terms of sale does not impact the other terms of the sale, including the "time of the essence" provision (*see Beacon Term. Corp. v Chemprene, Inc.*, 75 AD2d 350, 354 [2d Dept 1980], *lv denied* 51 NY2d 706 [1980]). Nor was there any evidence that plaintiff and Selechnik were partners or had formed a partnership, or that

Selechnik or his attorney otherwise represented plaintiff's interests at the closing.

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: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10407 Wany'a Rivera, an Infant by His Mother and Natural Guardian, Ventesa Hewitt, et al., Plaintiffs-Respondents, Index 15555/05

-against-

Crotona Park East Bristow Elsmere, Defendant-Appellant.

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Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for respondents.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 13, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's 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 dismissing the complaint.

Contrary to plaintiffs' contention, defendant's motion for summary judgment was not untimely, since the case was marked off the calendar by so-ordered stipulation to allow for the completion of discovery and had not yet been restored when defendant's motion was filed (*Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 109 [1st Dept 2006]).

On the merits, defendant made a prima facie showing that the mold condition in plaintiffs' apartment did not cause the infant plaintiff's claimed injuries. It submitted expert evidence establishing that the infant plaintiff's asthma and pulmonary incapacity were caused by genetic and environmental factors not related to the mold condition, including medical records showing the infant plaintiff's significant allergies to cockroaches and cats, the extensive family history of severe asthma, and the presence of cigarette smoke, cockroaches and cats in the apartment.

In opposition, plaintiffs failed to raise a triable issue of fact as to causation (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 449 [2006]). They relied solely on an affirmation by the infant plaintiff's former treating physician, who failed to refute defendant's experts' conclusions that the infant plaintiff's asthma and pulmonary incapacity were caused by genetic and environmental factors other than mold (*see Lall v Ali*, 101 AD3d 439 [1st Dept 2012]). Moreover, the medical records indicate that the treating physician had himself directly attributed the infant plaintiff's symptoms to his exposure to smoke, cockroaches and cats.

Furthermore, the physician expressly stated that plaintiffs' apartment was where the "presumed toxic exposure occurred." The only source of his assumptions as to exposure that is identified in his affirmation is plaintiffs' uncorroborated, anecdotal allegations (*see Cleghorne v City of New York*, 99 AD3d 443, 446-447 [1st Dept 2012]). The physician did not provide any scientific measurement, or employ any accepted method of extrapolating such a measurement, to establish the infant plaintiff's ongoing exposure to a specific toxin or allergen, and plaintiffs submitted no other evidence concerning the level of allergens or toxins present in the apartment (*see id.; Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416 [1st Dept 2008], *appeal dismissed* 12 NY3d 847 [2009]). The physician also did not posit the level of exposure necessary for the causation of the injury (*see Fraser*, 57 AD3d at 420).

The medical records submitted with the physician's affirmation are uncertified and unaffirmed (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435, 435-436 [1st Dept 2011]), and in any event, like the physician's affirmation, they rely on plaintiffs' uncorroborated allegations as to the presence of mold in the apartment (*see Cleghorne*, 99 AD3d at 446-447).

We note that plaintiffs submitted no evidence establishing the presence of toxic mold in the apartment from October 1997 to September 2003 or at any time after December 20, 2005. Nor did they demonstrate that defendant had actual or constructive notice of a potentially harmful mold condition during those time periods (*see Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10409 The People of the State of New York, Ind. 4389/08
Respondent, 3616/09

-against-

Barron Jackson, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Sharon A.M. Aarons, J.), rendered on or about October 5, 2010,

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

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

ENTERED: JUNE 20, 2013

CLERK

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

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10410 Henry Desmangles, etc., Index 653423/11
Plaintiff-Appellant,

-against-

Woodside Management, Inc.,
Defendant-Respondent.

_____

Law Office of Daniel L. Ackman, New York (Daniel L. Ackman of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success (Keith J. Singer of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 17, 2012, which granted defendant's motion to dismiss the first cause of action without prejudice, and the second, third, fourth and fifth causes of action with prejudice, unanimously modified, on the law, to grant the motion as to the first cause of action with prejudice, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is a taxi driver who leased a medallion from defendant. He alleges that defendant overcharged him on his weekly lease, which was subject to an $800 cap (*see* Rules of City of New York Taxi and Limousine Commission (TLC) [35 RCNY] § 58-

21[c][4][ii]). He alleges that defendant imposed, and collected weekly, certain additional charges that are not permitted (*see* 35 RCNY 58-21[c][5]), over and above the $800 medallion lease fee that defendant was already collecting from him.

Plaintiff's fourth and fifth causes of action allege that the overcharges violated the lease cap rule (35 RCNY 58-21[c][4]) and a 5% credit card withholding surcharge rule (35 RCNY 58-21[f][3]). Upon review of the TLC's legislative scheme and detailed self-enforcement provisions, we conclude that plaintiff has no private right of action and therefore cannot assert these causes of action (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-634 [1989]).

Plaintiff's first and second causes of action allege breach of contract; however, it appears that plaintiff couched his claims of TLC violations in terms of breach of contract to circumvent the absence of a private right of action. In any event, it is clear from the allegations in the complaint and the lease that plaintiff's breach of contract (first and second) causes of action are founded not upon defendant's failure to comply with the terms of the lease as written but upon the unenforceability of the lease insofar as it openly violated the TLC's lease cap rule (*see* 35 RCNY 58-21[a][1] ["Regardless of the

terms of the lease, the Owner is responsible for complying with all laws, rules and regulations governing Owners"]; *see Boiadjian v New York City Taxi & Limousine Commn.*, 243 AD2d 355 [1st Dept 1997], *lv denied* 91 NY2d 814 (1998); *Mystic Cab Corp. v New York City Taxi & Limousine Commn.*, 243 AD2d 353 [1st Dept 1997], *lv denied* 91 NY2d 814 [1998]). With respect to the additional charges collected improperly, there was no breach because those charges were outside the lease terms.

The existence of plaintiff's lease, a requirement under TLC rules (*see* 35 RCNY 58-21[h]), precludes his unjust enrichment (third) cause of action (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10411 Diego De La Rosa, et al., Index 653424/11
Plaintiffs-Appellants-Respondents,

-against-

All Taxi Management, Inc.,
Defendant-Respondent-Appellant.

_____

Milberg LLP, New York (Barry A. Weprin of counsel), for appellants-respondents.

Emery Celli Brinckerhoff & Abady LLP, New York (O. Andrew F. Wilson of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 28, 2012, which granted defendant's motion to dismiss as to the second, third, fourth and fifth causes of action, and denied the motion as to the first cause of action, unanimously modified, on the law, to grant the motion as to the first cause of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiffs are taxi drivers who leased medallions from defendant. They allege that defendant overcharged them on their weekly leases, which were subject to an $800 cap (*see* Rules of City of New York Taxi and Limousine Commission (TLC) [35 RCNY] § 58-21[c][4][ii]). They allege that defendants imposed, and collected weekly, certain additional charges that are not

permitted (*see* 35 RCNY 58-21[c][5]), over and above the $800 medallion lease fee that defendants were already collecting from them.

Plaintiffs' fourth and fifth causes of action allege that the overcharges violated the lease cap rule (35 RCNY 58-21[c][4]) and a 5% credit card withholding surcharge rule (35 RCNY 58-21[f][3]). Upon review of the TLC's legislative scheme and detailed self-enforcement provisions, we conclude that plaintiffs have no private right of action and therefore cannot assert these causes of action (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-634 [1989]).

Plaintiffs' first and second causes of action allege breach of contract; however, it appears that plaintiffs couched their claims of TLC violations in terms of breach of contract to circumvent the absence of a private right of action. In any event, it is clear from the allegations in the complaint and the respective leases that plaintiffs' breach of contract (first and second) causes of action are founded not upon defendants' failure to comply with the terms of the leases as written but upon the unenforceability of the leases insofar as they openly violated the TLC's lease cap rule (*see* 35 RCNY 58-21[a][1] ["Regardless of the terms of the lease, the Owner is responsible for complying

with all laws, rules and regulations governing Owners"]; *see Boiadjian v New York City Taxi & Limousine Commn.*, 243 AD2d 355 [1st Dept 1997], *lv denied* 91 NY2d 814 (1998); *Mystic Cab Corp. v New York City Taxi & Limousine Commn.*, 243 AD2d 353 [1st Dept 1997], *lv denied* 91 NY2d 814 [1998]). With respect to the additional charges collected improperly, there was no breach because those charges were outside the lease terms.

The existence of plaintiffs' leases, a requirement under TLC rules (*see* 35 RCNY 58-21[h]), precludes their unjust enrichment (third) cause of action (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

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: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10412 Khaled Pervaiz, etc., Index 450220/12
Plaintiff-Appellant-Respondent,

-against-

Queens Medallion Leasing, Inc.,
Defendant-Respondent-Appellant.

_____

Milberg LLP, New York (Barry A. Weprin of counsel), for appellant-respondent.

Emery Celli Brinckerhoff & Abady LLP, New York (O. Andrew F. Wilson of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 17, 2012, which granted defendant's motion to dismiss as to the second, third, fourth and fifth causes of action and denied the motion as to the first cause of action, unanimously modified, on the law, to grant the motion as to the first cause of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is a taxi driver who leased a medallion from defendant. He alleges that defendant overcharged him on his weekly lease, which was subject to an $800 cap (*see* Rules of City of New York Taxi and Limousine Commission (TLC) [35 RCNY] § 58-21[c][4][ii]). He alleges that defendant imposed, and collected weekly, certain additional charges that are not permitted (*see* 35

RCNY 58-21[c][5]), over and above the $800 medallion lease fee that defendant was already collecting from him.

Plaintiff's fourth and fifth causes of action allege that the overcharges violated the lease cap rule (35 RCNY 58-21[c][4]) and a 5% credit card withholding surcharge rule (35 RCNY 58-21[f][3]). Upon review of the TLC's legislative scheme and detailed self-enforcement provisions, we conclude that plaintiff has no private right of action and therefore cannot assert these causes of action (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-634 [1989]).

Plaintiff's first and second causes of action allege breach of contract; however, it appears that plaintiff couched his claims of TLC violations in terms of breach of contract to circumvent the absence of a private right of action. In any event, it is clear from the allegations in the complaint and the lease that plaintiff's breach of contract (first and second) causes of action are founded not upon defendant's failure to comply with the terms of the lease as written but upon the unenforceability of the lease insofar as it openly violated the TLC's lease cap rule (*see* 35 RCNY 58-21[a][1] ["Regardless of the terms of the lease, the Owner is responsible for complying with all laws, rules and regulations governing Owners"]; *see Boiadjian*

v New York City Taxi & Limousine Commn., 243 AD2d 355 [1st Dept 1997], *lv denied* 91 NY2d 814 (1998); *Mystic Cab Corp. v New York City Taxi & Limousine Commn.*, 243 AD2d 353 [1st Dept 1997], *lv denied* 91 NY2d 814 [1998]). With respect to the additional charges collected improperly, there was no breach because those charges were outside the lease terms.

The existence of plaintiff's lease, a requirement under TLC rules (*see* 35 RCNY 58-21[h]), precludes his unjust enrichment (third) cause of action (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10413 Haroon Rashid, etc., Index 653426/11
Plaintiff-Appellant,

-against-

B. Taxi Management Inc.,
Defendant-Respondent.

_____

Milberg LLP, New York (Barry A. Weprin of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (O. Andrew F. Wilson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 17, 2012, which granted defendant's motion to dismiss the first cause of action without prejudice, and the second, third, fourth and fifth causes of action with prejudice, unanimously modified, on the law, to grant the motion as to the first cause of action with prejudice, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is a taxi driver who leased a medallion from defendant, allegedly pursuant to an oral agreement. He alleges that defendant overcharged him on his weekly lease, which was subject to an $800 cap (*see* Rules of City of New York Taxi and Limousine Commission (TLC) [35 RCNY] § 58-21[c][4][ii]). He

alleges that defendant imposed, and collected weekly, certain additional charges that are not permitted (*see* 35 RCNY 58-21[c][5]), over and above the $800 medallion lease fee that defendant was already collecting from him.

Plaintiff's fourth and fifth causes of action allege that the overcharges violated the lease cap rule (35 RCNY 58-21[c][4]) and a 5% credit card withholding surcharge rule (35 RCNY 58-21[f][3]). Upon review of the TLC's legislative scheme and detailed self-enforcement provisions, we conclude that plaintiff has no private right of action and therefore cannot assert these causes of action (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-634 [1989]).

Plaintiff's first and second causes of action allege that he entered into an oral lease agreement with B. Taxi Management Inc. and that B. Taxi breached the agreement by charging him a vehicle expense fee of $200 weekly in excess of his $800 lease payment. However, it appears that plaintiff couched his claims of TLC violations in terms of breach of contract to circumvent the absence of a private right of action. In any event, the alleged overcharge, which plaintiff paid, was included in the alleged oral lease agreement or was outside the terms of the agreement,

and either way there is no basis for a breach of contract cause of action.

The existence of plaintiff's alleged oral lease agreement precludes his unjust enrichment (third) cause of action (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10415& M2159 The People of the State of New York, Respondent,

Ind. 4559/09

-against-

James Sutera, Defendant-Appellant.

_____

Norman A. Olch, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at dismissal motion; Bruce Allen, J. at jury trial and sentencing), rendered August 11, 2010, convicting defendant of perjury in the first degree, and sentencing him to five years' probation, unanimously affirmed.

The court properly denied defendant's pretrial motion to dismiss the indictment on the ground that the New York Inspector General lacked the authority to conduct the investigation into the Waterfront Commission of New York Harbor, during which defendant made allegedly false sworn statements. The Inspector General was authorized to conduct such an investigation pursuant to Executive Law § 51, which gives the Inspector General jurisdiction over various government entities including "commissions"; the

Waterfront Commission is not a public authority and thus did not fall under that statute's exception to the Inspector General's jurisdiction for "multi-state" "public authorities." The Commission is a bistate commission, not a bistate authority. The terms authority and commission are not interchangeable, and the fact that the Commission is called a commission and not an authority is not merely a matter of nomenclature. A public authority, though created by the State, is "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission" (*Matter of Levy v City Commn. on Human Rights*, 85 NY2d 740, 744 [1995]). In contrast, the Waterfront Commission, created by New York and New Jersey with Congressional consent for the purpose of fighting criminal activity and promoting fair hiring practices on the waterfront, is a relatively conventional "part of the government of each of the states" (*State v Murphy*, 36 NJ 172, 186, 175 A2d 622 [1961]). Since Executive Law § 51 conveyed the necessary jurisdiction, the executive order directing the Inspector General to investigate the Commission was also lawful (*see* Executive Law § 6). Defendant did not preserve his contention that the entire prosecution was barred because he could not be prosecuted under

New York law in the New York legal system for making a false statement regarding the employment practices of the Commission, since it was created by a compact between New York and New Jersey (*see Matter of Malverty v Waterfront Commn. of N.Y. Harbor*, 71 NY2d 977, 979 [1988]), and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits. "The Commission is not a separate level of government somewhere between the federal government and the contracting states," but "is part of the government of each of the states," and is not generally exempt from applicable state law, "except insofar as the states agreed expressly or by fair implication to place it beyond them" (*Murphy*, 36 NJ at 186). Furthermore, this prosecution was not about New York attempting unilaterally to regulate the employment practices of the Commission. Instead, the gravamen of the charge was that, in New York County, defendant made false sworn statements relating to cheating, or offering to help others to cheat, on employment examinations, a matter plainly under the normal jurisdiction of the District Attorney. Similarly, nothing about this prosecution and conviction was inconsistent with the Compact Clause (US Const, art 1, § 10).

To the extent that defendant also challenges the sufficiency of the evidence on the same grounds as contained in his pretrial motion to dismiss, that challenge is without merit for the reasons already stated. Defendant's remaining legal sufficiency claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence satisfied the perjury corroboration requirement of Penal Law § 210.50. The testimony of the main witness, Taveras, was corroborated by a second witness, Brando, even though Taveras's testimony was essentially direct evidence of the falsity of defendant's sworn statements while Brando's testimony was more in the nature of circumstantial evidence. Moreover, there was additional corroborating evidence in the form of recorded conversations and evidence of defendant's consciousness of guilt. Defendant's remaining arguments concerning the sufficiency and weight of the evidence are without merit.

The court provided a meaningful and correct response to a note from the deliberating jury (*see People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). The court

properly instructed the jury that it could convict defendant if it found beyond a reasonable doubt that any of the four statements alleged under the count of which he was ultimately convicted met the definition of perjury. This did not change the theory set forth in the indictment, or the People's bill of particulars, alleging that each of the four statements was false (*see People v Charles*, 61 NY2d 321, 327-328 [1984]; *People v Frascone*, 271 AD2d 333 [1st Dept 2000]). "Use of the conjunctive 'and' in the indictment did not obligate the People to prove more than what was required under the statutes" (*People v Molloy*, 58 AD3d 404, 404 [1st Dept 2009], *lv denied* 12 NY3d 856 [2009]). The People were entitled to argue to the jury that each statement was false, thereby implicitly arguing that *at least one* was false, and by doing so they did not assume the burden of proving that *all* were false. Furthermore, the court's supplemental instruction did not contradict anything in its original charge. We have considered and rejected defendant's remaining arguments concerning the court's response.

Defendant's challenges to two evidentiary rulings by the trial court are unavailing. In each instance, defendant opened the door to the testimony at issue.

M-2159 ***People v Sutera***

Motion to strike brief denied.

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10416 PRG Brokerage Inc., Index 111578/04
Plaintiff-Respondent-Appellant,

-against-

Aramarine Brokerage, Inc.,
Defendant-Appellant-Respondent.

_____

Lewis Brisbois Bisgard & Smith LLP, New York (Peter T. Shapiro of counsel), for appellant-respondent.

Carney & McKay, Garden City (Robert B. McKay of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 2, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on its claims for breach of contract and unjust enrichment; denied defendant's motion for summary judgment on its constructive trust counterclaim, granted plaintiff's cross motion for summary judgment dismissing that counterclaim, and denied the cross motion for summary judgment dismissing defendant's counterclaim for an accounting; and granted plaintiff's cross motion to strike from the record a mediation memorandum, unanimously affirmed, with costs.

The court properly rejected plaintiff's breach of contract and unjust enrichment claims. As found by the motion court, plaintiff failed to demonstrate that the contract between the parties entitled it to any portion of the commissions paid to defendant by nonparty Highlands. In fact, the record supports the opposite conclusion; that is, that plaintiff was well aware that the money paid by Highlands constituted only defendant's portion of collected commissions. The unjust enrichment claim was also properly dismissed because where, as here, "the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" and "[o]nly where the contract does not cover the dispute in issue may a plaintiff proceed upon a quasi-contract theory of unjust enrichment" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012] [internal quotation marks and citations omitted]).

Defendant's constructive trust claim was also properly dismissed, since defendant failed to establish that plaintiff had no right to collect the fees at issue, or, more importantly, that defendant had a right to share in the allegedly inappropriately charged fees (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978],

Sharp v Kosmalski, 40 NY2d 119 [1976]). However, defendant's claim for an accounting of second-year premiums is viable and may proceed.

Consideration by the court of plaintiff's cross motion "was not erroneous, even though it was served after the 120-day cutoff [because such] motion was largely based on the same arguments raised in [defendant's] timely motion, and the same findings" could be used to find or reject judgment in favor of both parties (*see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304-305 [1st Dept 2006] [internal citations omitted]).

Finally, the court properly excluded the mediation memorandum, which was created by plaintiff in a prior litigation for purposes of settlement discussions. The central question for the court was why defendant sought to admit the mediation statement. If it was being offered because it contained a factual admission by plaintiff, that use would be allowed, whether or not "the statement [wa]s contained in a settlement document" (*Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165, 165 [1st Dept 1986], *lv dismissed* 68 NY2d 807 [1986] [allowing the use of a settlement document for purposes of defendant's admission that it had been properly served]). If, however, the mediation statement was "prepared [solely for purposes of]

settlement discussions" and thus was not being offered for its factual content, admission would have been improper (*D.B. Zwirn Special Opportunities Fund, L.P. v Brin Inv. Corp.*, 96 AD3d 447, 448 [1st Dept 2012] [excluding spreadsheet prepared for settlement discussions], citing CPLR 4547).

Here, the court properly found that defendant did not seek to introduce the mediation statement because it admitted some fact, like the proper service admission in *Central Petroleum* (121 AD2d 165). Rather, defendant sought to utilize numbers and calculations "prepared [solely for purposes of] settlement discussions," like the spreadsheet in *D.B.Zwirn* (96 AD3d at 448).

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: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10418 The People of the State of New York, Ind. 39616/09
Respondent, 2933/09

-against-

Dominick Nelson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Emily L. Auletta of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about September 1, 2010,

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

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

ENTERED: JUNE 20, 2013

CLERK

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

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10419 Blue Danube Property LLC, Index 118124/09
Plaintiff-Respondent, 590066/10

-against-

Mad52 LLC,
Defendant-Appellant.
- - - - -
Mad52 LLC,
Third-Party Plaintiff-Appellant,

-against-

Liza Levine,
Third-Party Defendant,

Brown, Harris, Stevens on Site Marketing and Sales LLC,
Third-Party Defendant-Respondent.

_____

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Eric J. Mandell of counsel), for appellant.

Beckmann & Associates LLC, New York (Bruce H. Beckmann of counsel), for Blue Danube Property LLC, respondent.

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for Brown, Harris, Stevens on Site Marketing and Sales LLC, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 19, 2012, which, to the extent appealed from, granted plaintiff's motion for summary judgment cancelling a mortgage, granted third-party defendant Brown, Harris, Stevens on Site Marketing and Sales LLC's (BHS) motion to dismiss the third-

party complaint as against it, and denied defendant/third party plaintiff Mad52 LLC's cross motion for summary judgment dismissing BHS's affirmative defense and on its claim against BHS, unanimously modified, on the law, to deny BHS's motion, and otherwise affirmed, without costs.

Third-party defendant Levine conceded that she notarized the signature of plaintiff's principal, Ralph Preyer, on the collateral mortgage in his absence and with no indication from him that the signature was his. Thus, the mortgage was not a duly acknowledged instrument, and, contrary to Mad52's contention, plaintiff was required to prove forgery only by a preponderance of the evidence, not by clear and convincing evidence (*see Bryant v Bryant*, 58 AD3d 496 [1st Dept 2009], *affg* 18 Misc 3d 1105[A], *3 [Sur Ct, Bronx County 2007], citing *Albany County Sav. Bank v McCarty*, 149 NY 71 [1896]). In any event, plaintiff's documentary evidence, which includes Preyer's passport and records from the Department of Homeland Security and U.S. Customs, established conclusively that Preyer was not in the United States when the collateral mortgage was signed. In opposition, Mad52 offered nothing more than speculation.

As to Mad52's claim against BHS for Levine's notarial misconduct, on a theory of respondeat superior, Levine was

employed by BHS and seconded to a client of BHS. While she did not perform notarization in her work for BHS, the client encouraged her to become a notary and paid for her notary classes. Moreover, BHS knew that she had become a notary, and on one occasion one of its executives had advised Levine, at her request, about whether to notarize a particular document. Thus, summary judgment on this claim is precluded by issues of fact such as the foreseeability of an executive assistant to the sponsor of a condominium project being called upon to notarize documents and the scope of BHS's supervisory control as to Levine's notarizations (*see Riviello v Waldron*, 47 NY2d 297, 303 [1979]).

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10420 In re Alford Isaiah B., III,
and Another,

Dependent Children Under the
Age of Eighteen, etc.,

Alford B., Jr.
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Mayer Brown LLP, New York (Lisa H. Miller of counsel), for appellant.

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

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

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 3, 2012, which, to the extent appealed from, determined, following a fact-finding hearing, that respondent father permanently neglected the subject children, unanimously affirmed, without costs.

Respondent's argument that the Family Court erred in admitting the records of the agency that was initially assigned to the case is not preserved for appellate review, and we decline to review it in the interest of justice. As an alternative

holding, we reject it on the merits. A proper foundation was laid for their admission and respondent, who received a copy of the records in advance of the hearing, failed to challenge any specific entry.

The agency demonstrated by clear and convincing evidence that it repeatedly tried to contact respondent in writing and by telephone and made referrals in order to assist him in completing the service plan, but he failed to respond, failed to consistently visit the children, and did not complete a drug treatment program or other programs to which he was referred *(see In re Sheila G,* 61 NY2d 368, 385 [1984]).

The court was permitted to draw a negative inference from respondent's failure to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

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

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10423N Indemnity Insurance Corporation, Risk Retention Group,
Plaintiff-Appellant,

-against-

A 1 Entertainment LLC,
Defendant-Respondent.

Index 101611/11

Ropers, Majeski, Kohn & Bentley, New York (Andrew L. Margulis of counsel), for appellant.

Order, Supreme Court, New York County (George J. Silver, J.), entered June 22, 2012, which denied plaintiff's motion pursuant to CPLR 3215 for a default judgment rescinding the Liquor Liability Coverage Part of the policy plaintiff issued to defendant and declaring that no coverage is available under the policy for two underlying actions, unanimously reversed, on the law, without costs, and the motion granted, and it is so declared. The Clerk is directed to enter judgment accordingly.

In support of its motion, plaintiff insurer submitted the affidavit of its vice president of claims, who stated that plaintiff issued its policy to defendant in reliance on the representations made in the application submitted by defendant, that the application contained material misrepresentations (i.e., that defendant's nightclub was not open to patrons after 4 a.m.),

and that its actions in allowing the premises to be open after 4 a.m. led to claims that defendant submitted for coverage under the policy. The affidavit was sworn to before a notary in Maryland, but lacked the authenticating certificate required by CPLR 2309(c). However, "courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary" (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]; *see also Hall v Elrac, Inc.*, 79 AD3d 427 [1st Dept 2010]). Moreover, it is undisputed that following the denial of its motion, plaintiff submitted to the motion court a certification from the Maryland Secretary of State verifying and authenticating the qualification of the Maryland notary public who notarized the affidavit.

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10424 The People of the State of New York, Ind. 2545/08
Respondent,

-against-

James Kinney,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Patricia Nunez, J.), entered May 24, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court and Justice, rendered April 27, 2009, convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court properly denied defendant's CPL 440.10(1)(h) motion to vacate the judgment, made on the ground that it was obtained in violation of his right to disclosure of exculpatory evidence under *Brady v Maryland* (373 US 83 [1963]). More than a year after defendant's guilty plea, it was learned that a police chemist, who retested the drugs in this case after the original

testing chemist had retired, had committed misconduct in unrelated cases. There was no *Brady* violation, because at the time of defendant's conviction, the People had neither actual nor imputed possession of, or access to, information about misconduct by this particular chemist (*see People v Santorelli*, 95 NY2d 412, 421 [2000]; *People v Ortega*, 40 AD3d 394, 395 [1st Dept 2007], *lv denied* 9 NY3d 992 [2007]; *see also People v Vasquez*, 214 AD2d 93, 99-102 [1st Dept 1995], *lv denied* 88 NY2d 943 [1996]). In any event, the alleged nondisclosure could not have materially affected defendant's decision to plead guilty (*see People v Martin*, 240 AD2d 5, 8-9 [1st Dept 1998], *lv denied* 92 NY2d 856 [1998]). Timely discovery and disclosure of the retesting chemist's misconduct would have provided defendant with little or no reason to reject a favorable plea offer and go to trial. The People would have called the retired chemist to testify, or had

the drugs retested by a third chemist, or both, and the tainted chemist's involvement would have created minor issues, at most, about the identity of the drugs.

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

ENTERED: JUNE 20, 2013

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Clark, JJ.

10425 In re Michael O'Dette, Index 103174/12
Petitioner,

-against-

New York State Unified Court System,
Respondent.

_____

O'Rourke & Degen, PLLC, New York (Ronald D. Degen of counsel), for petitioner.

John W. McConnell, Office of Court Administration, New York (Shawn Kerby of counsel), for respondent.

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Determination of respondent Deputy Chief Administrative Judge for the New York City Courts, dated March 6, 2012, which confirmed the report and recommendation of a Judicial Hearing Officer ("JHO") finding petitioner, a Senior Court Officer, guilty of misconduct and terminating his employment, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis, J.], entered July 9, 2012), dismissed without costs.

Substantial evidence supports respondent's determination that petitioner engaged in the misconduct alleged (*Matter of Nelk v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2011]). Petitioner's argument that his conduct was

involuntary because it was the result of illnesses, Tourette's Syndrome and obsessive-compulsive disorder, from which he suffers, and therefore does not constitute misconduct is unavailing. The JHO found that petitioner's conduct was only partially attributable to these disorders. To the extent that his conduct was attributable to his illness, the law does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace (*Hazen v Hill Betts & Nash, LLP*, 92 AD3d 162, 170-171 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

Petitioner's claim that, even if the determination is supported by substantial evidence, he is entitled to back pay under the governing agreement, was not presented to or resolved by the agency. Accordingly, petitioner's failure to exhaust his administrative remedies precludes this Court's review of this claim (*see Clark v New York City Tr. Auth.*, 46 AD3d 360 [1st Dept2007], *lv denied* 10 NY3d 706 [2008], *cert. denied* 555 US 1012 [2008]).

Under the circumstances, the penalty of termination is not "so disproportionate as to be shocking to one's sense of fairness" (*Pell v Board of Education*, 34 NY2d 222, 233 [1974]).

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10426 Bernarda Perez, et al., Index 105293/09
Plaintiffs-Respondents,

-against-

Keith Edwards, M.D.,
Defendant-Appellant,

Mount Vernon Hospital,
Defendant.

_____

Westermann, Sheehy, Keenan, Samaan & Aydelott, LLP, White Plains (Timothy M. Smith of counsel), for appellant.

Howard M. File, P.C., Staten Island (Martin Rubenstein of counsel), for respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 27, 2012, which, to the extent appealed from, denied the motion of defendant Keith Edwards, M.D. for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as to defendant Keith Edwards, M.D. The Clerk is directed to enter judgment accordingly. Appeal by defendant Mount Vernon Hospital from above order, unanimously dismissed, without costs, as abandoned.

In this medical malpractice action, plaintiffs claim that defendant Edwards failed to diagnose diabetes during an office

visit made by plaintiffs' decedent on April 17, 2007, which subsequently led to a hyperosmolar condition and eventually, his death, six days later. They also allege that defendant is liable for improper care provided to decedent during his admission to the hospital between April 19 and April 23, 2007.

With respect to the failure to diagnose allegation, defendant met his initial burden through the affirmed report of his expert who noted that decedent had no prior history of diabetes or elevated glucose during the previous year and a half he had been treated by defendant, and opined that defendant acted appropriately and "within the standard of care" in performing a focused clinical examination when decedent presented with complaints of a sore throat (*see Alvarado v Miles*, 32 AD3d 255 [1st Dept 2006], *affd* 9 NY3d 902 [2007]). In opposition, plaintiffs' expert's opinion that defendant deviated from the standard of care depended on his statement that decedent presented with a history of symptoms, including polyuria and polydipsia. However, the record contains no evidence that such history was presented to defendant, but rather to Mount Vernon Hospital two days later. To the extent plaintiffs' expert's opinion relied on facts and evidence not in the record (*see Roques v Noble*, 73 AD3d 204 [1st Dept 2010]), plaintiffs' theory

was without "expert or record support" (*see Sassen v Lazar*, 105 AD3d 410 [1st Dept 2013]).

As for plaintiffs' allegations that defendant was responsible for alleged improper treatment of decedent during his hospital stay, "'[a]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient'" (*see Burtman v Brown*, 97 AD3d 156, 161 [1st Dept 2012]; *Hamilton v Good Samaritan Hosp. of Suffern, N.Y.*, 73 AD3d 697 [2nd Dept 2010]). Defendant owed decedent no duty to treat or manage his hyperosmolar state once he was admitted to the hospital (*see Burtman* at 161-162). Moreover, defendant was entitled to rely on the treatment rendered to decedent in the hospital by specialists better equipped to handle decedent's condition (*see Hamilton*, 73 AD3d 697; *Yasin v Manhattan Eye, Ear & Throat Hosp.*, 254 AD2d 281 [2nd Dept 1998]).

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10427 In re Nia J., and Others,

Children Under the Age of
Eighteen Years, etc.,

Janet Jordan P., etc.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 29, 2012, which, following a hearing, determined that respondent mother had neglected the children Leeana P. and Shamiah P., and derivatively neglected the child Nia J., unanimously affirmed, without costs.

The record demonstrates by a preponderance of the evidence that on January 12, 2012, respondent neglected Leeana and Shamiah by engaging in an altercation with a man in front of the children while she held two knives. Contrary to respondent's contentions Shamiah's out-of-court statement that respondent was holding two

knives while she argued with a man was sufficiently corroborated by the security guard's testimony that he saw respondent holding a knife when he arrived at respondent's apartment (*see Matter of Aliyah B.* [*Denise J.*], 87 AD3d 943, 943 [1st Dept 2011]). The security guard's observations that the children were sitting on the bed and "appeared to be crying," and that one child "was shaking from the situation," is sufficient to demonstrate by a preponderance of the evidence that their emotional well-being had been impaired by the altercation they had just witnessed (*see Matter of Jessica R.*, 230 AD2d 108, 111-112 [1st Dept 1997]).

In addition, a preponderance of the evidence demonstrates that on January 19, 2012, respondent neglected Leeana and Shamiah by failing to promptly pick them up from a caseworker, who had agreed to watch them while respondent traveled back from the agency. Indeed, the record demonstrates that respondent failed to contact the caseworker for approximately three hours to determine whether the caseworker could continue caring for them or that their needs were being met, which caused the caseworker to have to contact ACS so that an emergency removal of the children from the shelter could be performed to ensure their safety (*see Matter of Joyce A-M. [Yvette A.],* 68 AD3d 417, 418 [1st Dept 2009]).

Lastly, a preponderance of the evidence supports the Family Court's determination that respondent had derivatively neglected Nia, even though the child did not live with respondent when the neglect occurred, because respondent suffers from such an impaired level of parental judgment as to create a substantial risk of harm for any child in her custody (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10428 In re 124 West 23rd Street, LLC, Index 103036/12
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development, ("HPD"), et al.,
Respondents-Respondents.

_____

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered December 7, 2012, denying the petition seeking to annul respondents' determination to reject petitioner's application for certain tax benefits pursuant to RPTL 421-a, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the petition granted to the extent of annulling respondents' determination and directing respondents to grant petitioner's application.

Respondents' denial of petitioner's application for certain tax benefits under RPTL 421-a, on the ground that construction on petitioner's project was commenced after June 30, 2009, must be annulled because it was affected by an error of law (CPLR

7803[3]). Construction of the subject property was clearly "commenced" on or before June 30, 2009, entitling petitioner to a partial exemption from a cap on tax benefits pursuant to RPTL 421-a(12). RPTL 421-a(2)(g) provides that construction "shall be deemed 'commenced' when excavation or alteration has begun in good faith on the basis of approved construction plans." Petitioner satisfied the definition of "commenced" by lawfully beginning to excavate on the subject property on June 30, 2009 based on a foundation permit that DOB issued on June 25 on the basis of its approval of petitioner's foundation plans. On June 25, DOB also approved petitioner's architectural and structural plans in support of another permit application. Accordingly, there was no rational basis for respondents to determine that petitioner's excavation on June 30, 2009 did not satisfy the requirement that construction be commenced on or before June 30, 2009.

In denying petitioner's application, respondents relied on local laws providing that construction shall be deemed to have "commenced" after or upon DOB's issuance of permits based upon architectural and structural plans approved by DOB (*see* Administrative Code of City of NY § 11-245[d]; 28 RCNY 6-09[a]). According to respondents, petitioner commenced construction after

June 30, 2009 within the meaning of those provisions because DOB issued a permit based on approved architectural and structural plans on July 6, 2009. However, the provisions upon which respondents rely improperly "alter the effect" of RPTL 421-a(12) (RPTL 421-a[2][i]) by narrowing the definition of "commenced" as it exists in the RPTL. Accordingly, the definition of "commenced" in the RPTL controls.

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10430- Index 116261/09
10431-
10432 333 Fifth Avenue Associates, LLC, et al.,
Plaintiffs-Appellants,

-against-

Utica First Insurance Company, et al.,
Defendants-Respondents,

SPN, Inc., et al.,
Defendants.

_____

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel), for appellants.

Farber Brocks & Zane, LLP, Garden City (Sherri N. Pavloff of counsel), for Utica First Insurance Company, respondent.

Mound Cotton Wollan & Greengrass, New York (Tania A. Gondiosa of counsel), for Tower Insurance Company of New York, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 16, 2012, which, inter alia, granted the insurer defendants' motion and cross motion for summary judgment and declared that Tower Insurance was not required to defend and indemnify plaintiffs in an underlying personal injury action, unanimously modified, on the law, to declare that Utica Insurance was also not required to defend and indemnify plaintiffs, and otherwise affirmed, without costs.

Judgment, same court and Justice, entered June 11, 2012, awarding the insurers the principal sum of $200,000 each in recoupment of amounts they had contributed toward the settlement of the personal injury action, unanimously affirmed, without costs.

The plaintiff in the underlying personal injury action alleges that he was injured while working for SPN, a pizzeria located in plaintiffs' premises, when he borrowed the elevator key from neighboring tenant Perfume Valley and fell down the shaft upon attempting to enter the elevator cab that was not there. Both tenants had elevator keys and both, albeit to different degrees, used the basement area where plaintiff was injured.

The landlord/plaintiffs in this declaratory judgment action were not an additional insured under its tenants' policies. Although the leases required that such coverage be procured, there was none under tenant Perfume Valley's Tower Insurance policy because the alleged injury did not arise from that insured's operations (*see Admiral Ins. Co. v American Empire Surplus Lines Ins. Co.*, 96 AD3d 585, 587-590 [1st Dept 2012]). The timeliness of Tower's disclaimer is irrelevant, because there was no duty to disclaim in the absence of coverage (*see Zappone v Home Ins. Co.*, 55 NY2d 131, 134 [1982]). Nor was the landlord an

additional insured under SPN's Utica Insurance policy, which did not contain an additional insured endorsement; the lease obligation to obtain such coverage and an exception to a coverage exclusion did not create additional insured coverage.

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

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10434-
10434A Peter R. Friedman, Ltd., Index 602784/09
Plaintiff-Appellant-Respondent,

-against-

Tishman Speyer Hudson Limited Partnership, et al.,
Defendants-Respondents-Appellants.

_____

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant-respondent.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 22, 2012, which, insofar as appealed from and as limited by the briefs, granted defendants' motion for summary judgment to the extent of dismissing the second cause of action for breach of the implied covenant of good faith and fair dealing, and denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, with costs.

This is an action to recover a commission on a lease renewal pursuant to the original brokerage agreement entered into by the parties, which provided that plaintiff would not be entitled to additional compensation with respect to any lease renewals or extensions unless, *inter alia*, the tenant renewed the lease

"pursuant to, or generally consonant with, the provisions of Article 42 of the Lease." The motion court properly dismissed plaintiff's claim for breach of the implied covenant of fair dealing. Defendants were not required to preserve plaintiff's entitlement to a renewal commission, which right was expressly limited by the brokerage agreement, and "the covenant of good faith and fair dealing . . . cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003] [citations omitted]).

Further, plaintiff failed to show that defendants acted "in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Communications, Inc.*, 222 AD2d 17, 22-23 [1st Dept 1996]). Unlike in *Rachmani v 9 E. 96th St. Apt. Corp.* (211 AD2d 262, 270 [1st Dept 1995]), defendants here did not "implicitly promise[] to use [their] good-faith best efforts to bring about" a generally consonant renewal lease. To the contrary, the renewal provision clearly anticipated that renewal may be had on terms that are not "generally consonant."

The court did not improvidently exercise its discretion in denying plaintiff's motion for leave to amend the complaint. Plaintiff failed to make a showing that the proposed claim for tortious interference with contract against the tenant and its real estate broker was colorable (*see Weksler v Kane Kessler, PC*, 63 AD3d 529 [1st Dept 2009]; *Davis & Davis v Morson*, 286 AD2d 584 [1st Dept 2001]). The tenant and its broker did not become aware of the brokerage agreement until after the essential terms of the renewal lease were negotiated and agreed upon. Moreover, the tenant and its broker were justified in acting in furtherance of their own economic self-interest (*see Waterfront NY Realty Corp. v Weber*, 281 AD2d 180 [1st Dept 2001]; *Aegis Prop. Servs. Corp. v Hotel Empire Corp.*, 106 AD2d 66 [1st Dept 1985]). Additionally, plaintiff failed to establish any basis for its claim that it is

entitled to attorney's fees (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10435 Waterscape Resort LLC, Index 652123/10
Plaintiff-Appellant,

-against-

Eric McGovern, et al.,
Defendants-Respondents.

_____

Holland & Knight LLP, New York (Frederick R. Rohn of counsel), for appellant.

John E, Osborn P.C., New York (Daniel H. Crow of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered April 26, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff project owner alleges that defendants fraudulently misrepresented that their construction management company (PMG) had obtained full subguard insurance coverage to protect plaintiff against default by the largest subcontractor on the project, which was responsible for constructing the project's superstructure. According to plaintiff, it reasonably relied on defendants' alleged misrepresentation and incurred damages when the subcontractor later defaulted and there was no subguard insurance for this default.

There is no dispute that the named insured on the subguard policy is PMG, and that plaintiff is not an insured under the policy. Accordingly, based on the policy's plain language (*see Citizens Ins. Co. of Am. v Illinois Union Ins. Co.*, 105 AD3d 679 [1st Dept 2013]), plaintiff cannot claim damages under the policy, as it is not an insured.

Although plaintiff maintains that it incurred substantial damages due to PMG's failure to procure insurance on behalf of the defaulting subcontractor, plaintiff's fraud claim fails, because "merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Plaintiff's "subjective claims of reliance on defendants' expertise" do not give rise to a "confidential relationship" whose "requisite high degree of dominance and reliance" existed prior to the alleged fraud (*Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl.*, 251 AD2d 137, 138 [1st Dept 1998], *lv denied* 95 NY2d 762 [2000]). Defendants had no advisory capacity as to plaintiff, and a special relationship of trust and confidence does not arise merely from an arm's-length business transaction (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

In any event, to maintain a claim for fraud, plaintiff must show that its reliance on an alleged misrepresentation was justifiable or reasonable (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]). Here, plaintiff neither inquired of the subcontractor nor of the subguard provider if the subcontractor was covered, despite the fact that the agreement between plaintiff and PMG specifically contemplated the possibility of a trade contractor not being qualified for subguard coverage.

Moreover, "[a]n actionable fraud claim requires proof that defendant made a misrepresentation of fact which was false and known to be false" (*New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [1st Dept 2000]). According to plaintiff, defendants represented to it that PMG had obtained subguard insurance against default by the subject subcontractor hired by PMG for the project. However, defendants' affidavit states that the trade contract with the subcontractor had not yet been finalized or executed at the time the requisition for subguard premiums was submitted to plaintiff, and that after the requisition was paid, PMG determined that plaintiff should not be charged subguard insurance premiums for that subcontractor

because the subcontractor turned out to be unqualified for such coverage. Plaintiff fails to address these contentions.

A defendant's knowledge of an allegedly false representation is another element of a fraud claim that must be established (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]), and plaintiff's affidavit stating that "it is inconceivable that [defendants] were unaware that PMG had not obtained Subguard Insurance for [the subcontractor's] work" was insufficient to establish scienter in this case.

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10436 Aura Siri Santos, et al., Index 300483/10
Plaintiffs-Appellants,

-against-

Pedro A. Perez, et al.,
Defendants,

Gerardo Pena-Taveraz, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellants.

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

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 10, 2012, which granted defendants Gerardo Pena-Taveraz and American United Transportation II, Inc.'s motion for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion with respect to plaintiff Aura Siri Santos's claim of serious injury to her lumbar spine, and otherwise affirmed, without costs.

Plaintiffs Aura Siri Santos (Aura) and her sister Maria Siri Santos (Maria) allegedly suffered serious injuries to their cervical and lumbar spines as the result of a motor vehicle

accident that occurred in August 2008, while they were passengers in a taxi.

Defendants met their prima facie burden of showing that Aura did not sustain a serious injury to her cervical spine or lumbar spine by submitting the affirmed reports of a radiologist who found that the MRIs revealed injuries that were degenerative in nature, consistent with her age and increased body habitus (*see Lugo v Adom Rental Transp., Inc.*, 102 AD3d 444, 445 [1st Dept 2013]; *Torres v Triboro Servs., Inc.*, 83 AD3d 563, 564 [1st Dept 2011]), and a neurologist's finding of a full range of motion in every plane of both body parts, and diagnosing any injuries as resolved (*see Gibbs v Reid*, 94 AD3d 636 [1st Dept 2012]; *Steinbergin v Ali*, 99 AD3d 609 [1st Dept 2012]). Defendants also met their initial burden with respect to Maria by proffering affirmations of a radiologist who found that the MRI of the lumbar spine revealed no abnormalities and the MRI of the cervical spine revealed only age-related disc bulges, and of a neurologist who found a full range of motion in all planes (*see Njie v Thompson*, 99 AD3d 421, 422 [1st Dept 2012]; *Paulino v Rodriguez*, 91 AD3d 559 [1st Dept 2012]; *Serbia v Mudge*, 95 AD3d 786 [1st Dept 2012]).

In opposition, Aura submitted sufficient medical evidence to raise an issue of fact as to her alleged lumbar spine injury by submitting the affirmed report of a radiologist who opined that the MRI showed a focal disc herniation, and the affirmation of her treating physician who opined, based upon his multiple examinations, review of her medical records, and the fact that she was asymptomatic until the accident, that the lumbar herniation was caused by the accident (*see Osborne v Diaz*, 104 AD3d 486, 487 [1st Dept 2013]; *Bonilla v Abdullah*, 90 AD3d 466, 467 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]). The treating physician also measured range of motion limitations in Aura's lumbar spine shortly after the accident, three months later, and recently, and provided a sufficient explanation of the gap in treatment to raise an issue of fact (*see Mercado-Arif v Garcia*, 74 AD3d 446 [1st Dept 2010]). However, Aura did not present evidence of permanent or significant limitations in her cervical spine sufficient to meet the threshold injury requirement (*see Moore v Almanzar*, 103 AD3d 415, 416 [1st Dept 2013]).

Maria failed to raise an issue of fact as to either of her claimed injuries. Her treating physician found that she had normal ranges of motion in her cervical spine at a November 2008

examination and insignificant range of motion limitations at a November 2010 examination (*see id.* at 416; *Phillips v Tolnep Limo Inc.*, 99 AD3d 534 [1st Dept 2012]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]). In addition, Maria's failure to explain the inconsistencies between her treating physician's finding of near full range of motion in the lumbar spine within three months after the accident, and his present findings of deficits, entitles defendant to summary judgment (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

Finally, we note that Supreme Court properly dismissed plaintiffs' 90/180-day claims, which, in any event, plaintiffs have abandoned on this appeal (*see Matter of Roberts v Gavin*, 96 AD3d 669, 670 [1st Dept 2012]; *McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10437 Marilyn Frank, Index 108894/09
Plaintiff-Appellant,

-against-

Animal Haven, Inc.,
Defendant-Respondent,

172 East 4th Street Tenants Corp., et al.,
Defendants.

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Law Offices of Gerald P. Gross, Cedarhurst (Elliot B. Pasik of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Marissa E. Troiano of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered February 28, 2012, which, in this action for personal injuries sustained by plaintiff when she was bitten by a dog, granted the motion of defendant Animal Haven, Inc. (Animal Haven) to dismiss the complaint as against it, unanimously affirmed, without costs.

When defendant Skimbirauskas adopted the subject dog from Animal Haven, the parties signed a contract whereby Skimbirauskas agreed to assume a "lifetime commitment" for the responsible care of the dog. Although Animal Haven reserved the right to have the dog returned if Skimbirauskas breached the contract's provisions, the purpose of doing so was clearly to protect the well-being of

the dog, not to reserve ownership. Indeed, the contract provides that Skimbirauskas explicitly "release[s] Animal Haven from all liability once the animal is in [his] possession," and "that the adoption of this pet is at [his] own risk and that the destruction of any personal or private property is [his] responsibility." Accordingly, dismissal of the complaint as against Animal Haven was proper since it was not the dog's owner (*see* CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also* Administrative Code of City of NY § 17-802[a] ["'Adoption' means the delivery of a dog . . . deemed appropriate and suitable by an animal shelter to an individual . . . who has been approved to *own*, care and provide for the animal by the animal shelter" (emphasis added)]).

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

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10439 Abu Kamara, Index 301731/09
Plaintiff-Respondent,

-against-

Tawfiq Ajlan, et al.,
Defendants-Appellants.

_____

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

Friedman, Levy, Goldfarb & Green, P.C., New York (Ira H. Goldfarb of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 31, 2012, which denied defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff alleges he suffered serious injuries to his right knee, cervical spine and lumbar spine in an accident that occurred when the taxi he was driving was struck in the rear by defendants' taxi. Contrary to the motion court's determination, defendants made a prima facie showing that plaintiff did not suffer a permanent consequential or significant limitation in any of the aforementioned body parts by submitting medical evidence

that he had full range of motion in those parts. In addition, defendants' radiologist and orthopedist reviewed the MRIs of the subject parts, and each opined that plaintiff had suffered a prior injury to his right knee and had preexisting degenerative conditions in each of the parts (*see McArthur v Act Limo, Inc.*, 93 AD3d 567, 568 [1st Dept 2012]; *Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]).

In opposition, plaintiff failed to submit evidence in admissible form sufficient to raise an issue of fact as to whether he had suffered injuries caused by the accident, or whether he had any permanent or significant limitations. The unaffirmed MRI reports submitted by plaintiff noted degenerative changes in the spine and right knee and a likely prior knee fracture, consistent with the findings noted in defendants' physicians' reports. Notwithstanding the uncontroverted evidence of preexisting conditions unrelated to the accident, plaintiff's physicians ignored the effect of those prior conditions, presented no evidence that the claimed injuries were different from the preexisting conditions, and failed to otherwise explain why those preexisting conditions were ruled out as the cause of his current alleged limitations (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Rampersaud v Eljamali*, 100 AD3d 508, 509 [1st Dept 2012]). Plaintiff also failed to submit evidence of

sufficiently recent range-of-motion deficits or qualitative limitations in the use of his right knee, lumbar spine or cervical spine (*see Mitrotti*, 91 AD3d at 450; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]).

Absent evidence that plaintiff's injuries were caused by the subject accident, his 90/180-day claim also fails (*see Rampersaud*, 100 AD3d at 509).

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: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

10440 Arie Genger, Index 104249/07
Plaintiff-Appellant,

-against-

Sagi Genger, et al.,
Defendants-Respondents.

_____

Leon Friedman, New York, for appellant.

Morgan Lewis & Bockius LLP, New York (John Dellaportas of counsel), for Sagi Genger, respondent.

Pedowitz & Meister LLP, New York (Robert Meister of counsel), for Dalia Genger, respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 14, 2012, which, inter alia, granted defendant Dalia Genger's motion, pursuant to CPLR 3211(a), dismissing the complaint, unanimously reversed, on the law, without costs and the motion denied.

We disagree with the Supreme Court's finding that it was the province of the auditor to make the initial determination as to whether the notes at issue were marital assets, and that it was then the province of the arbitrator to make the final determination if plaintiff Arie Genger chose to challenge the auditor's determination. Arie and Dalia's divorce settlement stipulation entitled Dalia to audit Arie's assets and liabilities "as of the date of commencement of the parties' matrimonial

action, i.e., January 31, 2002." The $100,000 and $50,000 notes that are being disputed were not issued until March 12, 2002 and November 17, 2003. As we noted on the prior appeal, neither the notes nor the purchase agreement contain arbitration clauses (*Genger v Genger*, 87 AD3d 871, 874, fn 2 [1st Dept 2011]).

However, we agree with the court that the arbitrator's determination that he lacked jurisdiction to determine ownership of the notes was not entitled to res judicata or collateral estoppel effect. As we held on the prior appeal, because the arbitrator rendered no award and determined no issues concerning the notes and the purchase agreement, "the arbitration has no preclusive effect on those issues" (*Genger*, 87 AD3d at 873).

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10441 The People of the State of New York, Ind. 1247/06
Respondent,

-against-

James Bennett,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered August 18, 2010, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him to a term of 4½ years, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

Defendant pleaded guilty as part of a joint disposition of this case and another case, upon which he would be receiving a concurrent sentence of one year. However, the other indictment was dismissed, with finality, before defendant's sentencing. The court should have granted defendant's plea withdrawal motion, made on the ground that the plea had been induced by a promise that was ultimately unfulfilled (*see People v Monroe*, 21 NY3d 875 [2013]). The record establishes that defendant's plea was induced in large part by the court's specific representation that

defendant was resolving two pending prosecutions. "It simply cannot be said on this record that defendant . . . would have pleaded guilty absent this assurance" (*id.* at 878). As the dismissal of the other indictment amounted to a fundamental change in a "condition that induced [defendant's] admission of guilt" (*People v Pichardo*, 1 NY3d 126, 129 [2003]), he was entitled to withdraw his plea (*see People v Rowland*, 8 NY3d 342 [2007]).

Defendant's request for assignment of the case to a different justice is denied.

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10442N Ellen Walker, Index 111878/07
Plaintiff-Appellant,

-against-

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

Parkdale Realty Company, et al.,
Defendants.

_____

Alexander J. Wulwick, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 19, 2012, which, in this action for personal injuries, denied plaintiff's motion to vacate the dismissal of her action and to restore the case to the trial calendar, unanimously affirmed, without costs.

The record demonstrates that plaintiff was granted one eve-of-trial adjournment on the ground that her expert was unavailable, and upon the stipulation that no further adjournments would be permitted. On the adjourned trial date, the action was dismissed with prejudice when plaintiff was again unprepared to try the case because her expert "can't come." When plaintiff moved to restore the matter, almost one year later, she still offered no explanation as to why her expert had been

unavailable. Accordingly, given the lack of a reasonable excuse for the default, and the fact that plaintiff had stipulated that no further adjournments would be permitted, the motion was properly denied and there was no need to consider whether plaintiff had demonstrated a meritorious cause of action (*see e.g. M.R. v 2526 Valentine*, 58 AD3d 530, 532 [1st Dept 2009]).

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10443N- Index 650341/11
10444N-
10445N-
10446N Tareq Abed, etc.,
Plaintiff-Appellant,

-against-

John Thomas Financial, Inc., etc., et al.,
Defendants-Respondents.

_____

Joseph & Kirschenbaum LLP, New York (Michael D. Palmer of counsel), for appellant.

Sack & Sack, New York (Eric R. Stern of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about December 6, 2012, which, upon renewal, granted defendants' motion to stay the instant class action pending arbitration and to compel arbitration, unanimously reversed, on the law, without costs, and defendants' motion denied. Appeal from decision, same court and Justice, dated October 22, 2012, which directs the settlement of an order, unanimously dismissed, without costs, as taken from a nonappealable paper. Appeals from order, same court and Justice, entered December 5, 2011, and from the corresponding so-ordered transcript, entered on or about January 17, 2012, unanimously

dismissed, without costs, as superseded by the order entered on or about December 6, 2012.

The arbitration agreement in the Form U-4 signed by plaintiff provides for the arbitration of disputes "under the rules, constitutions, or by-laws of [the Financial Industry Regulatory Authority (FINRA)]." Accordingly, under the plain terms of the agreement, "arbitration shall be governed by the rules promulgated by FINRA," including former FINRA rule 13204(d) (now [a][1]), which "prohibits arbitration of class action claims" (*Gomez v Brill Sec., Inc.*, 95 AD3d 32, 37 [1st Dept 2012]; *see also Velez v Perrin Holden & Davenport Capital Corp.*, 769 F Supp 2d 445, 446-447 [SD NY 2011]).

The arbitration clause in the employment agreement between plaintiff and defendant John Thomas Financial (JTF) provides that employment disputes shall be resolved in an arbitration "under the auspices of FINRA." Contrary to the motion court's conclusion, the employment agreement, like the Form U-4, contemplates that arbitration shall be governed by the rules promulgated by FINRA, including FINRA rule 13204. Indeed, a party cannot agree to arbitrate "under the auspices of FINRA" without agreeing to abide by FINRA's arbitration rules and the limits therein, at least not in the absence of an express

agreement stating otherwise (*see Macquarie Holdings (USA) Inc. v Song*, 82 AD3d 566, 567 [1st Dept 2011]).

Moreover, since the Form U-4 and the employment agreement were executed at substantially the same time and relate to the same subject matter, they "are regarded as contemporaneous writings and must be read together as one" (*PETRA CRE CDO 2007-1, Ltd. v Morgans Group LLC*, 84 AD3d 614, 615 [1st Dept 2011], *lv denied* 17 NY3d 711 [2011]). Accordingly, both the Form U-4 and the employment agreement incorporate the FINRA rule prohibiting arbitration of class action claims like the ones at issue here.

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

ENTERED: JUNE 20, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10447 & [M-2268] In re Jomo Williams, Petitioner,

-against-

Hon. R.A.W., et al., Respondents.

Ind. 4872/11

Jomo Williams, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Renee A. White and Hon. Laura A. Ward, respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 20, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9301 Monica Patricia Tenesaca Delgado, et al., Plaintiffs-Appellants, -against- Bretz & Coven, LLP, et al., Defendants-Respondents. Index 116181/10

_____

Jarret A. Kahn, Elmsford, for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Barry Jacobs of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 17, 2011, modified, on the law, to reinstate the legal malpractice cause of action as to defendants Bretz & Coven, LLP and Kerry William Bretz, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli,
Rosalyn H. Richter,
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

9301
Index 116181/10

_____x

Monica Patricia Tenesaca Delgado, et al.,
Plaintiffs-Appellants,

-against-

Bretz & Coven, LLP, et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered October 17, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint and to disqualify Jarret Kahn as plaintiff's counsel.

Jarret A. Kahn, Elmsford, for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Barry Jacobs and Shari Sckolnick of counsel), for respondents.

MANZANET-DANIELS, J.

In this case we determine whether plaintiff has sufficiently alleged that defendants' legal advice concerning the consequences of applying for an adjustment of immigration status constitutes malpractice, and whether she has sufficiently alleged that such misguided advice was the but-for cause of her ultimately being taken into custody and deported.

Plaintiff is a native of Ecuador. On May 5, 1999, she first attempted to enter the United States at Houston International Airport by falsely presenting herself as a returning resident alien, using a visa belonging to her cousin, who has the same surname. Plaintiff was removed and returned to Ecuador, but in December 2000, reentered the United States without inspection by crossing the Mexican border. As an alien previously ordered removed who thereafter entered the United States without permission, plaintiff was deemed "inadmissible" pursuant to Immigration and Nationality Act (INA) § 212(a)(9)(C)(i)(II) (8 USC § 1182[a][9][C][i][II]), and, by statute, could not apply for readmission until ten years had passed from the date of her last departure from the United States (INA § 212(a)(9)(C)(ii) (8 USC § 1182[a][9][C][ii]).

On January 8, 2006, plaintiff married a United States citizen, Jarret Kahn. On February 23, 2006, plaintiff retained

defendant Bretz & Coven LLP to represent her before the United States Citizenship and Immigration Service (CIS) in order to obtain legal residency in the United States. Plaintiff alleges that defendant Kerry Bretz, a partner at the firm, determined that she could apply for adjustment of status without leaving the United States, based on a Ninth Circuit precedent, *Perez-Gonzalez v Ashcroft* (379 F3d 783, 788-789 [9th Cir 2004]).

On July 11, 2006, the firm filed several immigration forms with CIS, including a Form I-485 petition for adjustment of status to lawful permanent resident, Form I-212 for permission to reapply after deportation or removal, and a Form I-130 petition for classification of an alien as an immediate relative of a United States citizen.

On October 26, 2006, plaintiff and her husband appeared with defendants for an interview at CIS, which denied her requests on the I-485 and I-212 forms that same day. CIS found her ineligible for adjustment of her status because she had entered the United States without permission after having been removed. CIS found that plaintiff did not qualify for a waiver of inadmissibility, as set forth in section (a)(9)(C)(ii) because 10 years had not yet passed from the date of her last departure from the United States, and she did not seek permission for readmission before she reentered in December 2000.

Plaintiff was arrested on the same day by immigration authorities, who reinstated her expedited removal order of May 5, 1999. They released her from detention the same day pursuant to an agreement reached with her lawyers, but the reinstatement order remained in effect.

Defendant Matthew L. Guadagno, a partner at Bretz & Coven, orally argued plaintiff's petition before the Second Circuit. The petition for review relied on *Perez-Gonzalez*, which had already been rejected by seven sister circuits and abrogated by the Bureau of Immigration Appeals (BIA) in *Matter of Torres-Garcia* (23 I & N Dec 866, 873-876 [BIA 2006]).

On November 7, 2007, the Ninth Circuit overruled *Perez-Gonzalez,* announcing that it was bound by the BIA's decision in *Torres-Garcia* (*see Gonzalez v Department of Homeland Sec.*, 508 F3d 1227, 1242 [9th Cir 2007]).

On January 12, 2008, plaintiff terminated the services of Bretz & Coven and retained her husband, Kahn, as her attorney. On February 7, 2008, the Second Circuit denied plaintiff's petition for review and upheld the reinstatement of the May 5, 1999 deportation order, citing *Torres-Garcia* and deferring to the BIA's interpretation of immigration statutes (*Delgado v Mukasey*, 516 F3d 65, 73 [2d Cir 2008], *cert denied* 555 US 887 [2008], citing *Chevron U.S.A. Inc. v Natural Resources Defense Council,*

Inc., 467 US 837, 842-843 [1984]). The court observed that *Perez-Gonzalez*, relied upon by defendants, had been overruled by *Gonzalez* (*id.*)

Plaintiff commenced this action on December 14, 2010, asserting claims for legal malpractice, breach of contract and breach of fiduciary duty.[1] Plaintiff alleges that Bretz was "dishonest and deceitful with Plaintiff[] to [her] detriment in an effort to create legal fees." Plaintiff alleges that defendants encouraged her to apply for adjustment of status "as soon as possible," "without informing her of numerous material issues," including the fact that she was deemed inadmissible under INA § 212(a)(9)(C)(i)(II), and the likelihood of reinstatement of the prior removal order. Defendants allegedly informed plaintiff that if she applied for adjustment of status in 2006, "there was no risk of her being deported much less detained." Defendants failed to give plaintiff "a realistic assessment of the consequences of any action." Plaintiff alleges that Bretz failed to advise her that if she were going to pursue such a "risky" application, she ought to have waited until 10 years had passed from the date of her last departure from the United States, in light of the statutory language and the

[1]Plaintiff subsequently withdrew her breach of contract claim.

relevant law.

With respect to the Second Circuit appeal, plaintiff alleges that the firm ignored "BIA [and] Second Circuit law," and that Guadagno "showed up at oral argument unprepared."

Defendants moved to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (5), and/or (7), and moved to disqualify Kahn from representing Delgado in this matter pursuant to the advocate-witness rule.

The court granted the motion to dismiss the legal malpractice claim, noting that the retainer agreements "clearly identify the difficulty of [plaintiff's] position and warn of a 'harsh' legal environment." The court further reasoned that given the passage of "time and intervening events" from the time she retained defendants, in February 2006, to her ultimate deportation in May 2010, more than four years later, defendants' actions in soliciting her business could not be deemed the "but for" cause of her deportation.

The court rejected plaintiff's arguments concerning the quality of defendants' representation during the appellate process, noting that the Second Circuit's opinion was "rife with citations to statutes, immigration rules and regulations, and federal case law from various jurisdictions" and thus, was not entirely contingent on the contents of defendants' brief. The

court found that plaintiff had failed to establish that she would have succeeded on the appeal but for defendants' negligence, noting that her deportation to Ecuador was consistent with prevailing law.

The court dismissed the breach of fiduciary duty claim as duplicative of the legal malpractice claim. Finally, the court granted defendants' motion to disqualify Kahn pursuant to the advocate-witness rule, reasoning that his testimony would be critical in presenting plaintiff's case.

We now modify to reinstate plaintiff's claim for legal malpractice against defendant law firm and Bretz. The claim against defendant Guadagno was properly dismissed. Inasmuch as the well-reasoned and thorough Second Circuit opinion was not contingent on defendant Guadagno's argument or briefing, it was not a but-for cause of plaintiff's deportation.

We disagree with the motion court's conclusion that due to intervening events, defendant law firm and Bretz's malpractice was not a "but for" cause of plaintiff's removal from the United States. Plaintiff was unambiguously ineligible for relief under prevailing case law when defendants submitted her application to immigration authorities. Once her application was submitted and denied and the removal order reinstated, any efforts by Kahn, whom plaintiff had retained to represent her after terminating

defendants' services, were too late to remedy the situation. By that point, the only intervening event sufficient to break the causal chain would have been a change in the relevant immigration law. The passage of four years between plaintiff's consultation with defendants and her removal did not disrupt the chain of causation.

When defendants submitted plaintiff's application, the government had already publicly announced that it would not grant relief to those in her position in light of the BIA's decision in *Matter of Torres-Garcia* (*see e.g.* CIS Interoffice Memo dated Mar. 31, 2006, p. 2, attached to the complaint and available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/perezgonz033106.pdf, stating that in light of *Torres-Garcia*, "in any case where an alien is inadmissible under section 212(a)(9)(C)(i) of the INA and 10 years have not elapsed since the date of the alien's last *departure* from the United States, USCIS should deny any Form I-212 requesting consent to reapply for admission"). However, instead of advising plaintiff concerning the clear implications of the BIA's ruling in *Torres-Garcia* – to which the Ninth Circuit owed deference under *Chevron USA* – defendants assured plaintiff "she would not be deported much less detained" if she applied.

Given plaintiff's allegations that she had no chance of

obtaining immigration relief and that defendants failed to thoroughly discuss the possibility, if not certainty, of reinstatement of the order of deportation and removal upon submission of the application, plaintiff has sufficiently alleged that defendants followed an unreasonable course of action in pursuing the application (*see Phoenix Erectors, LLC v Fogarty*, 90 AD3d 468, 469 [1st Dept 2011]). Moreover, she has sufficiently alleged proximate cause, because the submission of the application alerted authorities to her status, which led to the issuance of the reinstatement order and ultimately to her removal (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Phoenix Erectors*, 90 AD3d at 469). Plaintiff's unlawful status alone did not trigger her removal, since she had resided in the United States, albeit unlawfully, for more than six years; she was removed only after defendants affirmatively alerted immigration authorities to her presence. The record does not indicate on this motion pursuant to CPLR 3211 that plaintiff would have otherwise come to the attention of the immigration authorities. Without discovery on the issue, it cannot yet be said, as defendants assert, that plaintiff would have been deported regardless of defendants' malpractice. Indeed, had plaintiff waited four more years she would have been eligible to apply for reinstatement under INA § 212(a)(9)(C)(ii), which

provides that an alien in plaintiff's position can apply for admission if more than ten years have passed from the date of the alien's last departure from the United States.

Defendants rely on the fact that *Perez-Gonzalez v Ashcroft* had not yet been overruled at the time they submitted plaintiff's application for reinstatement and argued the appeal.

However, *Perez-Gonzalez* was an anomalous case, the reasoning of which was swiftly rejected. Notwithstanding the explicit language in INA § 241(a)(5) (8 USC § 1231[a][5])[2] which provides that a person subject to reinstatement of a prior order of removal "is not eligible and may not apply for *any* relief under [the INA]," the Ninth Circuit held that an alien in plaintiff's position may adjust his or her status under INA § 245(i) (8 USC § 1255[i]) (*Perez-Gonzalez* at 784). The Ninth Circuit relied in large part on the implementing regulations of the *prior* version of the statute, which – as the BIA later explained in *Torres-Garcia* – had clearly been supplanted by the repeal of those statutory provisions.

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[2]Section 241(a)(5) (8 USC § 1231[a][5]) provides that "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this [Act], and the alien shall be removed under the prior order at any time after the reentry."

Indeed, every other circuit confronting the issue has ruled that aliens whose prior orders of removal are reinstated pursuant to Section 241(a)(5) (8 USC § 1231[a][5]) are ineligible for relief under Section 1255(i), relying on the plain wording of Section 1231(a)(5) that aliens in plaintiff's position are "ineligible for any relief" under the INA, including reinstatement.

The First Circuit, in *Lattab v Ashcroft* (384 F3d 8 [1st Cir 2004]) expressed "grave doubts" about the correctness of the holding in *Perez-Gonzalez*, noting "permission to reenter, like adjustment of status, is relief under the INA, which section 241(5) precludes an illegal reentrant from seeking" (*id.* at 17).

In *Berrum-Garcia v Comfort* (390 F3d 1158 [10th Cir 2004]), the Tenth Circuit declined to follow *Perez-Gonzalez*, concluding "[p]etitioner may not seek adjustment of status under § 1255(i) because § 1231(a)(5) bars illegally reentering aliens from 'any relief' under the INA. . . . Congress did not consider those who reenter the United States in defiance of a prior deportation order to be qualified for § 1255(i)'s amnesty" (*id.* at 1164-65, 1167-68).

The Fifth, Sixth, Seventh, Eighth and Eleventh Circuits similarly held that Section 1231(a)(5) bars illegal reentrants from seeking an adjustment of status under Section 1255(i) (*see*

Warner v Ashcroft, 381 F3d 534, 539-540 [6th Cir 2004] [rejecting the argument that Section 255(i) conflicts with and supersedes Section 1231(a)(5), and ruling that aliens whose prior orders of removal are reinstated under 1231(a)(5) are not eligible for relief under Section 255(i)]; *De Sandoval v United States Attorney Gen.*, 440 F3d 1276, 1285 [11th Cir 2006] ["[t]he fact that § 1231(a)(5) prohibits a subset of aliens from applying for adjustment of status under § 1255(i) does not create a conflict between § 1231(a)(5) and § 1255(i)"]; *Mortera-Cruz v Gonzalez*, 409 F3d 246 [5th Cir 2005], *cert denied* 546 US 1031 [2005] [BIA had not acted arbitrarily in ruling that the petitioner, who was inadmissible under section 1182(a)(9)(C)(i)(I), was ineligible to adjust his status under section 1255(i)]; *Gomez-Chavez v Perryman*, 308 F3d 796, 801-803 [7th Cir 2002], *cert denied* 540 US 811 [2003] [adjustment of status application does not affect alien's removal pursuant to reinstatement statute]; *Flores v Ashcroft*, 354 F3d 727, 730-731 [8th Cir 2003] [section 1231(a)(5) controls over Section 1255(i)]).

On January 26, 2006, the BIA resoundingly rejected the holding of *Perez-Gonzalez*, finding that the Ninth's Circuit's analysis "contradict[ed] the language and purpose of the [INA]," and "appears to have proceeded from an understandable, but ultimately incorrect, assumption regarding the applicability of 8

CFR 212.2 [the implementing regulation for statutory provisions under an earlier version of the Act]," which "does not correspond to any provision of the current section," and "cannot reasonably be construed as implementing the provision for consent to reapply" (*Torres-Garcia* at 873-75).

The BIA unequivocally ruled that an alien who had reentered the United States without permission after having been previously removed is ineligible for an adjustment of status, and cannot apply for admission until more than 10 years after the date of the alien's last departure from the United States (*id.* at 873-876; INA § 212[a][9][C][ii]). The BIA observed that "Congress has given the Attorney General no authority to grant an alien a waiver of the section 212(a)(9)(C)(i) ground of inadmissibility . . . prior to the end of this 10-year period" (*id.* at 875). The petitioner in *Torres-Garcia*, like plaintiff, was taken into custody during his adjustment of status interview and charged with being removable as an alien present in the United States without having been admitted or paroled.

The BIA concluded:}

> "8 CFR § 212.2 does not purport to implement section 212(a)(9)(C)(ii) of the Act. Even if the regulation were applicable, however, we could not interpret it in a manner that would allow an alien to circumvent the statutory 10-year limitation on section 212(a)(9)(C)(ii) waivers by simply reentering

> unlawfully before requesting the waiver. After all, it is the alien's unlawful reentry without admission that makes section 212(a)(9)(C)(i) applicable in the first place. In effect, *Perez-Gonzalez* allows an alien to obtain a section 212(a)(9)(C)(ii) waiver nunc pro tunc even though such a waiver would have been unavailable to him had he sought it prospectively, thereby placing him in a better position by asking forgiveness than he would have been in had he asked permission. Such an interpretation contradicts the clear language of section 212(a)(9)(C)(ii) and the legislative policy underlying section 212(a)(9)(C) generally. We find that the more reasonable interpretation of the statutory framework . . . is that an alien may not obtain a waiver of the section 212(a)(9)(C)(i) ground of inadmissibility, retroactively or prospectively, without regard to the 10-year limitation set forth at section 212(a)(9)(C)(ii)" (*id.* at 876).

The BIA, and every circuit confronting the issue having resoundingly rejected the legal underpinnings of *Perez-Gonzalez*, allegations that defendants advised plaintiff that she would "not be deported much less detained" if she applied for reinstatement, and that they encouraged her to apply for an adjustment of status, sufficiently state a cause of action for negligence. Moreover, plaintiff has sufficiently alleged that defendants' actions were the but-for cause of her being taken into custody and deported.

We agree, however, that the breach of fiduciary duty cause of action is redundant of the legal malpractice cause of action,

and should be dismissed on that basis (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1st Dept 2011]).

The court properly granted the motion to disqualify Kahn based on the advocate witness rule. The allegations in the complaint reveal that Kahn was closely involved with the immigration petition on behalf of his wife, and it is likely that he will be a witness on a significant issue of fact on plaintiff's behalf (*see* Rules of Professional Conduct [22 NYCRR 1200.0], rule 3.7).

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered October 17, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint and to disqualify Jarret Kahn as plaintiff's counsel, should be modified, on the law, to reinstate the legal malpractice cause of action as to defendant Bretz and defendant law firm, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JUNE 20, 2013

CLERK