To be argued by:
Jota Borgmann
10 Minutes

Supreme Court Of The State Of New York
Appellate Division: Second Judicial Department

Barry Green, Philip Noonan, Kenneth Paltzik
and Lisa Soto,

Plaintiffs-Appellants,

- against -

Lakeside Manor Home For Adults, Inc.
and Lakeside Manor Homes For Adults, Inc.

Defendants-Respondents.

Appellate Division
Docket No.:

2011-08580

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Jota Borgmann, of counsel to
Jeanette Zelhof, Esq.
MFY Legal Services, Inc.
Attorneys for Plaintiffs-Appellants
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3717

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PRELIMINARY STATEMENT

Plaintiffs-Appellants respectfully submit this Reply Memorandum of Law in further support of their appeal of the order of the Supreme Court, Richmond County, dated July 6, 2011, which granted Defendants-Respondents' Motion for Summary Judgment and dismissed Plaintiffs-Appellants' complaint. Plaintiffs-Appellants are four current or former residents of Lakeside Manor Home for Adults ("Lakeside Manor"), an adult care facility operated by Defendants-Respondents. Adult care facilities are licensed by New York State to provide temporary or long-term residential care and services to adults who are "by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently." See 18 NYCRR 485.2.

This appeal challenges the trial court's improper grant of summary judgment based on its finding that Defendants-Respondents met their obligation to provide telephone service to Plaintiffs-Appellants *after* the commencement of this lawsuit. Defendants-Respondents are required by regulation, which is incorporated into their contracts with Plaintiffs-Respondents, to make available at least one telephone for every 40 residents at Lakeside Manor. See 18 NYCRR § 487.11(l)(15). This obligation is not trivial. Plaintiffs-Appellants rely on telephone service to connect with family, friends and service providers, to meet basic needs, and to avoid isolation. Yet, for decades, Defendants-Respondents made available only one or

two pay telephones for 200 residents. Nothing changed until Plaintiffs-Appellants filed this litigation and brought motions for preliminary relief.

ARGUMENT

The trial court improperly granted summary judgment and deprived Plaintiffs-Appellants of their day in court. The unambiguous language of the Social Services regulation require Defendants-Respondents to make available at least five telephones to residents for outgoing telephone calls to the 200 residents at Lakeside Manor. Plaintiffs-Appellants demonstrated that Defendants provided only one or two telephones for many years, and that they did so even after receiving complaints from residents and being issued a violation from the New York State Department of Health ("DOH"). Thus, they presented genuine issues of material fact on their claims for breach of contract and the implied warranty of habitability. Defendants-Respondents admitted that their decision to provide only a few telephones for 200 residents was motivated by animus toward people with disabilities. Thus, Plaintiffs-Appellants established genuine issues of material fact on their discrimination claim under the Fair Housing Act. Regulatory oversight of adult care facilities by the DOH does not render these claims beyond the reach of the courts. Even if Defendants-Respondents cured their breaches of contract and breaches of the implied warranty of habitability after this action was filed, Plaintiffs-

Appellants are still entitled to a trial on damages.

I. Summary judgment was improper where Plaintiffs-Appellants presented triable issues of fact on each claim

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues.'" Kolivas v. Kirchoff, 14 A.D.3d 493, 493, 787 N.Y.S.2d 392, 392-93 (App. Div. 2d Dep't 2005) (quoting Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 [1974]). "The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist." Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573, 574, 774 N.Y.S.2d 792 (App. Div. 2d Dep't 2004) (internal quotation omitted). Here, the trial court failed to view the facts in the light most favorable to Plaintiffs-Appellants; improperly made determinations on each issue of fact underlying Plaintiffs-Appellants' claims for breach of contract, breach of warranty of habitability, and violations of the Fair Housing Act; and unfairly deprived Plaintiffs-Appellants of a trial.

A. Plaintiffs-Appellants' entitlement to injunctive relief must be determined after a trial

Plaintiffs-Appellants presented numerous facts supporting their request for permanent injunctive relief, including the fact that Defendants-Respondents were in violation of the telephone regulation for 26 years prior to the lawsuit, A-791-

792, and the fact that they took another year after commencement of this lawsuit and after motions for preliminary relief and contempt to install more than two telephones, A-54-55. Defendants-Respondents' claims that they had a good-faith basis to believe they were in compliance with the telephone regulations for 26 years and that the DOH had merely changed its interpretation of the unambiguous telephone regulation when it issued a violation in 2007, Defs.' Br. at 18, are contradicted by the record.

Defendants-Respondents acknowledged that they received complaints about telephone service from the Residents Council, see A-512-527, and the Resident Council minutes show that there were complaints throughout 2007, see A-426-427, 579-583. Defendants-Respondents failed to present any evidence that they had made five telephones available for outgoing calls at anytime prior to or after the commencement of this litigation. Plaintiffs-Appellants' claim for injunctive relief is not speculative. The fact that telecommunications and technology change over time, see Defs.' Br. at 17, does not obviate adult home residents' current reliance on telephone service as a primary means of communication. There has been no movement by the DOH to repeal the regulation requiring telephone service. As long as telephones remain a means of communication, an order requiring Defendants-Respondents to provide adequate telephone service is appropriate.

B. Plaintiffs-Appellants presented sufficient issues of fact to warrant a trial on damages

Plaintiffs-Appellants provided proof—not general allegations—of their damages. They presented evidence about the harms caused by the lack of telephone service, including the inability to contact family, friends, or service providers when they wanted or needed to, A-149, 154-155, 157-159, 211-21, 227-233, 246-247, 827, 856; the burden of walking to another pay telephone in the neighborhood to make a call, A-71-72, 109-110, 144-145, 221-222, 234-235; the costs they incurred to order private telephone service, A -288-312, 324-341, 828, 860-861; and the inability to make toll-free calls when Defendants-Respondents charged $.50 for those calls, A-179-180, 227-228, 858, 860. Defendants-Respondents themselves provided support of Plaintiffs-Appellants' claims for damages by acknowledging in depositions that one or both installed telephones were in use at times by residents, leaving no available telephone for other residents to use. See A-486-488. Defendants-Respondents' arguments regarding the weight of the evidence and Plaintiffs-Appellants' credibility are unavailing because such fact and credibility determinations must be reserved for trial. See Guadalupe v. New York City Transit Auth., 91 A.D.3d 716, 716, 936 N.Y.S.2d 314, 315 (App. Div. 2d Dep't 2012).

This case is distinguishable from Novoni v. La Parma Corp., 278 A.D.2d 393, 717 N.Y.S.2d 379 (App. Div. 2d Dep't 2000), where the plaintiff testified at

deposition that he did not remember the cause of his fall and then, more than one year later, submitted an affidavit stating that ice was the cause of his fall. Here, Plaintiffs-Appellants provide deposition testimony and affidavits to support their claims for damages for an ongoing condition in their home. Unlike Novoni, Plaintiffs-Appellants' damages are not dependent on their recollection of a single event that forms the basis for liability. Thus, in this instance, it is inappropriate to make credibility determinations or to affirm summary judgment where the issues are "arguable." See Glick & Dolleck, Inc. v. Tri-Pac Exp. Corp., 22 N.Y.2d 439, 441, 239 N.E.2d 725, 726 (1968) (reversing grant of summary judgment in action to recover sales price where defendants offered affidavits presenting issues of fact on the merchantability of goods they returned).

Moreover, Defendants-Respondents' attempts to discredit Plaintiff-Appellant Paltzik based on his disability, Defs.' Br. at 25, reflect the discriminatory attitudes that form the basis of Plaintiffs-Appellants' Fair Housing Act claims. See Section C.3., below. It should be noted that Defendants-Respondents abruptly ended Plaintiff-Appellant Paltzik's deposition and never requested a continuation.

C. Plaintiffs-Appellants have met the legal standards applicable to their claims

1. Defendants-Respondents' obligation to comply with the Social Services regulations is incorporated into their admission agreements with Plaintiffs-Appellants

A party to a contract is bound by any rules or regulations that the contract explicitly incorporates. See Clifden Futures, LLC v. Man Fin., Inc., 20 Misc. 3d 638, 643-644, 858 N.Y.S.2d 580, 584-585 (Sup. Ct. N.Y. Cty. 2008). Rules, regulations, or statutes are incorporated into a contract when the parties agree to be bound by those provisions in the contract. See id. at 645. In Town of Ogden v. Earl R. Howarth & Sons, Inc., 58 Misc. 2d 213, 294 N.Y.S.2d 430 (Sup. Ct. Monroe Cty. 1968), the defendant building contractor agreed to develop a subdivision in accordance with Town construction regulations. The court held that a third-party beneficiary of the contract, who had purchased a home in the subdivision, could seek enforcement of the contract to compel the defendant to develop the subdivision in compliance with the construction regulations. Likewise, here, Plaintiffs-Appellants may seek to enforce the Social Services regulations because Defendants-Respondents agreed to provide services in compliance with those regulations.

Each of Plaintiffs-Appellants' admission agreements incorporates the Social Services Law and implementing regulations by reference:

The parties to this agreement understand that this facility is an adult care

> facility providing lodging, board, housekeeping, personal care and supervision services to the resident in accordance with New York State Social Services Law and the Regulations of the New York State Department of Social Services.

See, e.g. A-433. The agreements also state that "[t]he resident and the resident's representative agree to pay and the operator agrees to accept the following payment in full satisfaction of the services which the operator must provide according to law and regulation …." See; e.g. A-434 (emphasis added). Defendants-Respondents are bound to adhere to the Social Services Law and regulations in exchange for Plaintiffs-Appellants' performance under the contract.

The telephone regulation clearly obligates Lakeside Manor to make at least five telephones available to its approximately 200 residents for outside calls. See 18 NYCRR § 487.11(l)(15) ("All facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof." [emphasis added]). Defendants-Respondents claim that they have always complied with this regulation, by having telephones in staff members' offices—telephones for which residents would have to ask permission to use and many of which would not be available outside of business hours—or through the existence of free cell phone programs offered by third parties. These claims are belied by the DOH's finding that existing telephone service at Lakeside Manor in November 2007 did not meet the regulatory requirement. A-597.

Because Defendants-Respondents specifically agreed to be bound by adult home regulations in exchange for payment of services, and because they failed to make available at least one telephone for every 40 residents, Plaintiffs-Appellants established their claim for breach of contract. See 18 NYCRR § 487.11(l)(15); cf. Saldan Const. Co. v. Kasenetz, 225 A.D. 819, 819, 232 N.Y.S. 378, 378-79 (App. Div. 2d. Dep't 1929) (building violations were admissible to establish breach where defendant contracted to construct building foundations in a manner that complied with building regulations).

Defendants argue that the floodgates of litigation will open if adult home residents are allowed to sue for every violation of a regulation and argue that a resident could bring an action every time that "the water temperature is too low." Defs.' Br. at 31. Plaintiffs-Appellants do not maintain that every violation of a regulation supports an action for breach of contract.[1] In fact, since this action was commenced, the DOH has made several findings of violations of environmental standards by Lakeside Manor for which Plaintiffs-Appellants and other residents

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[1] It should be noted, however, that a building owner could be held liable for injuries resulting from extreme water temperatures. See, e.g., Carlos v. 395 E. 151st St., LLC, 41 A.D.3d 193, 195-96, 837 N.Y.S.2d 150, 151-52 (App. Div. 1st Dep't 2007) (denying summary judgment where there were issues of fact as to whether owner received notice of problems with building's hot water system, including alleged complaints of "bursts of excessively hot water," and therefore violated the requirement in the Multiple Dwelling Law to maintain plumbing systems in good repair).

have not instituted legal action.[2]

2. Defendants-Respondents' violation of the telephone regulation is a proper basis for a warranty of habitability claim

The Court of Appeals has held that "the standards of habitability set forth in local housing codes will often be of help" in resolving whether a breach of the warranty of habitability has occurred and that a "[s]ubstantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition." See Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 327, 418 N.Y.S.2d 310, 316 (1979). Thus, the Defendants-Respondents' violation of the telephone regulation is a relevant consideration as to whether they breached the implied warranty of habitability.

A breach of the warranty of habitability occurs where there are "conditions that materially affect the health and safety of tenants." See id. at 328. "If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the warranty of habitability has occurred." See id. The instant case is similar to Solow v. Wellner, 154 Misc. 2d 737, 741, 595 N.Y.S.2d 619, 621 (App. Term 1st Dep't

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[2] DOH Surveys of adult care facilities are publicly available at: http://www.health.ny.gov/facilities/adult_care/reports.htm.

1992), where the tenant was granted a rent abatement for elevator service which was deemed operational, but slow and unreliable. Here, the provision of a sufficient number of phones for the 200 residents at Lakeside Manor is part of the "reasonable expectations of the tenant." See Solow v. Wellner, 150 Misc. 2d 642, 650, 569 N.Y.S.2d 882 (Civ. Ct. N.Y. Cty. 1991).

Defendants-Respondents cite McIntosh v. Moscrip, 138 A.D.2d 781, 525 N.Y.S.2d 420 (App. Div. 3d Dep't 1988), in support of their assertion that "ancillary services" do not bear on the habitability of a dwelling. McIntosh concerned damages resulting from a fire in the plaintiff's apartment and the resulting claim that defendants breached their duty to provide proper smoke detection equipment under the Multiple Residence Law. Id. The Third Department reversed the trial court's grant of summary judgment on that claim because the fire took place nearly four years before the statute became effective. The instant case is distinguishable because telephone service is not "ancillary," but a required service pursuant to effective regulation and contract.

Available, operable telephone service is crucial to Plaintiffs-Appellants' health, safety and welfare, because it allows them to contact friends and family, arrange health and other services, and to complain to state agencies about conditions at Lakeside Manor. See A-149, 154-155, 157-159, 246-247, 827. In granting Plaintiffs-Appellants' motion for preliminary injunction, the trial court

emphasized that residents' "need to communicate with their families, advisors, healthcare providers, etc. is essential to their well-being, the lack of which could cause irreparable harm." A-51-52. Defendants-Respondents argue that a lack of telephone service does not affect residents' health or safety because Lakeside Manor staff members can make calls on residents' behalf. Defs.' Br. at 36. This reflects a paternalistic attitude toward adults with disabilities and a lack of respect for residents' right to privacy in caring for their personal needs. See 18 NYCRR § 487.5(a)(3)(vii). Decisions to provide services to people with disabilities based on "false and over-protective assumptions" about their needs violate the Fair Housing Act. See Bryant Woods Inn v. Howard County, 911 F.Supp. 918, 929 (D. Md. 1996) aff'd, 124 F3d 597 (4th Cir. 1997).

3. Defendants-Respondents clearly admitted a discriminatory basis for their decision not to provide the required number of telephones in violation of the Fair Housing Act

Disability discrimination may be shown even where the defendants only serve people with disabilities if they provide services in a discriminatory way. Defendants-Respondents argue that a claim of intentional discrimination under the Fair Housing Act ("FHA") requires a showing of a non-protected comparison group. "There is, of course, no 'commercial viability' exception in the FHA, nor is there one for housing providers whose concern and purpose is providing housing opportunities for disabled people as a whole." LaFlamme v. New Horizons, Inc.,

605 F.Supp.2d 378 (D. Conn. 2009) (holding that the policies of a housing provider exclusively serving people with disabilities discriminated against a resident on the basis of her disability). The Supreme Court has rejected the notion that a discrimination claim always requires a showing of uneven treatment of similarly situated individuals. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 (1999) ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA").[3]

Courts have also held that, under the FHA, a comparison group is not necessarily required in cases involving predatory practices targeted at people of a particular race. Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000) concerned allegations that the defendants had targeted African-Americans for predatory lending practices, known as "reverse redlining." The court rejected the defendants' argument that plaintiffs had to show that the defendants had made loans on preferable terms to non-African-Americans. Id. at 20. The court stated that a claim of reverse redlining could be established where the plaintiffs showed that the defendants' lending practices and loan terms were "unfair" and "predatory," and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race. Id. The

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[3] The standards for disability discrimination are interpreted similarly in Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fair Housing Act. See Blatch ex rel. Clay v Hernandez, 360 F Supp 2d 595, 630 (S.D.N.Y. 2005).

court noted that Congress had recognized predatory lending as a problem by enacting legislation to provide protection to homebuyers. Id. at 20-21. The instant case concerns defendants who are providing services specifically to disabled people. In setting forth the purposes of the Americans with Disabilities Act, Congress recognized that one of the forms of discrimination against persons with disabilities was "relegation to lesser services." 42 U.S.C. § 12101.

Under the theory of intentional discrimination or disparate treatment, a plaintiff can establish a prima facie case of discrimination by showing that animus against a protected group was a motivating factor in the position taken by the decision-maker. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2nd Cir. 1995). In general, "[d]iscriminatory intent may be inferred from the totality of the circumstances ..." Id. One factor to consider is statements made about the basis for the decision. See Regional Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 49 (2d Cir. 2002). Here, Plaintiffs-Appellants' claim under the FHA is based on Defendants-Respondents decision to provide inadequate telephone service because of their attitudes and beliefs about persons with disabilities.

At his deposition, operator Sander Lustig, a representative of Defendants-Respondents, explained that residents at Lakeside Manor were provided with only one or two telephones because: (1) residents of Lakeside Manor lack capacity to

make phone calls due to their disabilities, A-414-418, 470; (2) residents have little or no friends or family to call, A-414-418, 470-471; (3) it is Lakeside Manor's job to make telephone calls on behalf of residents, A-470-471; (4) people with psychiatric disabilities tend to lie because "lying is part of the disease," A-412; and (5) "[m]entally ill residents often complain about things that have no foundation or substance" and make complaints "without any basis," A- 411-412, 419, 474. These statements provide prima facie evidence that Defendants-Respondents violated the FHA and Defendants-Respondents have failed to come forward with a legitimate, non-discriminatory reason for their actions. See Regional Econ. Cmty. Action Program, Inc. v. Middleton, 294 F.3d at 49 (describing the burden-shifting analysis for discrimination claims).

Defendants-Respondents claim that punitive damages are inappropriate because they did not act maliciously or with reckless indifference, and because they "reacted appropriately by promptly addressing each and every issue or complaint." Defs.' Br. at 22. Defendants did not act promptly. Upon the DOH's issuance of a violation for failing to provide adequate telephone service, Defendants-Respondents applied to the DOH for a waiver of the regulation, but their application was denied. See A-528-540, 604-614. The testimony by Sander Lustig that Lakeside Manor provided few telephones based on beliefs that people with psychiatric disabilities are liars and that they do not need telephones presents

an issue of fact as to whether Defendants-Respondents acted maliciously or with reckless indifference.

II. Plaintiffs-Appellants have the right to litigate their statutory and common law claims

Plaintiffs-Appellants need not rely on the DOH to enforce their contractual, statutory and civil rights. See Henry v. Isaac, 214 A.D.2d 188, 193, 632 N.Y.S.2d 169, 172 (App. Div. 2d Dep't 1995) ("While [the DOH] may be primarily charged with enforcing the law and generally protecting the rights of residents, the remedies available to [the DOH] do not adequately address the harm that a particular individual may suffer"). And adult home operators are not immune to civil liability. See, e.g., Bowen v. Rubin, 213 F.Supp.2d 220 (E.D.N.Y. 2001), Viruet v. Rubin, 695 N.Y.Supp.2d 487 (Sup. Ct. Queens Cty. 1999).

Defendants repeatedly cite Carrier v. Salvation Army, 88 N.Y.2d 298 (1996), in support of their argument that adult home residents lack a private right of action for any claim involving adult home regulations and the DOH's regulatory authority. In Carrier, the Court of Appeals merely held that adult home residents do not have a private right of action to seek the appointment of a temporary receiver to operate an adult home. See Carrier, 88 N.Y.2d at 300. The Court of Appeals stated:

> The narrow issue presented by this appeal is whether Social Services Law § 460-d grants residents of an adult care facility subject to Department of Social Services supervision a private right of action to seek the appointment

of a temporary receiver."

See Carrier, 88 N.Y.2d at 300. (emphasis added). The Court of Appeals explicitly stated that adult home residents have a private right of action to enforce their admission agreements and the warranty of habitability, citing Section 461-c of the Social Services Law, which states that "[a]n action for breach of the warranty of habitability and any violation of a written admission agreement may be maintained in a court of competent jurisdiction by the resident or representative of the resident" See Carrier, 88 N.Y.2d at 304 (emphasis added).

Defendants-Respondents also argue that Plaintiffs-Appellants lack standing to obtain the "broad relief" that they seek.[4] It is well-established that a party to a contract has standing to enforce the contract, and that such party "is not to be compelled to surrender his right to resort to the courts, with all of their safeguards, unless he has agreed in writing to do so . . . , and by clear language." See Nassau Chapter of Civil Serv. Employees Ass'n, Inc. v. Nassau County, 84 A.D.2d 784, 784-85, 443 N.Y.S.2d 884, 885-87 (App. Div. 2d Dep't 1981).

The regulations governing adult homes are not merely intended to "promote sound business practices" as Defendants-Respondents argue, Defs.' Br. at 51; they are intended to promote the safety and welfare of adult home residents. See Henry

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[4] Defendants-Respondents argue, on the other hand, that they have implemented better service than Plaintiffs-Appellants requested. Defs.' Br. at 50.

v. Isaac, 214 A.D.2d at 193 ("The Social Services Law and the implementing regulations are not simply remedial in nature, but afford the residents various rights and impose an affirmative duty on the operators of adult care facilities to provide specified services and care"). The standards they set are not "trivial" as Defendants-Respondents suggest, Defs.' Br. at 52; they help ensure safe and sanitary conditions in adult homes. Defendants-Respondents would have adult home residents excluded from our system of justice. But adult home residents are not second-class citizens who are relegated to whatever relief may be doled out by a regulatory body.

III. A mootness analysis is relevant where the trial court dismissed the complaint upon a finding of post-litigation compliance

Although the trial court did not discuss the mootness doctrine in its decision and order granting summary judgment, it specifically stated that there was no competent evidence before it suggesting that the "upgrades and alternatives" in telephone service were "insufficient to bring Lakeside Manor into full compliance with the relevant regulation." A-10 (emphasis added). The clear implication is that Defendants-Respondents were at one time out of compliance with the regulation, and the subsequent provision and/or existence of additional telephone service rendered Plaintiffs-Appellants claims moot. A finding of post-litigation compliance cannot render Plaintiffs-Appellants' claims for permanent injunctive relief moot, see People ex rel. Spitzer v. ELRAC, Inc., 192 Misc. 2d 78, 84-85, 745

N.Y.S.2d 671, 677 (N.Y. Cty. Sup. Ct. 2002) (cessation of an unlawful activity did not obviate the need for an injunction, or deprive Plaintiffs-Appellants of a trial on damages, see Hirsch Elec. Co., Inc. v. Cmty. Servs., Inc., 145 A.D.2d 603, 604, 536 N.Y.S.2d 141, 142 (App. Div. 2d Dep't 1988) (holding that summary judgment was improperly granted where there were issues of fact on plaintiff's claim for damages). Defendants-Respondents fail to cite any cases in support of their argument that Plaintiffs-Appellants fail to meet the exception to the mootness doctrine.

CONCLUSION

For all of the reasons set forth above, Plaintiffs-Appellants respectfully request that this Court reverse the order of the trial court and remand the case for trial.

Dated: April 3, 2012
New York, NY

Jota Borgmann, of counsel to
Jeanette Zelhof, Esq.
MFY LEGAL SERVICES, INC.
Attorneys for Plaintiffs-Appellants
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3717

CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 670.10-c

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