

No. \_\_\_\_\_

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IN THE

# Supreme Court of the United States

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IGNIS DEVELOPMENT INC., STANLY NY ENTERPRISES, INC.  
d/b/a STANLY NEW YORK ENTERPRISES, and STANISLAV BRODSKY,

*Petitioners,*  
—v.—

LONG ISLAND COLLEGE HOSPITAL,  
ROYAL FARMS, INC.,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## **PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Department of the Appellate Division of the Supreme Court of New York (the “Second Department”) so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power because the conflicting rulings in the Fourth Department of the Appellate Division of the Supreme Court of New York’s (the “Fourth Department”) ruling in *Smith v. Smith*, 291 A.D.2d 828 (4th Dept. 2002) together with the Second Department’s rulings in *Khanal v. Sheldon*, 74 A.D.3d 894 (2nd Dept. 2010) and in a Decision and Order in this matter dated June 26, 2020 create an “illegal and irrebuttable presumption” in New York State Civil Law and Practice Rules §5701 and CPLR §5015(a) by which the statutes contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and the statutes, “as applied” to Appellants, violate Appellants’ sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1?

2. Did the Court of Appeals of New York (the “Court of Appeals”) so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power and sanctioned such a departure by the Second Department due to its denial of Appellants’ motion for leave to appeal itself because it did not consider two prior decision and orders in this matter issued by the Second Department on June 26, 2020 and September 14, 2020 respectively as “non-final” orders that “necessarily affect(ed)” a final decision and order issued by the lower court on February 23, 2021, which created an “illegal and irrebuttable presumption” in New York State Civil Law and Practice Rule

§5602(a)(1)(ii) and §5601(d) by which the statutes contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and the statutes, “as applied” to Appellants, violate Appellants’ sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1?

### **PARTIES TO THE PROCEEDING**

All parties to the proceeding are contained in the caption.

### **CORPORATE DISCLOSURE STATEMENT**

Ignis Development Inc. and Stanly NY Enterprises, Inc. d/b/a Stanly New York Enterprises are New York corporations. Neither party has a parent corporation and no publicly held company owns 10% of either of their stock.

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## OPINIONS AND ORDERS

The Court of Appeals: (i) denied Appellants' second motion for permission to appeal to the Court of Appeals by its own motion on September 14, 2021 as reported at 2021 NY Slip Op 71472 and Motion No. 2021-348 (A.3a-4a); and (ii) denied Appellants' motion for reargument on January 11, 2022 as reported at 2022 NY Slip Op 60285 and Motion No. 2021-871 (A.1a-2a).

The Court of Appeals also denied Appellants' first motion for permission to appeal to the Court of Appeals, *sua sponte*, on December 15, 2020 as reported at 2020 NY Slip Op 76012 (A.9a-10a).

The Second Department: (i) denied Appellants' notice of appeal of the Supreme Court of New York, County of Kings' March 10, 2020 denial of Appellants' order to show cause on its own motion on June 26, 2020 (A.13a-14a); and (ii) denied Appellants' motion for reargument and for leave to appeal to the Court of Appeals on September 14, 2020 (A.11a-12a).

The Supreme Court of New York, County of Kings: (i) entered a final Decision and Order in the lower court action referencing summary judgment having been granted in favor of Respondent Long Island College Hospital ("LICH") dismissing Ignis' Complaint in its entirety and finding Stanly NY and Brodsky liable for damages in the form of attorney's fees on February 23, 2021 (A.5a-8a); (ii) denied Appellants' order to show cause to vacate the court's March 12, 2019 decision and order on March 10, 2020 (A.15a-19a); (iii) dismissed Ignis' Complaint in its entirety and granted summary judgment in favor of LICH as against Stanly NY and Brodsky on March 12, 2019 (A.20a-23a); (iv) granted Appellants' previous

counsel's motion to withdraw as counsel on April 24, 2018 (A.27a-30a); and (v) granted Appellants' previous counsel a charging lien on July 18, 2018 (A.24a-27a).

## **JURISDICTIONAL STATEMENT**

The Court of Appeals: (i) denied Appellants' second motion for permission to appeal to the Court of Appeals by its own motion on September 14, 2021 as reported at 2021 NY Slip Op 71472 and Motion No. 2021-348 (A.3a-4a); and (ii) denied Appellants' motion for reargument on January 11, 2022 as reported at 2022 NY Slip Op 60285 and Motion No. 2021-871 (A.1a-2a). Appellants invoke their jurisdiction under 28 U.S.C. §1257 having timely filed this petition for a writ of certiorari within ninety days of entry of the Court of Appeals' denial of Appellants' motion for reargument. As 28 U.S.C. §2403(b) may apply, notification pursuant to Rule 29.4(c) is being provided. The Court of Appeals did not certify to the Attorney General of New York State that the constitutionality of a statute of New York was drawn into question.

## **CONSTITUTIONAL PROVISION INVOLVED**

USCS Const. Amend. 14, §1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## STATEMENT OF THE CASE

### **A. Facts Material to Consideration of the Questions Presented**

Appellants petition for certiorari to review whether, as a result of both the Court of Appeals and Second Department's interpretations of a number of New York statutes, the statutes violate Appellants' rights — and, in all likelihood, have violated and continue to violate those of countless other litigants — to the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution.

Ignis is in the business of modifying, storing and selling fireplaces, doors, burners, grates, bathroom fixtures and other home fixtures. Stanly NY, which is also in the business of modifying, storing and selling doors, entered into a transfer agreement with Ignis dated March 1, 2014 to allow Ignis to sublet premises (the "Premises") Stanly NY was renting from LICH pursuant to a lease dated November 15, 2007. LICH itself was leasing the Premises from Respondent Royal Farms, Inc. ("Royal").

From September 2013 to March 2014, Stanly contacted LICH concerning structural damage and leaks in and to the Premises, specifically that the outside walls and roofs needed repairs and that the leaks were damaging Stanly's goods. After Ignis took over as the tenant of the Premises, the roof leaks continued, yet LICH continued to do nothing despite repeated notice from Ignis.

In January 2015, a formation of ice and snow accumulated on the roof of the Premises that caused even more leaks as well as structural damage to the roof. Yet, despite repeated notice to LICH by Ignis,

and alleged notification by LICH to Royal, absolutely nothing was done to fix the roof.

On March 10, 2015, the roof at the Premises collapsed (the “3/10/15 Roof Collapse”), causing water to cascade to the floor of the Premises which caused extensive damage to Ignis’ goods and office. The event was so catastrophic that the Fire Department of New York arrived at the Premises and conducted a “shut down system” resulting in the turning off of the Premises’ electricity and the removal of large portions of the ceiling in an attempt to mitigate any further damage.

As a result of the 3/10/15 Roof Collapse, Ignis suffered damages to its business in the amount of \$231,499.50, which included thousands of units of its products, as well as the Premises themselves, being rendered unusable. On May 7, 2015, Ignis brought an action in the Supreme Court of New York, County of Kings, against, *inter alia*, LICH and Royal.

More than three (3) years of litigation ensued, including the filing of a third party complaint against Stanly NY and Brodsky over a dispute regarding the tenancy of the Premises. All discovery had concluded, including the depositions of key witnesses, and a Note of Issue had been duly filed. Yet, on the eve of what should have been a motion for summary judgment filed on behalf of Appellants, Appellants’ previous counsel filed a motion to withdraw as counsel for Appellants due to an unpaid legal bill.

On April 24, 2018, the lower court granted Appellants’ previous counsel’s motion to withdraw as counsel and, in doing so, ordered Appellants to retain new counsel within fifty-four days (A.27a-30a). Not only were Appellants unable, in this short window, to find new counsel, but the lower court, on July 18, 2018,

granted Appellants' counsel a charging lien (the "7/18/18 Charging Lien") (A.24a-26a), thus making it extremely difficult for Appellants to retain new counsel.

On March 12, 2019, after LICH had filed a motion for summary judgment which went unopposed by Appellants due to their failure to find new counsel, the lower court dismissed Ignis' Complaint in its entirety and granted summary judgment in favor of LICH as against Stanly NY and Brodsky for attorney's fees (the "3/12/19 Decision and Order") (A.20a-23a).

On February 12, 2020, counsel of record agreed to represent Appellants in the matter and sought to move to vacate the 3/12/19 Decision and Order.

The procedure for vacating an order under New York law is found at CPLR §5015(a), which states that a party may be relieved from the terms of a judgment or order by reason of excusable default "on motion of any interested person ***with such notice as the court may direct.***" (CPLR §5015(a)) (emphasis added).

New York courts allow for motions to be brought either by motion or by order to show cause under CPLR §2214 as follows:

"Rule 2214. Motion papers; service; time

- (a) Notice of motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded...
- (d) Order to show cause. The court in a proper case may grant an order to show cause, to be

served in lieu of a notice of motion, at a time and in a manner specified therein..."

CPLR §2214(a) and §2214(d).

As shown above, the only difference between a "motion" and an "order to show cause" is that in the case of a "motion," the movant specifies "the time and place of the hearing on the motion" while in the case of an "order to show cause," the court specifies the same information.

Counsel of record, in researching the procedure by which to move to vacate the 3/12/19 Decision and Order (A.20a-23a), discovered that while there was no definitive procedural guidance in the Second Department, where appeals from the lower court would be heard, for vacating an order either by motion or order to show cause, there was definitive procedural guidance in the Fourth Department in *Smith*, *supra*, which unequivocally required that a movant pursuant to CPLR §5015(a) must move by order to show cause by ruling as follows: "CPLR 5015(a) provides that such a motion shall be brought 'with such notice as the court may direct.' Thus, the motion should have been brought on by order to show cause. Plaintiff's motion was not brought on pursuant to notice directed by the court and thus jurisdiction over defendant was not obtained." *Smith v. Smith*, 291 A.D.2d 828, 736 N.Y.S.2d 557 (2002).

Therefore, on February 13, 2020, Appellants filed a proposed Order to Show Cause (the "2/13/20 Order to Show Cause") requesting that the lower court order the appropriate noticed and interested parties to show why an Order should not be made and entered pursuant to CPLR §5015(a)(1): (i) vacating and setting aside the 3/12/19 Decision and Order; (ii) restoring the action to the calendar; and (iii) for such other and

further relief as the Court may deem just and proper. Appellants argued, *inter alia*, that under New York law, “(w)hen a charging lien is placed on a matter against a party that moves for the vacatur of an order pursuant to CPLR §5015(a)(1), the moving party is entitled to a vacatur of the order should there be evidence that: (i) the testimony of relevant witnesses and documentary evidence have been preserved; and (ii) a period of time was necessary to obtain new counsel due to the presence of the charging lien” and cited the Third Department of the Appellate Division’s (the “Third Department”) ruling in *Cippitelli v. Town of Niskayuna*, 277 A.D.2d 540, 543 (3d Dept. 2000) (ruling that “plaintiffs established their entitlement to a vacatur of the dismissal order” due to the preservation of “relevant witness and documentary evidence” as well as the presence of a charging lien that resulted in plaintiffs needing “a lengthy time to secure new counsel”) (A.32a-46a).

On March 10, 2020, the lower court denied Appellants’ order to show cause to vacate the 3/12/19 Decision and Order (the “3/10/20 Decision and Order”) with a two-sentence handwritten ruling as follows: “Declined to sign. Movant failed to set forth reasonable excuse for the default.” A.15a-19a.

Thereafter, Appellants, on June 11, 2020, filed a notice of appeal of the 3/10/20 Decision and Order and expected to engage in due process in front of the Second Department to obtain a ruling on the merits of the 3/10/20 Decision and Order, as CPLR §5701 states the following:

- “(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court...:
  1. from any final or interlocutory judgment...

2. From an order...where the motion it decided was made upon notice and it:...
  - ...(iv) involves some part of the merits; or
  - (v) affects a substantial right; or...
3. from an order, where the motion it decided was made upon notice, refusing to vacate...a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.”

CPLR §5701.

However, this is where the first of two violations of Appellants' due process rights under USCS Const. Amend. 14, §1, committed by two different appellate courts, begins to come into play, as on June 26, 2020, the Second Department issued a Decision and Order (the “6/26/20 Decision and Order”) whereby Appellants' appeal was summarily dismissed by the Court on its own motion and without any briefing having been done “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing, *inter alia*, CPLR §5701 and the Second Department's decision in *Khanal v. Sheldon*, 74 A.D.3d 894 (2nd Dept. 2010) (A13a-14a), a case in which the Second Department actually reversed and remanded the lower court's denial of defendant's ***motion*** to vacate — which was ***not*** brought by an order to show cause — pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) “public policy favors a determination of controversies on their merits.” *Khanal*, *supra*, 74 A.D.3d at 896.

In their motion for reargument and for leave to appeal to the Court of Appeals, Appellants argued, *inter alia*, that the 6/26/20 Decision and Order's

interpretation of CPLR §5015(a) and CPLR §5701, as well as other cases decided on the merits by the Second Department interpreting CPLR §5015(a) and CPLR §5701 involving motions, and not orders to show cause, brought pursuant to CPLR §5015(a), resulted in CPLR §5015(a) and CPLR §5701 violating Appellants' due process rights under USCS Const. Amend. 14, §1 (A.47a-58a).

However, on September 14, 2020, the Second Department, without explanation, denied Appellants' motion for reargument and for leave to appeal to the Court of Appeals (the "9/14/20 Decision and Order") (A.11a-12a).

Appellants then first attempted to appeal to the Court of Appeals by submitting a motion to the Court of Appeals whereby Appellants: (i) moved for permission to appeal to the Court of Appeals pursuant to CPLR §5601(b)(1) because the Appellants were appealing to the Court of Appeals "from an order of the appellate division which finally determine[d] an action where there is directly involved the construction of the constitution of the state or of the United States"; (ii) argued, *inter alia*, that CPLR §5015(a) and CPLR §5701 violated Appellants' due process rights under USCS Const. Amend. 14, §1 as being both "irrational and irrebuttable" as applied specifically to Appellants, as the statutes: a) created an "illegal and irrebuttable presumption" or b) contain language that is so vague that Appellants could not ascertain their obligations under the statutes; and (iii) argued, *inter alia*, that the United States Supreme Court has recognized that successful "as-applied" equal protection claims that violate a party's Fourteenth Amendment rights "may be brought by a class of one where the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational

basis for the difference in treatment" and that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agent" and cited this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) and the First Department of the Appellate Division's decision in *Amazon.com, LLC v. New York State Dept. of Taxation & Fin.*, 81 A.D.3d 183, 204-207 (1st Dept. 2010) in support (A.59a-70a).

However, on December 15, 2020, the Court of Appeals denied Appellants' first motion for permission to appeal to the Court of Appeals, *sua sponte*, "upon the ground that the order appealed from does not finally determine the action within the meaning the Constitution" (A.9a-10a).

On February 23, 2021, the lower court filed a final decision and order (the "2/23/21 Final Decision and Order") that: (i) explicitly states that "on March 12, 2019, the Court issued (the 3/12/19 Decision and Order) granting . . . summary judgment against (Stanly NY) and (Brodsky); and (ii) directs the clerk to enter judgment (A.5a-8a).

On March 2, 2021, Appellants filed a notice of appeal to the Court of Appeals and, on March 31, 2021, filed an affirmation in support of Appellants' second motion for permission to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(ii), as it was an appeal "in an action originating in the supreme court . . . from a final judgment of such court . . . where the Appellate Division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and . . . the final . . .

determination . . . is not appealable as of right" (A. 71a-88a). Appellants, like their first motion for permission to appeal to the Court of Appeals, once again argued, *inter alia*, that: (i) CPLR §5015(a) and CPLR §5701 violated Appellants' due process rights under USCS Const. Amend. 14, §1 as being both "irrational and irrebuttable" as applied specifically to Appellants, as the statutes: a) created an "illegal and irrebuttable presumption" or b) contain language that is so vague that Appellants could not ascertain their obligations under the statutes; and (ii) argued, *inter alia*, that the United States Supreme Court has recognized that successful "as-applied" equal protection claims that violate a party's Fourteenth Amendment rights "may be brought by a class of one where the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" and that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agent", citing *Willowbrook* and *Amazon.com, LLC*, *supra* (A.71a-88a).

However, on September 14, 2021, the Court of Appeals denied Appellants' motion for permission to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(ii), as well as CPLR §5601(d), by ruling pursuant to both statutes that "this Court has jurisdiction to entertain a motion for leave to appeal pursuant to (both statutes) from a final order only where a prior nonfinal Appellate Division order necessarily affects that final order, ***and no such prior nonfinal order exists here***" (the "9/14/21 Order") (A.3a-4a) (emphasis added).

In response to this second violation of Appellants' due process rights pursuant to USCS Const. Amend. 14, §1, Appellants, on October 14, 2021, filed a motion for reargument and once again argued, *inter alia*, that CPLR §5015(a) and CPLR §5701 violated Appellants' due process rights under USCS Const. Amend. 14, §1 as being both "irrational and irrebuttable" as applied specifically to Appellants, as the statutes: (i) created an "illegal and irrebuttable presumption" or (ii) contain language that is so vague that Appellants could not ascertain their obligations under the statutes (A. 89a-96a). Further, Appellants argued that **two** nonfinal orders issued by the Second Department existed in the form of the 6/26/20 Decision and Order and the 9/14/20 Decision and Order that **necessarily affected** the final order as the 2/23/21 Final Decision and Order explicit referenced the 3/12/19 Decision and Order that both dismissed Ignis's claims in their entirety and granted summary judgment against Stanly and Brodsky (A.89a-96a; A.5a-8a).

However, on January 11, 2022, the Court of Appeals, without explanation, denied Appellants' motion for reargument (A.1a-2a).

In short, at no time during this entire matter have Appellants been allowed, either by the Court of Appeals or the Second Department, to appeal the merits of the 3/10/20 Decision and Order upon which Appellants' entire appeal is based and which summarily states in two handwritten sentences without any further explanation that: "Declined to sign. Movant failed to set forth reasonable excuse for the default." (A.15a-19a).

**B. When The Federal Questions Sought To Be Reviewed Were Timely And Properly Raised**

Because the Second Department's 6/26/20 Decision and Order (A8) dismissed Appellants' notice of appeal *sua sponte* without any briefing whatsoever, Appellants timely and properly raised their federal questions regarding their rights to the due process and equal protection provisions of USCS Const. Amend. 14, §1 having been violated at each and every step of the remainder of their exhaustion of the appellate process as follows:

- (i) in the “questions of law...sought to be reviewed by the Court of Appeals” and subsequent argument contained in paragraphs 4, 13 and 14 of the July 24, 2020 Affirmation of Jason R. Mischel in Support of the Appellate Division Motion for Reargument submitted to the Second Department (A.47a-58a), which was denied pursuant to the 9/14/20 Decision & Order (A.11a-12a);
- (ii) in the “Summary” and “Jurisdictional Response” contained in the November 16, 2020 Jurisdictional Response submitted to the Court of Appeals in support of Appellants’ first Motion for Permission to Appeal to the Court of Appeals (A.59a-70a), which was denied pursuant to the 12/15/20 Appeal Dismissal (A.9a-10a);
- (iii) in the “Preliminary Statement,” “Statement of the Questions Presented for Review” and “Argument” contained in paragraphs 3, 22 and 23-38 in the March 31, 2021 Affirmation of Jason R. Mischel in Support of the Appellants’ second Motion for Permission to

Appeal to the Court of Appeals submitted to the Court of Appeals (A.71a-88a), which was denied pursuant to the 9/14/21 Decision and Order (A.3a-4a); and

- (iv) in the October 14, 2021 Affirmation of Jason R. Mischel in Support of Appellants' Motion for Reargument submitted to the Court of Appeals (A.89a-96a), which was denied pursuant to the 1/11/22 Decision and Order (A.1a-2a).

#### **ARGUMENT: REASONS FOR GRANTING CERTIORARI**

The Court should grant the petition and reverse the 9/14/21 Decision and Order of the Court of Appeals for two (2) reasons. First, because the Second Department so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power due to the conflicting rulings in the Fourth Department of the Appellate Division of the Supreme Court of New York's ruling in *Smith*, *supra*, together with the Second Department's rulings in *Khanal*, *supra*, and in the 6/26/20 Decision and Order create an "illegal and irrebuttable presumption" in CPLR §5701 and CPLR §5015(a) by which the statutes contain language that is "so vague" that Appellants "cannot ascertain their obligations under the statutes," and the statutes, "as applied" to Appellants, violate Appellants' sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1.

Second, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and sanctioned such a departure by the Second

Department in ruling in the 9/14/21 Decision and Order (A.3a-4a) that the 6/26/20 Decision and Order (A.13a-14a) and 9/14/20 Decision and Order (A.11a-12a) were not “prior nonfinal” orders that necessarily affected the 2/23/21 Final Decision and Order (A.3a-8a), as to call for an exercise of this Court’s supervisory power, as the result was the creation of an “illegal and irrebuttable presumption” in CPLR §5602(a)(1)(ii) and CPLR §5601(d) by which the statutes contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and the statutes, “as applied” to Appellants, violate, for a second time, Appellants’ sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1.

**I. THE SECOND DEPARTMENT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT’S SUPERVISORY POWER**

New York courts allow for motions to be brought either by motion or by order to show cause under CPLR §2214 as follows:

“Rule 2214. Motion papers; service; time

(b) Notice of motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded...

(d) Order to show cause. The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein...”

CPLR §2214(a) and §2214(d).

As shown above, the only difference between a “motion” and an “order to show cause” is that in the case of a “motion,” the movant specifies “the time and place of the hearing on the motion” while in the case of an “order to show cause,” the **court** specifies the same information.

CPLR §5015(a) states that a party may be relieved from the terms of a judgment or order by reason of excusable default “on motion of any interested person **with such notice as the court may direct.**” (emphasis added).

CPLR §5701, which applies to matters that are appealable **as of right** to the appellate division, does not state that an application for an order to show cause is not appealable to the appellate division as of right.

USCS Const. Amend. 14, §1 (the “Fourteenth Amendment”) states that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”

A party may raise an “as-applied” due process challenge when the statute violates the party’s Fourteenth Amendment rights as being both “irrational and irrebuttable” as applied specifically to the party (*Amazon.com, LLC*, *supra*, 81 A.D.3d at 204-205), when a statute: (i) creates an “illegal and irrebuttable presumption”; or (ii) contains language that is so vague that a party cannot ascertain their obligations under the statute.

Further, this Court has recognized that successful “as-applied” equal protection claims that violate a party’s Fourteenth Amendment rights “may be

brought by a class of one where the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" and that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook*, *supra*, 528 U.S. at 564; *Amazon.com, LLC*, *supra*, 81 A.D.3d at 205-206.

On April 24, 2018, the lower court granted Appellants' previous counsel's motion to withdraw as counsel and, in doing so, ordered Appellants to retain new counsel within fifty-four days (A.27a-30a). Not only were Appellants unable, in this short window, to find new counsel, but the lower court, on July 18, 2018, granted Appellants' counsel the 7/18/18 Charging Lien (A.24a-26a), thus making it extremely difficult for Appellants to retain new counsel.

On March 12, 2019, after LICH had filed a motion for summary judgment which went unopposed by Appellants due to their failure to find new counsel, the lower court dismissed Ignis' Complaint in its entirety and granted summary judgment in favor of LICH as against Stanly NY and Brodsky for attorney's fees in the 3/12/19 Decision and Order (A.20a-23a).

On February 12, 2020, counsel of record agreed to represent Appellants in the matter and sought to move to vacate the 3/12/19 Decision and Order.

While there is no **definitive** procedural guidance in the Second Department for vacating a final judgment or order pursuant to CPLR §5015(a) by either order to show cause or by motion, there is **definitive**

procedural guidance in the Fourth Department, which unequivocally requires that a party must move by order to show cause for the vacatur of a final judgment or order pursuant to CPLR §5015(a). *Smith*, *supra*, (requiring that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of by notice of motion).

The Fourth Department, in its ruling in *Smith*, interpreted the procedural requirement of an application to vacate a final judgment or order under CPLR §5015(a) as follows: “CPLR 5015(a) provides that such a motion shall be brought ‘with such notice as the court may direct.’ Thus, the motion should have been brought on by order to show cause. Plaintiff’s motion was not brought on pursuant to notice directed by the court and thus jurisdiction over defendant was not obtained.” *Smith*, *supra*, 291 A.D.2d at 828. Thus, in reliance upon the Fourth Department’s ruling in *Smith*, Appellants moved to vacate the 3/12/19 Decision and Order (A.20a-23a) in the lower court via the 2/13/20 Order to Show Cause and not by notice of motion.

Therefore, on February 13, 2020, Appellants filed the 2/13/20 Order to Show Cause requesting that the lower court order the appropriate noticed and interested parties to show why an Order should not be made and entered pursuant to CPLR §5015(a)(1): (i) vacating and setting aside the 3/12/19 Decision and Order; (ii) restoring the action to the calendar; and (iii) for such other and further relief as the Court may deem just and proper. Appellants argued, *inter alia*, that under New York law, “(w)hen a charging lien is placed on a matter against a party that moves for the vacatur of an order pursuant to CPLR §5015(a)(1), the moving party is entitled to a vacatur of the order should there be evidence that: (i) the testimony of

relevant witnesses and documentary evidence have been preserved; and (ii) a period of time was necessary to obtain new counsel due to the presence of the “charging lien” and cited the Third Department’s ruling in *Cippitelli*, *supra* (ruling that “plaintiffs established their entitlement to a vacatur of the dismissal order” due to the preservation of “relevant witness and documentary evidence” as well as the presence of a “charging lien that resulted in plaintiffs needing “a lengthy time to secure new counsel”) (A.32a-46a).

On March 10, 2020, the lower court issued the 3/10/20 Decision and Order denying Appellants’ order to show cause to vacate the 3/12/19 Decision and Order with a two-sentence handwritten ruling as follows: “Declined to sign. Movant failed to set forth reasonable excuse for the default.” A.15a-19a.

Thereafter, Appellants, on June 11, 2020, filed a notice of appeal of the 3/10/20 Decision and Order and expected to engage in due process in front of the Second Department to obtain a ruling on the merits of the 3/10/20 Decision and Order, as CPLR §5701 states the following:

- “(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court....:
- 4. from any final or interlocutory judgment...
- 5. From an order...where the motion it decided was made upon notice and it:...
  - ...*(iv)* involves some part of the merits; or
  - (v)* affects a substantial right; or...
- 6. from an order, where the motion it decided was made upon notice, refusing to vacate...a prior order, if the prior order would have been

appealable as of right under paragraph two had it decided a motion made upon notice.”

CPLR §5701.

On June 26, 2020, the Second Department issued the 6/26/20 Decision & Order whereby Appellants’ appeal was summarily dismissed “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing, *inter alia*, the Second Department’s decision in *Khanal*, *supra*, and CPLR §5701 (A.13a-14a).

However, Appellants, in their affirmation in support of their Motion for Reargument (A.47a-58a), argued four (4) reasons as to why their requested relief should have been granted. **First**, the words “order to show cause” simply do not appear anywhere within CPLR §5701 nor in its Advisory Committee Notes as somehow not being entitled to an appeal as of right, and the 3/10/20 Decision and Order is not explicitly excepted from being appealable as a matter of right pursuant to CPLR §5701(b), in that the 3/10/20 Order: (a) was not derived from an Article 78 proceeding; (b) did not require or refuse to require a more definite statement in a pleading; or (c) did not order or refuse to order that scandalous or prejudicial matter be stricken from a pleading.

**Second**, contrary to the Fourth Department’s ruling in *Smith*, there is absolutely no language in CPLR §5015(a) that expressly dictates that a §5015(a) application must be filed pursuant to an order to show cause, as not only do the words “order to show cause” do not appear anywhere within CPLR §5015 or in its Advisory Committee Notes, but also it is a fact that “rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven” that judges in New York **routinely** “direct”

the alteration of filed ***notices of motion*** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice [*Kingbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 (2nd Dept. 2009) citing *Ptasznik v. Schultz*, 247 A.D.2d 197 (2nd Dept. 1998); see also *Caffrey v. North Arrow Abstract & Settlement Svcs., Inc.*, 160 A.D.3d 121 (2nd Dept. 2018) (ruling that “judicial notice may be taken by a court at any stage of the litigation, even on appeal”)], and thus, those “routine directions” for relief sought by ***notice of motion*** constitute “such notice as the court may direct,” within the meaning of CPLR §5015(a), rendering the distinction between relief sought by order to show cause versus motion on notice, at worst, irrelevant in that respect.

**Third**, the Second Department itself on numerous occasions including in *210 E. 60 St. LLC v. Rahman*, 2019 App. Div. LEXIS 9062 (2nd Dept.), *Ramirez v. Romualdo*, 25 A.D.3d 680 (2nd Dept. 2006), and, most significantly, in *Khanal*, *supra* — the ***very precedent*** cited by the Second Department in the 6/26/20 Decision & Order — either affirmed the granting of a ***motion***, and ***not an order to show cause***, to vacate an order pursuant to CPLR §5015(a) or, in the case of *Khanal*, reversed and remanded the lower court’s denial of defendant’s ***motion*** to vacate — ***again, not an order to show cause*** — pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) “public policy favors a determination of controversies on their merits.” *Khanal*, *supra*, 74 A.D.3d at 896.

**Fourth**, there is substantial precedent for “substance over form” with respect to an application for vacatur under CPLR §5015(a), including in the Fourth Department itself (see *Estate of Taylor v.*

*Moreno*, 294 A.D.2d 821 (4th Dept. 2002) (affirming the granting of a motion to vacate pursuant to CPLR §5015(a) due to demonstrating a reasonable excuse and meritorious defense to the action); *Khanal*, supra, 74 A.D.3d at 896, (“public policy favors a determination of controversies on their merits”).

Finally, Appellants argued that, when taking the above arguments together: (i) CPLR §5701 and CPLR §5015(a) created an “illegal and irrebuttable presumption” and contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” specifically whether to request vacatur of a final order or judgment via order to show cause or notice of motion, or whether the denial of an application for an order to show cause concerning vacatur of a final order or judgment is appealable as of right; (ii) this, by itself, results in Appellants having a valid “as-applied” due process challenge because they have properly raised the threshold Constitutional issue that the statutes, “as applied” to Appellants, violate their Fourteenth Amendment rights as being both “irrational and irrebuttable” as applied specifically to Appellants (*Amazon.com, LLC*, supra, 81 A.D.3d at 204-205); and (iii) Appellants, having been “intentionally treated differently from others similarly situated” despite there being “no rational basis for the difference in treatment” when the Second Department issued the 6/26/20 Decision & Order (A.13a-14a), have a valid “as-applied” equal protection claim in that their Fourteenth Amendment rights were violated despite “the purpose of the equal protection clause of the Fourteenth Amendment (being) to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly

constituted agents.” *Village of Willowbrook*, supra, 528 U.S. at 564; *Amazon.com, LLC*, supra, 81 A.D.3d at 205-206. A47a-58a.

Yet, despite the above, the Second Department, without explanation, issued the 9/14/20 Decision and Order denying Appellants’ motion for reargument (A.11a-12a). Simply put, the audacity of the Second Department to ignore the above arguments, together with its outrageous citation of *Khanal*, supra, in the 6/26/20 Decision and Order (A.13a-14a) (a case that decided the merits of a case in which the Second Department actually reversed and remanded the lower court’s denial of defendant’s ***motion*** to vacate — which was ***not*** brought by an order to show cause — pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) “public policy favors a determination of controversies on their merits”) (*Khanal*, supra, 74 A.D.3d at 896) is a *prima facie* example of a court of appeals that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power, as the result was a violation of Appellants’ sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1. As such, Appellants’ petition for writ of certiorari should be granted.

**II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY THE SECOND DEPARTMENT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER**

On February 23, 2021, the lower court filed the 2/23/21 Final Decision and Order that: (i) explicitly states that “the Court issued (the 3/12/19 Decision and Order) granting . . . summary judgment against (Stanly NY) and (Brodsky); and (ii) directs the clerk to enter judgment (A.5a-8a).

CPLR §5602(a)(1)(ii) states that the Court of Appeals has jurisdiction over an appeal “in an action originating in the supreme court . . . from a final judgment of such court . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and the final . . . determination . . . is not appealable as of right” pursuant to CPLR §5601(d).

CPLR §5601(d) states that “an appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance...where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award”.

Appellants, in their affirmation in support of their second motion for permission to appeal to the Court of Appeals, argued the points and precedent stated in Point I above, including that their due process and equal protection rights pursuant to USCS Const. Amend. 14, §1 were violated (A.71a-88a). Further, Appellants, *inter alia*, attached: (i) the Second

Department's 6/26/20 Decision and Order (A.13a-14a) and 9/14/21 Decision and Order (A.11a-12a); and (ii) the subsequent lower court's 2/23/21 Final Decision and Order, and argued that the Court of Appeals had jurisdiction over the matter as follows:

- “1. Pursuant to CPLR §5602(a)(1)(ii), the Court of Appeals has jurisdiction over Appellants' appeal of the 2/23/21 Final Decision and Order as it is an appeal “in an action originating in the supreme court . . . from a final judgment of such court . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and the final . . . determination . . . is not appealable as of right” pursuant to CPLR §5601(d).
2. In this matter, the Appellate Division's previous orders that “necessarily affect the final determination” are the 6/26/20 Decision and Order and, because it represented Appellants' first chance to brief an argument to the Appellate Division, the 9/14/20 Decision and Order.”

(A.71a-88a).

However, on September 14, 2021, the Court of Appeals issued the 9/14/21 Decision and Order and denied Appellants' motion for permission to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(ii), as well as CPLR §5601(d), by ruling pursuant to both statutes that “this Court has jurisdiction to entertain a motion for leave to appeal pursuant to (both statutes) from a final order only where a prior nonfinal Appellate Division order necessarily affects that final order, ***and no such prior nonfinal order exists here***” (A.3a-4a) (emphasis added).

Appellants then filed a motion for reargument, whereby, in the affirmation in support, they argued, *inter alia*: (i) that their due process rights pursuant to due process and equal protection rights pursuant to USCS Const. Amend. 14, §1 were violated; and (ii) the Court of Appeals overlooked the existence of, not one, but two nonfinal orders issued by the Second Department, specifically the 6/26/20 Decision and Order (A.13a-14a) and the 9/14/20 Decision and Order (A.11a-12a), that necessarily affected the 2/23/21 Final Decision and Order as, in the 2/23/21 Final Decision and Order, the lower made explicit reference to the 3/12/19 Decision and Order that both dismissed Ignis's claims in their entirety and granted summary judgment against Stanly and Brodsky (A.5a-8a; A89a-96a).

However, on January 11, 2022, the Court of Appeals, without explanation, denied Appellants' motion for reargument (A.1a-2a). Simply put, the audacity of the Court of Appeals to ignore the existence of the Second Department's previous non-final 6/26/20 Decision and Order (A.13a-14a) and 9/14/20 Decision and Order (A.11a-12a) that necessarily affected the 2/23/21 Final Decision and Order which explicitly referenced the 3/10/20 Decision and Order upon which this entire appeal has been based (A.5a-8a) as it was the order that granted summary judgment to LICH dismissing Ignis' complaint in its entirety and holding Stanly NY and Brodsky liable for attorney's fees, is a *prima facie* example of a court of appeals that so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the Second Department, as to call for an exercise of this Court's supervisory power, as the result was the creation of an "illegal and irrebuttable presumption" in CPLR §5602(a)(1)(ii) and CPLR §5601(d) by which the

statutes contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and the statutes, “as applied” to Appellants, violate, for a second time, Appellants’ sacred and inalienable due process and equal protection rights pursuant to USCS Const. Amend. 14, §1. As such, Appellants’ petition for writ of certiorari should be granted.

In sum, it should be repeated and stressed that at no time during this entire matter have Appellants been allowed to appeal the merits of the 3/10/20 Decision and Order upon which Appellants’ entire appeal is based (A.15a-19a), whereby the lower court declined to sign Appellants’ Order to Show Cause to reargue the 3/12/19 Decision and Order -- that both dismissed Ignis’s claims in their entirety and granted summary judgment against Stanly and Brodsky -- by summarily stating in two handwritten sentences, without any further explanation, that: “Declined to sign. Movant failed to set forth reasonable excuse for the default.”

## CONCLUSION

For the reasons stated above, the Court should grant the petition and reverse the Court of Appeals' 9/14/21 Decision and Order.

Dated: April 11, 2022

Respectfully submitted,

JAMES J. DECRISTOFARO  
*Counsel of Record*  
THE LAWYER JAMES  
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New York, NY 10010  
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## **APPENDIX**

1a

Appendix A

STATE OF NEW YORK COURT OF APPEALS

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**Ignis Dev., Inc. v Long Is. Coll. Hosp.**

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Motion No: 2021-871

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Slip Opinion No: 2022 NY Slip Op 60285

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Decided on January 11, 2022

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Court of Appeals Motion Decision

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Published by New York State Law Reporting Bureau  
pursuant to Judiciary Law § 431.

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This motion is uncorrected and subject to revision  
before publication in the Official Reports.

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**Ignis Development, Inc.,  
Appellant,**

v

**Long Island College Hospital, et al.,  
Respondents.**

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**Long Island College Hospital,  
Third-Party Respondent,**

v

**Stanly NY Enterprises, Inc., et al.,  
Third-Party Appellants.**

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Motion for reargument denied.

Appendix B  
***State of New York  
Court of Appeals***

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Decided and Entered on the  
fourteenth day of September, 2021

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**Present**, Hon. Janet DiFiore, *Chief Judge, presiding.*

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Mo. No. 2021-348

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Ignis Development, Inc.,  
Appellant,

v.

Long Island College Hospital, et al.,  
Respondents,  
et al.,  
Defendants.

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Long Island College Hospital,  
Third-Party Respondent,

v.

Stanly NY Enterprises, Inc., et al.,  
Third-Party Appellants.

---

Appellant and third-party appellants having appealed and moved to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal dismissed, without costs, upon the ground that this Court has jurisdiction to entertain an appeal pursuant to CPLR 5601 (d) from a final order only where a prior nonfinal Appellate Division order necessarily affects that final order, and no such prior nonfinal order exists here; and it is further

ORDERED, that the motion for leave to appeal is dismissed upon the ground that this Court has jurisdiction to entertain a motion for leave to appeal pursuant to CPLR 5602 (a) (1) (ii) from a final order only where a prior nonfinal Appellate Division order necessarily affects that final order; and no such prior nonfinal Order exists here.

/s/ John P. Asiello  
John P. Asiello  
Clerk of the Court

Appendix B  
SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS

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At Part 96 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse: 360 Adams Street, Brooklyn, New York on the 17th day of February, 2021.

Present: Honorable Robin K. Sheares,  
A.J.S.C.

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Index No.: 505638/2015

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ORDER/DECISION  
*Motion Seq. No. 12*

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IGNIS DEVELOPMENT, INC.,  
Plaintiff,  
—against—

LONG ISLAND COLLEGE HOSPITAL,  
ALWAYNE CONSTRUCTION CORP.,  
BOGOPA-COLUMBIA, INC. and  
ROYAL FARMS, INC.,  
Defendants.

---

THE LONG ISLAND COLLEGE HOSPITAL,  
Defendant/Third-Party Plaintiff,  
—against—

STANLY NY ENTERPRISES, INC., d/b/a STANLY  
NEW YORK ENTERPRISES AND STANISLAV  
BRODSKY

Third-Party Defendants.

---

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion:

<u>Papers</u>	<u>NYSCF Line No.</u>
<u>Sequence #12</u>	
Order to Show Cause/Notice of Motion and	
Affidavits/Affirmations Annexed	262 – 263
Exhibits	264 – 269

**WHEREAS**, on March 12, 2019, the Court issued an Order granting Defendant/Third Party Plaintiff the Long Island College Hospital (“LICH”) summary judgment against Third-Party Defendants Stanly NY Enterprises, Inc. d/b/a Stanly New York Enterprises and Stanislav Brodsky (collectively the “Third-Party Defendants”) as to all claims alleged in the Third-Party Complaint, for among other things, LICH’s attorneys’ fees and costs for the defense of this action

**WHEREAS**, on June 30, 2020 LICH filed a motion pursuant to the Court’s March 12, 2019 Order for an order awarding LICH attorneys’ fees and costs in the amount of Three Hundred Seventy Thousand, Five

Hundred and Forty Dollars (\$370,540.00) against the Third Party Defendants (the “Motion”);

**WHEREAS**, the Motion reflects attorneys’ fees and costs incurred by LICH from the inception of the action through June 30, 2020 and such other fees that have or may accrue thereafter may be sought upon subsequent application to the Court;

**WHEREAS**, the Third-Party Defendants did not oppose the Motion nor appear before the Court during the telephone conference hearing on February 17, 2021; and now

Upon the reading and filing of the Affirmation of Kathryn T. Lundy dated June 30, 2020, the exhibits annexed thereto, all the prior pleadings heretofore had herein. and upon oral argument held on February 17, 2021, it is hereby

**ORDERED**, that LICH’s Motion is GRANTED, in its entirety, as the Court has determined that the attorneys’ fees and costs incurred by LICH, in the amount of Three Hundred Seventy Thousand, Five Hundred and Forty Dollars (\$370,540.00), relate to the defense of this action and is reasonable given (1) the difficulty of the issues; (2) the skill required to resolve them; (3) the lawyers’ experience; (4) the time and labor required; and (5) the benefit resulting to LICH from the services;

**ORDERED**, that judgment be entered in favor of LICH and against Third-Party Defendants Stanly NY Enterprises, Inc. d/b/a Stanly New York Enterprises and Stanislav Brodsky (“Third-Party Defendants”) in the amount of Three Hundred Seventy Thousand, Five Hundred and Forty Dollars (\$370,540.00) representing attorneys’ fees costs and disbursements through June 30, 2020;

**ORDERED**, to the extent additional attorneys fees and costs have and will accrue, LICH shall make an additional application to the Court; and it is

**ORDERED**, that the Clerk of this Court is hereby directed to enter judgment accordingly.

This constitutes the Decision/Order of the Court.

ENTER:

/s/ Robin K. Sheares, AJSC  
Hon. Robin K. Sheares, A.J.S.C.

9a

Appendix D  
STATE OF NEW YORK COURT OF APPEALS

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**Ignis Dev., Inc. v Long Is. Coll. Hosp.**

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Motion No:

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Slip Opinion No: 2020 NY Slip Op 76012

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Decided on December 15, 2020

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Court of Appeals Motion Decision

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Published by New York State Law Reporting Bureau  
pursuant to Judiciary Law § 431.

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This motion is uncorrected and subject to revision  
before publication in the Official Reports.

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**Ignis Development, Inc.,  
Appellant,**

v

**Long Island College Hospital, et al.,  
Respondents.**

---

**Long Island College Hospital,  
Third-Party Respondent,**

v

**Stanly NY Enterprises, Inc., et al.,  
Third-Party Appellants.**

---

Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

11a

Appendix E

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

M272923  
E/sl

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JOHN M. LEVENTHAL, J.P.  
ROBERT J. MILLER  
ANGELA G. IANNACCI  
PAUL WOOTEN, JJ.

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2020-04606

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DECISION AND ORDER ON MOTION

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Ignis Development, Inc., plaintiff-appellant,  
v Long Island College Hospital, defendant  
third-party plaintiff-respondent, Royal Farms,  
Inc., defendant-respondent, et al., defendants;  
Stanly NY Enterprises, Inc., et al., third-party  
defendants-appellants.

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(Index No. 505638/2015)

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Appeal from the denial of an application to sign an order to show cause of the Supreme Court, Kings County, which occurred on March 10, 2020, which was dismissed by decision and order on motion of this Court dated June 26, 2020. Motion by the appellant, in effect, to recall and vacate the decision and order on motion of this Court dated June 26, 2020, or, in the alternative, for leave to appeal to Court of Appeals from the decision and order on motion of this Court dated June 26, 2020.

Upon the papers filed in support of the motion and no papers having been filed in opposition or in relation thereto, it is

ORDERED that the motion is denied.

LEVENTHAL, J.P., MILLER, IANNACCI and WOOTEN, JJ., concur.

ENTER:

/s/ Aprilanne Agostino  
Aprilanne Agostino  
Clerk of the Court

September 14, 2020

IGNIS DEVELOPMENT, INC. v  
LONG ISLAND COLLEGE HOSPITAL

Appendix F

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

M271529  
E/sl

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ALAN D. SCHEINKMAN, P.J.  
WILLIAM F. MASTRO  
REINALDO E. RIVERA  
MARK C. DILLON  
RUTH C. BALKIN, JJ.

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2020-04606

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DECISION & ORDER ON MOTION

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Ignis Development, Inc., plaintiff-appellant,  
v Long Island College Hospital, defendant  
third-party plaintiff-respondent, Royal Farms,  
Inc., defendant-respondent, et al., defendants;  
Stanly NY Enterprises, Inc., etc., et al., third-  
party defendants-appellants (and another  
title).

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(Index No. 505638/2015)

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Appeal by Ignis Development, Inc., Stanly NY Enterprises, Inc., and Stanislav Brodsky from the denial of an application to sign an order to show cause of the Supreme Court, Kings County, which occurred on March 10, 2020.

On the Court's own motion, it is

ORDERED that the appeal is dismissed, without costs or disbursements, on the ground that no appeal lies from the denial of an application to sign an order to show cause (*see Khanal v Sheldon*, 74 AD3d 894; *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*, 14 AD3d 553; CPLR 5701).

SCHEINKMAN, P.J., MASTRO, RIVERA, DILLON and BALKIN, JJ., concur.

ENTER:

/s/ Aprilanne Agostino  
Aprilanne Agostino  
Clerk of the Court

June 26, 2020

IGNIS DEVELOPMENT, INC. v  
LONG ISLAND COLLEGE HOSPITAL

Appendix G

SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS

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At IAS Part 41 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, located at 360 Adams Street, Brooklyn, New York on the 10<sup>th</sup> day of March, 2020.

PRESENT: HON. Larry D. Martin, Justice SC

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Index No.: 505638/2015  
(NYSCEF CASE)  
Hon. Larry D. Martin

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**ORDER TO SHOW CAUSE**  
**(PROPOSED)**

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**IGNIS DEVELOPMENT, INC.,**  
Plaintiff,  
—against—

**THE LONG ISLAND COLLEGE HOSPITAL,  
ALWAYNE CONSTRUCTION CORP.,  
BOGOPA-COLUMBIA, INC. and  
ROYAL FARMS, INC.,**  
Defendants.

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**THE LONG ISLAND COLLEGE HOSPITAL,**  
Third-Party Plaintiff,  
—against—

**STANLY NY ENTERPRISES, INC.,  
d/b/a STANLY NEW YORK ENTERPRISES  
and STANISLAV BRODSKY,**  
Third-Party Defendants.

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**ROYAL FARMS, INC.,**  
Petitioner-Landlord,  
—against—

**THE LONG ISLAND COLLEGE HOSPITAL,**  
Respondent-Tenant,  
**STANLY NY ENTERPRISES, INC.,  
d/b/a STANLY NEW YORK ENTERPRISES  
and IGNIS DEVELOPMENT INC.,**  
Respondents.

---

**THE LONG ISLAND COLLEGE HOSPITAL,**  
Petitioner-Landlord,  
—against—  
**STANLY NY ENTERPRISES, INC.,**  
**d/b/a STANLY NEW YORK ENTERPRISES,**  
Respondent-Subtenant,  
**IGNIS DEVELOPMENT INC.,**  
Respondent.

---

Upon the reading of the Affidavit of Vladimir Brodsky, subscribed and affirmed on February 12th, 2020, and upon the Affirmation of James J. DeCristofaro, Esq., subscribed and affirmed February 13th, 2020, and upon all other relevant papers filed with the Court and proceedings heretofore had herein:

Let Defendant-Third Party Plaintiff/Respondent-Tenant/Petitioner-Landlord THE LONG ISLAND COLLEGE HOSPITAL (“LICH”) and Defendant/Petitioner-Landlord ROYAL FARMS, INC. (“Royal Farms”) show cause at IAS Part 41 of this Court, Room 741, to be held at the Courthouse, located at 360 Adams Street, New York, New York, on the \_\_\_\_\_ day of \_\_\_\_\_ 2020, at 9:30 A.M. in the forenoon of that day, or as soon as thereafter as counsel or the parties to this proceeding may be heard, why an Order should not be made and entered: (a) pursuant to CPLR § 5015(a)(1) vacating and setting aside the Decision and Order entered herein against Plaintiff IGNIS DEVELOPMENT INC. (“Ignis”), Third-Party Defendant/Respondent-Subtenant STANLY NY

ENTERPRISES, INC. d/b/a STANLY NEW YORK ENTERPRISES ("Stanly NY") and Third-Party Defendant STANISLAV BRODSKY ("Stanislav") on or about March 15, 2019 (NYSCEF document number 215, the "March 15 SJ Order"); (b) restoring the action to the calendar; and (c) for such other and further relief as the Court may deem just and proper.

This action concerns a suit for the recovery of damages to Ignis's property at certain premises caused by leaks and roof deterioration whereby LICH or Royal Farms were the landlord responsible for compensating Ignis for said damages.

Sufficient cause being alleged, let service of a copy of this Order to Show Cause, together with papers on which it is based, be deemed sufficient if made on or before the \_\_\_\_ day of \_\_\_\_\_, 2020, given that Ignis, Stanly NY, Stanislav, LICH, and Royal Farms are represented by counsel, and any other parties entitled to notice.

~~ORDERED, that answering papers, if any, shall be served upon counsel to LICH and RF by filing on the NYSCEF system, no later than the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.~~

**ENTER**

---

J.S.C.

[HANDWRITTEN]

Declined to sign. Movant failed to set forth reasonable excuse for the default.

/s/ Larry Martin 3/10/20  
HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT

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Appendix H

SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS  
[HANDWRITTEN ORDER]

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At an I.A.S. Trial Term, Part \_\_\_ of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York on the 12<sup>th</sup> day of March, 2019.

P R E S E N T :

Honorable Martin,  
Justice

---

Cal. No. 43  
Index No. 505638/2015

---

Ignis Developement, Inc., Plaintiff(s)  
—against—

Long Island College Hospital, et al., Defendant(s)

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Notice of Motion – Order to Show Cause \_\_\_\_\_  
and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Answering Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_  
Affidavit (Affirmation) \_\_\_\_\_  
Pleadings – Exhibits \_\_\_\_\_  
Stipulations – Minutes \_\_\_\_\_  
Filed Papers \_\_\_\_\_

A. Defendant Long Island College Hospital/Third-Party Plaintiff (“Ignis”) Motion for summary judgement is granted as follows: (1) plaintiff Ignis Development, Inc. (Ignis) claims are dismissed, in their entirety; (2) granting judgement against Stanley NY enterprises, Inc. d/b/a Stanly New York Enterprises (Stanly) and Stanislav Brodsky (“Brodsky”) as to all claims alleged in the Third-Party Complaint for (a) attorneys fees and costs for the defense of this action,

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**PAGE 2**

INDEX# 505638-2015 DATE March 12, 2019

PLAINTIFF Ignis vs DEFENDANT Long Island  
College Hospital

(b) enforcing the personal guarantee against Brodsky for Royal Farms claims for unpaid rent, additional rent, penalties, attorneys' fees and costs to the extent Royal Farms claim is granted; (c) indemnification against Stanly for Royal Farms claims for unpaid rent, additional rent, penalties, attorneys' fees and costs.

B. LICH's cross-claim against Royal Farms for indemnification against Ignis' claims are dismissed as moot because Ignis' claims have been dismissed

Royal Farms cross-claims against LICH for indemnification against Ignis' claims are dismissed as moot because Ignis' claims have been dismissed.

C. LICH's motion for summaruy jugement as to its Counter-claims against Royal Farms for overpayment of rent in the amount of \$10,416.67, plus anyh amount paid as additional rent for the same period and a return of its security deposit in the amount of \$20,823.34 is adjourned to 5/28/19. Royal Farms motion for summary judgment in the [illegible] non-payment is withdrawn.

D. Royal Farms Cross-Motion for summary judgement and application to amend its non-payment petition to include all rent through February 2016, a

23a

Final Judgment in the amount of \$112,484.94, representing rent for the period May 2015 through February 2016 (amount owed after credit of LICH's security deposit is adjourned to 5/28/19.

ENTERED/SO ORDERED

/s/ Larry D. Martin  
JSC/JHO  
[STAMP]  
HON. LARRY D. MARTIN

**PAGE 2**

Appendix I

SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York on the 2<sup>nd</sup> day of July, 2018.

P R E S E N T :

Hon. LARRY D. MARTIN, J.S.C.

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Motion Sequence #7  
INDEX No. 505638/2015

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IGNIS DEVELOPMENT INC.,

PLAINTIFF,

—VS—

LONG ISLAND COLLEGE HOSPITAL, ET AL

DEFENDANTS.

---

**The following papers  
numbered 1 to 4 read  
on this motion**

## Papers Numbered

Notice of Motion and Affidavits  
(Affirmations) Annexed \_\_\_\_\_ 1-2 \_\_\_\_\_  
Answering Affidavit  
(Affirmation) \_\_\_\_\_ 3 \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_ 4 \_\_\_\_\_

Upon the foregoing papers, the law office of Borah, Goldstein, Altschuler, Nahns & Goidel, P.C. (“BGANG”), as attorney of record for plaintiff/third-party defendants/respondents, Ignis Development Inc. Stanly NY Enterprises, Inc., d/b/a Stanley New York Enterprises and Stanislav Brodsky (collectively, the “Brodsky Parties”), moves, by order to show cause, for an order: (1) granting leave to withdraw as counsel for the Brodsky Parties; (2) granting BGANG a charging lien, pursuant to Judiciary Law § 475, for attorneys’ fees and disbursements; and (3) staying the instant action for 30 days.

It is noted that by order dated April 17, 2018, this court granted BGANG leave to withdraw as counsel of record for the Brodsky Parties and stayed the action until June 18, 2018. The portion of BGANG's motion for a charging lien under Judiciary Law § 475 was reserved for decision and is granted herein. It is undisputed that BGANG served as attorney of record for the Brodsky Parties from the inception of the litigation in this matter, serving the summons and complaint, engaging in motion practice and making related court appearances (*see Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574, 574 [2d Dept 1996]). Based upon the foregoing, BGANG is entitled to a charging lien (*see Cataldo*, 226 AD2d at 574). The fee to be paid to BGANG shall be determined by a

Justice of this court at the conclusion of this matter, unless an agreement is reached between BGANG and either the Brodsky Parties (if they are pro-se litigants) or their incoming counsel, in writing, before seeking the intervention of the court.

The foregoing constitutes the decision and order of the court.

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**Motion Seq. #**

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E N T E R

/s/ Larry D. Martin  
HON. LARRY D. MARTIN  
J.S.C.

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HON. LARRY D. MARTIN  
JUSTICE OF THE SUPREME COURT

Appendix J

SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS  
[HANDWRITTEN ORDER]

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York on the 17<sup>th</sup> day of April, 2018.

P R E S E N T :

Hon. Martin \_\_\_\_\_  
Justice

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Cal. No. 36  
Index No. 505638/2015

---

Ignis Development, Inc., Plaintiff(s)  
—against—

Long Island College Hospital, et al., Defendant(s)

---

The following papers  
numbered 1 to read  
on this motion Papers Numbered

Notice of Motion – Order to Show Cause \_\_\_\_\_  
and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Answering Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Pleadings – Exhibits \_\_\_\_\_  
Stipulations – Minutes \_\_\_\_\_  
Filed Papers \_\_\_\_\_

Borah, Goldstein, Altschuler, Nahins & Goidel P.C.'s ("BGANG") Motion (Sequence No. 007) is granted as follows: (1) BGANG is withdrawn as counsel of record for Ignis Development Inc., Stanly NY Enterprises, Inc. and Stanislav Brodsky ("Brodsky Parties"); see next page)

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**PAGE 2**

INDEX# 505638/2015 DATE 4/17/18

PLAINTIFF Ignis Development vs DEFENDANT  
Long Island College Hospital

(2) staying the proceeding until June 18, 2018 to provide the Brodsky Parties with time to retain new counsel; and (3) BGANG shall serve a copy of this Order on the Brodsky Parties by personal service with ten (10) days of entry; and (4) BGANG's motion is granted on default as against the Brodsky Parties who failed to appear in opposition; and (5) the portion of BGANG's motion seeking a charging lien is taken on submission.

Long Island College Hospital Cross-Motion to Extend the deadline to file dispositive Motions is granted as follows: (1) the deadline to file dispositive Motions is extended from June 13, 2018 until September 18, 2018; and Defendant Bogopa's motion for summary judgment Motion Sequence #6 currently scheduled for 5/22/18 is adjourned until 7/10/18

/s/ Kathryn T. Lundy  
By Kathryn T. Lundy,  
Michelman & Robinson, LLP  
For Long Island College Hospital

/s/ Matt Cueter  
Lewis Brisbois by Matt Cueter  
for Bogopa

/s/ [Illegible]  
By Ka Nili, Borah Goldstein  
For the Brodsky Parties

Harris, King by /s/ Jose M. Gomez  
For Defendant Royal Farms

30a

ENTERED/SO ORDERED

/s/ Larry D. Martin

JSC/JHO

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HON. LARRY D. MARTIN

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KINGS COUNTY CLERK

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**PAGE 2 of 2**

Appendix K

**USCS Const. Amend. 14, §1**

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Appendix L  
**SUPREME COURT OF  
THE STATE OF NEW YORK  
COUNTY OF KINGS**

---

**IGNIS DEVELOPMENT INC.,**

Plaintiff,

—against—

**THE LONG ISLAND COLLEGE HOSPITAL,  
ALWAYNE CONSTRUCTION CORP., BOGOPA-  
COLUMBIA, INC., and ROYAL FARMS, INC.,**

Defendants.

---

**THE LONG ISLAND COLLEGE HOSPITAL,**

Third-Party Plaintiff,

—against—

**STANLY NY ENTERPRISES, INC. d/b/a STANLY  
NEW YORK ENTERPRISES and STANISLAV  
BRODSKY,**

Third-Party Defendants.

---

**ROYAL FARMS, INC.,**

Petitioner-Landlord,

—against—

**THE LONG ISLAND COLLEGE HOSPITAL,**

Respondent-Tenant.

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**THE LONG ISLAND COLLEGE HOSPITAL,**

Petitioner-Landlord,

—against—

**STANLY NY ENTERPRISES, INC. d/b/a STANLY  
NEW YORK ENTERPRISES,**

Respondent-Subtenant,

**IGNIS DEVELOPMENT INC.,**

Respondent.

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**AFFIRMATION OF JAMES J. DECRISTOFARO,  
ESQ. IN SUPPORT OF MOTION TO VACATE  
ORDER PURSUANT TO CPLR §5015(a)**

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Index No. 505638/2015

(NYSCEF CASE)

Hon. Larry D. Martin

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Motion Seq. No. 11

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James J. DeCristofaro, Esq., an attorney duly admitted to practice before the Courts of the State of New York, affirms pursuant to CPLR § 2106 the following to be true under the penalties of perjury:

1. I am the principal attorney of DCL Firm (DeCristofaro Law), counsel to Plaintiff IGNIS DEVELOPMENT INC. (“Ignis”), Third-Party Defendant/Respondent-Subtenant STANLY NY

ENTERPRISES, INC. d/b/a STANLY NEW YORK ENTERPRISES (“Stanly NY”) and Third Party Defendant STANISLAV BRODSKY (“Stanislav,” and collectively with Ignis and Stanly NY, the “Movants”), and I make this Affirmation in support of the Movants’ motion: (a) pursuant to CPLR § 5015(a)(1) vacating and setting aside the Decision and Order entered in this case against the Movants on or about October 22, 2019 (attached to this Affirmation as Ex. A, NYSCEF document number 215, the “October 22 SJ Order”); (b) restoring the action to the calendar; and (c) for such other and further relief as the Court may deem just and proper.

2. I am fully familiar with the facts and circumstances set forth in this Affirmation based upon a review of the file maintained by this office and all papers filed on the NYSCEF docket.

#### **PROCEDURAL HISTORY**

3. Ignis commenced this action on or about May 7, 2015 by filing a Summons and Complaint (NYSCEF document number 1, the “Ignis Compl.”) against The Long Island College Hospital (“LICH”), Alwayne Construction Corp., Bogopa-Columbia, Inc. (“Bogopa”), and Royal Farms, Inc. (“Royal Farms”). Ignis’s initial counsel was the firm of Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. (“Borah Goldstein”).

4. The Ignis Compl. alleges, *inter alia*: (i) LICH entered into a lease with Royal Farms (“the LICH/Royal Farms Lease”), pursuant to which LICH leased from Royal Farms “a portion of the building known as 498 Colombia Street, Brooklyn, New York” (the “Premises”); (ii) LICH subleased the Premises to Stanly NY (the “Stanly NY/LICH Sublease”); (iii)

Stanly NY assigned its rights in the Stanly NY/LICH Sublease, as well as all of Stanly NY's property located at the Premises, to Ignis by a Transfer Agreement (the "Stanly NY/Ignis Transfer Agreement"); and (iv) Ignis is entitled to \$231,499.50 for damages to Ignis's personal property caused by the unjustified and improper failures by LICH and Royal Farms to fix water leaks and roof deterioration at the Premises. (Ignis Compl.)

5. Royal Farms appeared through counsel on or about June 4, 2015 by filing an Answer and Cross-Claim (NYSCEF document number 2, the "Royal Farms Ans.") against LICH and Defendant Bogopa.

6. LICH appeared through counsel on or about July 10, 2015 by filing an Answer and Cross-Claims against Royal Farms and Bogopa (NYSCEF document number 13, the "LICH Ans.").

7. On or about October 28, 2015, LICH commenced a third-party action against Stanly NY and Stanislav by filing a Third Party Summons and Complaint (NYSCEF document number 43, the "Third Party Compl.").

8. On or about February 22, 2016, the Court issued an Order consolidating this action with two commercial landlord tenant proceedings pending in part 52 of the Civil Court (NYSCEF document number 61).

9. Stanly NY and Stanislav appeared through counsel on or about March 17, 2016 by filing an Answer (NYSCEF document number 64, the "Stanly Stanislav Ans."). Borah Goldstein also initially represented both Stanly NY and Stanislav.

10. On or around May 1, 2018, the Court issued an Order (NYSCEF document number 153), *inter alia*:

(i) relieving Borah Goldstein as counsel for Ignis, Stanly NY, and Stanly; (ii) staying the action until June 18, 2018 to provide Ignis, Stanly NY and Stanislav the opportunity to retain new counsel; and (iii) taking on submission Borah Goldstein's motion for a charging lien against Ignis, Stanly NY and Stanislav.

11. On July 12, 2018, the Court issued an Order (NYSCEF document number 159) dismissing the action against Bogopa with prejudice.

12. On or around July 19, 2018, the Court issued an Order (attached to this Affirmation as Ex. B, NYSCEF document number 161, the "Charging Lien Order") granting Borah Goldstein a charging lien against Ignis, Stanly NY and Stanislav.

13. On September 18, 2018, LICH filed a motion (NYSCEF document numbers 162-192, the "LICH Motion") for an Order: (i) granting LICH Summary Judgment (a) dismissing Ignis's claim against LICH; (b) granting LICH's cross-claim against Royal Farms for indemnification; (c) denying Royal Farms' cross-claim against LICH for indemnification; (d) dismissing Royal Farms' claims against LICH for unpaid rent, additional rent, penalties and attorneys' fees and costs pursuant to the February 6, 1996 lease (the "Lease"); (e) granting LICH's counter-claims against Royal Farms for overpayment of rent in the amount of \$10,411.67, plus any amount paid as additional rent for the same period and a return of its security deposit in the amount of \$20,823.34; (f) granting LICH judgment against Stanly NY and Stanislav as to all claims alleged in the Third Party Compl. for (i) indemnification from Ignis' claims; (ii) attorney's fees and costs for the defense of the action; (iii) enforcing the personal guarantee against

Stanislav for Royal Farm's claims for unpaid rent, additional rent, penalties, attorney's fees and costs under the lease; and (2) for such other and further relief the Court deems just and proper.

14. The deposition transcripts of: (i) Jerome Sider (the "Sider Depo."); (ii) Stanislav (the "Stanly Depo."); Vincenta H. Fandialan (the "Fandialan Depo.") and Vladimir Brodsky (hereinafter "Vladimir Depo."), as well as the LICH/Royal Farms Lease, Stanly NY/LICH Sublease, and the Stanly NY/Ignis Transfer Agreement, were all filed either in support of, or in reply to, the LICH Motion, and are available on the NYSCEF docket: NYSCEF document numbers 175-180, 199-200.

15. On October 4, 2018, Royal Farms filed a cross-motion (NYSCEF document numbers 193-205) for an Order: (i) amending the Petition to include all rent due and owing through February 2016; (ii) pursuant to CPLR Section 3212, granting Royal Farms summary judgment for unpaid rent in the amount of \$112,484.94, representing rent for the period May 2015 through February 2016 (amount owed after credit of LICH's security deposit); (iii) scheduling this matter for an attorneys' fee hearing on a date certain; (iv) denying LICH summary judgment; and (v) for such other and further relief as to this Court deems just and proper under the circumstances.

16. On or around October 8, 2018, Borah Goldstein initiated an action against the Movants (the "Borah Goldstein Action") in the Supreme Court of New York, County of New York, Index No. 654988/2018, and filed a Summons and Complaint against the Movants (attached to this Affirmation as Ex. C, the "Borah Goldstein Compl.") for alleged legal fees due to it as a result of services provided in this matter.

17. On February 20, 2019, the Movants appeared by the undersigned counsel in the Borah Goldstein Action by filing an Answer and Counterclaims (attached as to this Affirmation as Ex. D, the “Ans. by Movants in the Borah Goldstein Action”).

18. Although undersigned counsel appeared on behalf of the Movants in the Borah Goldstein Action, undersigned counsel declined to represent the Movants in this matter at the time of appearing in the Borah Goldstein Action due to the Charging Lien Order.

19. On March 15, 2019, the Court, in this matter, issued a partial order on the LICH Motion (attached to this Affirmation as Ex. E): (i) dismissing Ignis’s claims in their entirety; (ii) granting summary judgment against Stanly NY and Stanislav for all claims alleged in the Third Party Compl. for: a) attorney’s fees and costs for the defense of the action; b) enforcing the personal guaranty against Stanislav for the claims by Royal Farms for unpaid rent, additional rent, penalties, attorney’s fees and costs; and c) indemnification against Stanly NY for the claims by Royal Farms for unpaid rent, additional rent, penalties, attorney’s fees and costs ***to the extent Royal Farms’ claim is granted***; (iii) dismissing LICH’s cross-claim against Royal Farm for indemnification against Ignis’ claims; (iv) dismissing Royal Farm’s cross-claim against LICH for indemnification against Ignis’ claims; (v) adjourning LICH’s motion for summary judgment as to its counter-claim against Royal Farms for overpayment of rent in the amount of \$10,416.67 plus any amount paid as additional rent for the same period and a return of its security deposit in the amount of \$20,823.34; and (vi) adjourning Royal Farms’ cross-motion and application to amend its

non-payment Petition to include all rent through February 2016, a final judgment in the amount of \$112,484.94 representing rent for the period May 2015 through February 2016 amount owed after credit of LICH's security deposit (Ex. E) (emphasis added).

20. On June 17, 2019, the parties in the Borah Goldstein Action entered into a Stipulation of Settlement (attached to this Affirmation as Ex. E, the "Borah Goldstein Action Settlement") whereby: (i) the Movants were required, *inter alia*, to make three (3) payments of \$5,000.00 each by June 21, 2019, July 30, 2019 and October 30, 2019, with an additional twenty-four (24) monthly payments of \$1,041.66 to begin on July 1, 2019; and (ii) Borah Goldstein would waive or discharge the charging lien set forth in the Charging Lien Order upon receipt of the first \$5,000.00 payment from the Movants.

21. Although Movants timely made the first \$5,000.00 payment due to Borah Goldstein pursuant to the Borah Goldstein Action Settlement, because of: (i) Movants' delinquent payment history with Borah Goldstein; and (ii) extended negotiations with Movants regarding undersigned counsel's fees relating to both the Borah Goldstein Action and this matter, undersigned counsel did not, immediately after Movants' first \$5,000.00 payment to Borah Goldstein, agree to represent Movants in this matter, as undersigned counsel wished to ensure that Movants would continue to abide by the Borah Goldstein Action Settlement and that undersigned counsel would be reasonably paid for its services in this matter.

22. On or around February 10, 2020, after being satisfied that Movants have continued to abide by the

6/17/19 Borah Goldstein Action Settlement and as well as with the negotiated terms of payment for services to be provided in this action – both of which undersigned counsel believed were necessary to avoid a future charging lien situation – undersigned counsel, concurrent with the filing of the instant application, filed a Notice of Appearance representing Movants in this matter, a true and correct copy of which is attached as Ex. F.

23. Between approximately March 2018 and February 10, 2020, Movants were unable to locate an attorney to represent them in this matter due to, *inter alia*, the issues surrounding the Charging Lien Order (see Affidavit of Vladimir Brodsky, submitted concurrently with the filing of this application, hereinafter the “Brodsky Aff.”).

**THE COURT SHOULD VACATE THE 3/15/19**  
**ORDER BECAUSE THE MOVANTS HAVE A**  
**REASONABLE EXCUSE AND A**  
**MERITORIOUS DEFENSE**

24. CPLR §5015(a)(1) provides: “The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry....”

25. To prevail on a motion to vacate a judgment or an order entered by default pursuant to CPLR §5015(a)(1), the movant is required to demonstrate: (i) a reasonable excuse for the default; and (ii) that

the movant has a meritorious defense to the action, and the determination of what constitutes a reasonable excuse lies within the sound direction of the Supreme Court. 210 E. 60 St., LLC v. Rahman, 2019 App. Div. LEXIS 9062 (2d Dept.).

26. When a charging lien is placed on a matter against a party that moves for the vacatur of an order pursuant to CPLR §5015(a)(1), the moving party is entitled to a vacatur of the order should there be evidence that: (i) the testimony of relevant witnesses and documentary evidence have been preserved; and (ii) a period of time was necessary to obtain new counsel due to the presence of the charging lien. Cippitelli v. Town of Niskayuna, 277 A.D.2d 540, 543 (3d Dept. 2000) (ruling that “plaintiffs established their entitlement to a vacatur of the dismissal order” due to the preservation of “relevant witness and documentary evidence” as well as the presence of a charging lien that resulted in plaintiffs needing “a lengthy time to secure new counsel”); see also Basetti v. Nour, 287 A.D.2d 126, 131 (2d Dept. 2001) (citing Cippitelli on other grounds).

27. Here, the Movants have both a reasonable excuse for a default, and a meritorious defense. First, as to a reasonable excuse, the reasonable excuse here results from the Charging Lien Order (Ex. B) which, under New York law, necessitated the Movants needing a “lengthy time to secure new counsel” in order to continue to prosecute and defend this matter. Cippitelli, supra. Indeed, as stated above: (i) although undersigned counsel appeared on behalf of the Movants in the Borah Goldstein Action, undersigned counsel declined to represent the Movants in this matter at the time of appearing in the Borah Goldstein Action due to the presence of the Charging Lien Order; (ii) only after being satisfied (a)

that Movants have continued to abide by the Borah Goldstein Action Settlement, and (b) with the negotiated terms of payment for services to be provided in this action – both of which undersigned counsel believed were necessary to avoid a future charging lien – undersigned counsel, concurrent with the filing of the instant application, filed a Notice of Appearance representing Movants in this matter (Ex. F); and (iii) Movants were otherwise unable to locate counsel to represent them in this matter due to, inter alia, the issues surrounding the Charging Lien Order (Brodsky Aff.).

28. Further, the testimony of relevant witnesses and documentary evidence have been preserved (Cippitelli, supra) as the Sider Depo., Stanislav Depo., Fandialan Depo. and Vladimir Depo., and the Stanly N/LICH Sublease and Stanly NY/Ignis Transfer Agreement, were all filed in support of the LICH Motion and are available on the NYSCEF docket (NYSCEF document numbers 175-179).

29. Thus, because: (i) the testimony of relevant witnesses and documentary evidence have been preserved; and (ii) a period of time was necessary for Movants to obtain new counsel due to the presence of the Charging Lien Order, Defendant has demonstrated a reasonable excuse for delay (CPLR §5015(a)(1); 210 E. 60 St., LLC supra) and should, under New York law, be entitled to a vacatur of the March 15 SJ Order (Cippitelli, supra).

30. Second, as to a meritorious defense, Ignis, in fact, and contrary to the March SJ Order, is entitled to summary judgment as a result of the preserved testimony of relevant witnesses and documentary evidence for four (4) reasons. First, in the Sider Depo., Sider testified and admitted: (i) he was the

Comptroller of Royal Farms at the time of the events in this matter; (ii) the LICH/Royal Farms Lease existed and contained a clause that obligated Royal Farms to make repairs to the Premises not caused by LICH; (iii) he was the “contact person” for the LICH/Royal Farms Lease; (iv) the Stanly NY/LICH Sublease existed; (v) as Comptroller of Royal Farms he was responsible for responding to complaints about the Premises including repairs to the roof; (vi) Royal Farms was made aware that repairs were required to be made to the roof of the Premises; and (vii) the repairs had not been made by Royal Farm’s roofer as of March 10, 2015, the date Ignis’s property was damaged at the Premises due to leaks and deterioration of the roof. (Sider Dep. 8:9; 15:21-24; 16:8-23; 17:23-25; 18:2; 18:15-18; 22:21-25; 27:16-23; 28:7-10; 29:17-25; 30:2-12; 30:22-25; 31:2-25; 32:2-13; 35:24-36:3; 38:4-6; 40:25; 41:2-4; 41:9-13) (the relevant portions of the Sider Dep. are attached to this Affirmation as Ex. G and a copy of the LICH Royal Farms Lease as previously filed in NYSCEF document numbers 199 and 200 is attached to this Affirmation as Ex. H).

31. Second, in the Fandalian Depo., Fandalian testified and admitted: (i) she was the Corporate Director of Real Estate Services for LICH, including the lease of the Premises, at the time of the events in this matter; and (ii) Ignis had become the rightful and legal sublessee of the Premises at the time that Ignis’ property was damaged at the Premises including the fact that LICH accepted rent checks directly from Ignis and never informed Stanly NY that Stanly NY was in default of the Stanly NY/LICH Sublease as a result of Stanly NYE having assigned its rights in the Stanly NY LICH/Sublease to Ignis. (Fandalian Dep., 17:19-25; 18:2-12; 133:15-

21; 134:16-21; 160:7-16; 185:18-25; 186:5-25; 187:2-9; 210:7-14; 219:17-25) (the relevant portions of the Fandialan Depo. are attached to this Affirmation as Ex. I and a copy of the Stanly NY/LICH Sublease as previously filed in NYSCEF document numbers 178 and 201 is attached to this Affirmation as Ex. J).

32. Third, in the Stanislav Depo., Stanislav testified and confirmed: (i) that he was the owner of Stanly NY at the time of the events of this matter; (ii) that the Stanly NY/Ignis Transfer Agreement existed and resulted in: a) the assignment of Stanly NY's rights and obligations in the Stanly NY/LICH Sublease to Ignis; and b) the transfer of all ownership rights to all of Stanly NY's property located at the Premises to Ignis; (iii) Ignis became responsible for making all rent payments for occupation of the Premises; and (iv) it was Ignis that vacated the Premises after the damages caused to its property due to the leaks and roof deterioration. (Stanislav Depo., 7:19-21; 27:13-21; 37:3-16; 37:23-25; 38:2-6; 38:16-23) (the relevant portions of the Stanislav Depo. are attached to this Affirmation as Ex. K and a copy of the Stanly NY/Ignis Transfer Agreement as previously filed in NYSCEF document numbers 180 and 203 is attached to this Affirmation as Ex. L).

33. Fourth, in the Vladimir Depo., Vladimir testified and confirmed: (i) that he was the President of Ignis at the time of the events of this matter; (ii) that the Stanly NY/Ignis Transfer Agreement existed and resulted in: a) the assignment of Stanly NY's rights and obligations in the Stanly NY/LICH Sublease to Ignis; and b) the transfer of all ownership rights to all of Stanly NY's property located at the Premises to Ignis; (iii) Ignis became responsible for making all rent payments for occupation of the Premises; and (iv) it was Ignis that vacated the

Premises after the damages caused to its property due to the leaks and roof deterioration. (Vladimir Depo. 6:5-11; 14:16-25; 15:2-16; 26:4-7; 27:8-12; 32:3-8) (the relevant portions of the Vladimir Depo. are attached to this Affirmation as Ex. M).

34. Thus, because Movants: (i) as stated above have a reasonable excuse for a default; and (ii) have demonstrated a meritorious defense (CPLR §5015(a)(1); 210 E. 60 St., supra; Cippitelli, supra) as shown in the preserved testimony of relevant witnesses and documentary evidence that collectively, indisputably, and unambiguously proves that (a) Ignis should be entitled to summary judgment on its allegations contained in the Ignis Compl.; and (ii) SNYE and SB are otherwise completely free from liability in this matter, the Court should vacate the 3/15/19 Order and restore this matter to the calendar.

35. No prior application has been made for the relief requested herein.

36. In light of the foregoing, Defendant respectfully requests that the Court enter an Order, as previously stated: (a) pursuant to CPLR § 5015(a)(1) vacating and setting aside the March 15 SJ Order; (b) restoring the to the calendar; and (c) for such other and further relief as the Court may deem just and proper.

Dated: February 13, 2020  
New York, New York

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Appendix M

**SUPREME COURT OF  
THE STATE OF NEW YORK  
APPELLATE DIVISION:  
SECOND JUDICIAL DEPARTMENT**

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Appellate Division  
Docket No. 2020-04606

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**IGNIS DEVELOPMENT INC.**, Plaintiff/Appellant,

—v.—

**LONG ISLAND COLLEGE HOSPITAL**, Defendant/  
Third-Party Plaintiff/Respondent, **ROYAL FARMS,  
INC.**, Defendant/Respondent, et al., Defendants;  
**STANLY NY ENTERPRISES, INC.**, etc., et al.,  
Third-Party Defendants/Appellants (and another title)

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(Index No. 505638/2015)

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**ATTORNEY AFFIRMATION OF  
JASON R. MISCHEL, ESQ. IN SUPPORT  
OF NOTICE OF MOTION**

I, Jason R. Mischel, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled case, affirm the following to be true under the penalties of perjury pursuant to CPLR §2106:

1. I am an attorney with DCL Firm (DeCristofaro Law), attorneys for Appellants Ignis Development Inc., Stanly NY Enterprises, Inc. and Stanislav Brodsky (collectively, the “Appellants”) and, pursuant to Appellate Division Rule 1250.16(d)(3), I make this Affirmation in Support of Appellants’ Motions: (i) for Reargument; (ii) for Leave for Permission to Appeal to the Court of Appeals Pursuant to CPLR §5602(a); and (iii) for such other and further relief as to the court may seem just and equitable (collectively the “Motions”).

2. I am fully familiar with the facts and circumstances set forth in this Affirmation based upon a review of the file maintained by this office, all papers filed on the NYSCEF docket, and communications with Appellants.

3. Attached to this Affirmation as Ex. A is a true and correct copy of the Decision & Order on Motion of the Court dated June 26, 2020 (the “6/26/20 Decision & Order”) whereby Appellants’ appeal was dismissed “on the ground that no appeal lies from the denial of an application to sign an order to show cause.” (Ex. A). Pursuant to Appellate Division Rule 1250.16(d)(1), the Motions have been timely filed within thirty (30) days of the notice of entry of the 6/26/20 Decision & Order.

4. The questions of law that both: (i) set forth the points overlooked or misapprehended by this Court; and (ii) are sought to be reviewed by the Court of Appeals are as follows:

- (i) Did the Appellate Division, Fourth Department err in the decision in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) requiring that a motion for relief from judgment or order pursuant to CPLR

§5015(a) must be brought as an order to show cause instead of a motion?

- (ii) Did this Court err in dismissing Appellants' appeal because Appellants properly relied procedurally upon the Fourth Department's decision in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) and its progeny, Vin-Mike Enter. v. Grigg, 2015 N.Y. Misc. LEXIS 3153 (Suffolk Cty) (U), One W. Bank FSB v. Umanzor, 2018 N.Y. Misc. LEXIS 3473 (Suffolk Cty) (U), and Wells Fargo Bank N.A. v. Stuart, 2018 N.Y. Misc. LEXIS 3231 (Suffolk Cty), all of which having ruled that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of a motion?
- (iii) Did this Court err in dismissing Appellants' appeal because the Court's decisions in Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010) and Matter of Astoria Gas Turbine Power, LLC v. Tax Comm'n, 14 A.D.3d 553 (2nd Dept. 2005), and their interpretation of CPLR §5701, upon which the Court relied in dismissing Appellants' appeal (Ex. A), violate Appellants' due process rights under USCS Const. Amend. 14, Sec. 1 and NY CLS Const Art I, §1?

5. On February 13, 2020, Appellants filed a proposed Order to Show Cause (the "2/13/20 Proposed Order to Show Cause") requesting that the lower court order the appropriate noticed and interested parties to show why an Order should not be made and entered pursuant to CPLR §5015(a)(1): (i) vacating and setting aside the Decision and Order

entered in the lower court against the Appellants on or about March 15, 2019; (ii) restoring the action to the calendar; and (iii) for such other and further relief as the Court may deem just and proper. A true and correct copy of the proposed order to show cause is attached to this Affirmation as Ex. B (the “2/13/20 Proposed Order to Show Cause”).

6. The 2/13/20 Proposed Order to Show Cause provided arguments that the Appellants demonstrated both excusable default and a meritorious defense, thus meeting the standard, pursuant to CPLR § 5015(a)(1), for vacating the default order. Ex. B.

7. On March 10, 2020, the Honorable Larry D. Martin declined to sign the 2/13/20 Proposed Order to Show Cause by summarily stating, without more, that: “Movant failed to set forth reasonable excuse for the default.” A true and correct copy of the March 10, 2020 declined order to show cause is attached to this Affirmation as Ex. C (the “3/10/20 Order”).

8. On June 11, 2020, after the Notice of Entry was entered on May 12, 2020, Appellants filed and served the Notice of Appeal and supporting documentation (the “6/11/20 Notice of Appeal”) in the lower court. A true and correct copy of the 6/11/20 Notice of Appeal is attached hereto as Ex. D.

9. There is no definitive procedural guidance in the Second Department for vacating a default judgment by order to show cause, or by motion; however, there is definitive procedural guidance in the Fourth Department, which unequivocally requires that a default be vacated by order to show cause. Therefore, Appellants proceeded in the lower court via order to show cause. Although Appellants cited this Court’s decision in 210 E. 60 St. LLC v.

Rahman, 2019 App. Div. LEXIS 9062 (2nd Dept.) in support of Appellants' argument in support of the 2/13/20 Proposed Order to Show Cause (Ex. B), which affirmed the granting of a motion, and not an order to show cause, to vacate an order pursuant to CPLR §5015(a), this is not guidance, is anecdotal, and is mere dicta; accordingly, Appellants relied procedurally upon the Fourth Department's decision in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002), as well as its progeny in Vin-Mike Enter. v. Grigg, 2015 N.Y. Misc. LEXIS 3153 (Suffolk Cty) (U), One W. Bank FSB v. Umanzor, 2018 N.Y. Misc. LEXIS 3473 (Suffolk Cty) (U), and Wells Fargo Bank N.A. v. Stuart, 2018 N.Y. Misc. LEXIS 3231 (Suffolk Cty), when proceeding by order to show cause, for one simple reason: ***all of these courts unequivocally ruled that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause, and not by motion.***

10. Even so, this Court should provide uniform guidance to parties litigant on how to proceed when asking a lower court to vacate a default judgment, i.e., by order to show cause, or by motion. This is because, as the law currently stands, although initially relied procedurally upon by Appellants when filing the 2/13/20 Proposed Order to Show Cause, the Fourth Department's decision in Smith requiring a motion for relief from judgment or order pursuant to CPLR §5015(a) to be brought as an order to show cause instead of a motion is confusing and will lead to inconsistent results, for two (2) reasons. First, this Court, on numerous occasions including in 210 E. 60 St. LLC, supra, Ramirez v. Romualdo, 25 A.D.3d 680 (2nd Dept. 2006), and, most significantly, in Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010) – the very

precedent cited by this Court in dismissing Appellants' appeal (Ex. A) – either affirmed the granting of a ***motion***, and ***not an order to show cause***, to vacate an order pursuant to CPLR §5015(a) or, in the case of Khanal, reversed and remanded the lower court's denial of defendant's ***motion*** to vacate – ***again, not an order to show cause*** – pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) "public policy favors a determination of controversies on their merits." Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett v. McCarthy, 2 A.D.3d 623 (2nd Dept. 2003) and Eastern Resources Serv. v. Mountbatten Sur. Co., 289 A.D.2d 283, 284 (2nd Dept. 2001). Thus, the rulings focused on the merits of the grounds for the relief sought, not the procedural device that put the issue before the lower court, *i.e.*, by motion rather than by order to show cause, notwithstanding the Fourth Department's unequivocal requirement that applications for relief from judgment or order be brought by order to show cause. Here, the Appellate Division, as it did when addressing motions to vacate brought by notice of motion, should have similarly addressed the grounds for vacating the lower court's decision by evaluating the reasonableness of the excuse, and the existence of a meritorious defense, only one of which – the reasonableness of the excuse – having been addressed in the 3/10/20 Order, which was summarily rejected without any explanation, reasoning, or detail whatsoever by the lower court (Ex. C); and in this Court, those merits were not addressed because of the procedural device used. It can hardly be the intent of the legislature that a motion for relief from judgment or order is reviewable on appeal, while the same relief sought by order to show cause is not.

11. Second, contrary to the Fourth Department's ruling in Smith, there is absolutely no language in CPLR §5015(a) that expressly dictates that a §5015(a) application must be filed pursuant to an order to show cause. While the Smith court interpreted the language in CPLR §5015(a) that states that the application is to be brought "on motion of any interested person with such notice as the court may direct" as mandating that the motion must be brought by order to show cause and not by motion, not only do the words "order to show cause" appear nowhere within CPLR §5015 or in its Advisory Committee Notes, but also it is a fact that "rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven" that judges in New York *routinely* "direct" the alteration of filed **notices of motion** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice, (Kingbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13 (2nd Dept. 2009) citing Ptasznik v. Schultz, 247 A.D.2d 197 (2nd Dept. 1998); see also Caffrey v. North Arrow Abstract & Settlement Svrs., Inc., 160 A.D.3d 121 (2nd Dept. 2018) (ruling that "judicial notice may be taken by a court at any stage of the litigation, even on appeal"), and thus, those "routine directions" for relief sought by **notice of motion** constitute "such notice as the court may direct," within the meaning of CPLR §5015(a), rendering the distinction between relief sought by order to show cause versus motion on notice, at worst, irrelevant in that respect. At best, the distinction between seeking relief from judgment or order via order to show cause or via motion leads to confusion, and again, a result that the legislature likely did not intend, i.e., a motion for relief from judgment or order

being reviewable on appeal, and the same relief sought by order to show cause not being reviewable on appeal.

12. Further, even if the Fourth Department's decision in Smith was not erroneous, this Court erred in dismissing Appellants' appeal because Appellants properly relied procedurally upon Smith, supra, and its progeny, Vin-Mike Enter., supra, One W. Bank FSB, supra and Wells Fargo Bank N.A., supra, all of which having ruled that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause and not as a motion. In addition, as stated above, this Court having affirmed the granting of a motion, and not an order to show cause, to vacate an order pursuant to CPLR §5015(a) in Khanal, 210 E. 60 St. LLC and Ramirez, there is substantial precedent of New York courts choosing "substance over form" and allowing for an argument and ruling on the merits of a motion to vacate an order pursuant to CPLR §5015(a) despite any alleged "procedural defect" in the application having been brought as a motion and not as an order to show cause. See, e.g., Estate of Taylor v. Moreno, 294 A.D.2d 821 (4th Dept. 2002) (affirming the granting of a motion to vacate pursuant to CPLR §5015(a) due to demonstrating a reasonable excuse and meritorious defense to the action); Chase Home Fin., LLC v. McManus, 2018 N.Y. Misc. LEXIS 3867 (Suffolk Cty) (disregarding the "procedural irregularity" of the movant's §5015(a) application having been brought by motion and adhering "to the philosophy of substance over form" in order to address the application on its merits); One W. Bank FSB, supra (disregarding the movant's §5015(a) motion being "procedurally defective" and ruling on the merits); Delacruz v. Calderon-Castillo, 2017 N.Y.

Misc. LEXIS 5421 (Civ. Ct. Bronx Cty) (disregarding the movant's §5015(a) motion having a "jurisdictional defect" and electing to address the motion on the merits); HSBC Bank USA N.A. v. MacPherson, 2015 N.Y. Misc. LEXIS 4419 (Suffolk Cty) (disregarding the "procedural irregularity" of the movant's §5015(a) application having been brought by motion and choosing to address the application on its merits); Vin-Mike Enter., *supra* (disregarding the movant's §5015(a) motion having a "jurisdictional defect" and electing to address the motion on the merits); Eastern Sav. Bank, FSB v. Bowen, 967 N.Y.S.2d 866 (Kings Cty 2013) (disregarding the movant's §5015(a) motion having been the "wrong procedural vehicle" and electing to address the motion on the merits); Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett, *supra* and Eastern Resources Serv, *supra* ("public policy favors a determination of controversies on their merits").

13. Finally, this Court erred in dismissing Appellants' appeal because the Court's decisions in Khanal, *supra* and Matter of Astoria Gas Turbine Power, LLC, and their interpretation of CPLR §5701, upon which the Court relied in dismissing Appellants' appeal (Ex. A), violate Appellants' due process rights under USCS Const. Amend. 14, Sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law") and NY CLS Const Art I, §1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land") for two (2) reasons. First, the words "order to show cause" simply appear nowhere within CPLR §5017 nor in its Advisory Committee Notes as somehow not being entitled to an appeal as

of right, and the 3/10/20 Order (Ex. C) is not explicitly excepted from being appealable as a matter of right pursuant to CPLR §5017(b); that is to say, the 3/10/20 Order: (i) was not derived from an Article 78 proceeding; (ii) did not require or refuse to require a more definite statement in a pleading; or (iii) did not order or refuse to order that scandalous or prejudicial matter be stricken from a pleading. Therefore, the 3/10/20 Order should be appealable on its merits, and more broadly, any request for relief from judgment or order, whether brought by order to show cause, or by notice of motion.

14. Second, as a result of this Court's bald interpretation of CPLR §5017 in its rulings in Khanal and Matter of Astoria Gas Turbine Power, LLC, Appellants are being penalized for following, as ruled in significant precedent, what they were led to believe to be the appropriate procedural rules, and, in doing so, an injustice has been committed by this Court denying Appellants their rightful day in court in violation of their due process rights under USCS Const. Amend. 14, Sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law") and NY CLS Const Art I, §1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land"), as Appellants are being deprived of their property as described in the 2/13/20 Proposed Order to Show Cause (Ex. B) without due process of law. As stated above, Appellants relied upon Smith, supra, and its progeny, Vin-Mike Enter., supra, One W. Bank FSB, supra and Wells Fargo Bank N.A, supra, all of which having ruled that a

motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of a motion, in choosing to bring their CPLR §5015(a) application in the form of the 2/13/20 Proposed Order to Show Cause, which itself provided arguments that the Appellants had established both excusable default and a meritorious defense (Ex. B). Yet, by doing so, this Court, on its own motion, denied Appellants' appeal by relying upon this Court's bald interpretation of CPLR §5017 in its rulings in Khanal, *supra*, and Matter of Astoria Gas Turbine Power, LLC, *supra* (Ex. A). Had Appellants not followed what they believed to be the appropriate procedural rules pursuant to Smith and its progeny, and instead brought their CPLR §5015(a) application by motion, Appellants would more than likely have benefitted from the above-cited litany of precedent, including from rulings by this very Court (Khanal, *supra*; 210 E. 60 St. LLC, *supra*; Ramirez, *supra*), as it is likely this Court would have allowed the current appeal of the merits of the lower court's ruling in the 3/10/20 Order (Ex. C) to proceed. Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett, *supra* and Eastern Resources Serv, *supra* ("public policy favors a determination of controversies on their merits"). In short, the distinction between proceeding by order to show cause and by notice of motion, both seeking same relief, and one being appealable, and one not, is arbitrary and capricious, and deprives Appellants of due process pursuant to CPLR §5701(a)(1) ("An appeal may be taken to the appellate division as of right in an action, originating in the supreme court...from any final or interlocutory judgment...").

15. Should the answer to one or more of the questions presented in paragraph four (4) above be in the affirmative, Appellants respectfully request that

this Court either: (i) treat the 2/13/20 Proposed Order to Show Cause (Ex. B) as an appealable motion and allow Appellants to pursue this appeal on the merits; (ii) remand this matter to the Supreme Court and allow Appellants to re-file the 2/13/20 Proposed Order to Show Cause as a motion with an order to extend the time to timely file said motion; or (iii) grant Appellants leave for permission to appeal to the Court of Appeals pursuant to CPLR §5602(a).

WHEREFORE, due to the nature of this injustice and Appellants' procedural good faith, I request that the court grant me the following relief:

1. Reargument; or
2. Leave for Permission to Appeal to the Court of Appeals Pursuant to CPLR §5602(a); and
3. Such other and further relief as to the court may seem just and equitable.

Dated: July 24, 2020  
New York, New York

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*Attorney for Appellants  
Ignis Development Inc., Stanly  
NY Enterprises, Inc. and  
Stanislav Brodsky*

Appendix N

[LETTERHEAD]  
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November 16, 2020

**VIA ELECTRONIC PORTAL**

Hon. John P. Asiello  
Clerk of the Court  
New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207

**Re: Ignis Development, Inc. v. The Long  
Island College Hospital, et al.  
Index No. APL-2020-00160  
Jurisdictional Response**

Dear Mr. Asiello:

I represent Plaintiff/Appellant Ignis Development Inc. (“Ignis”), Third-Party Defendant/Appellant Stanly NY Enterprises, Inc. (“Stanly”) and Third-Party Defendant/Appellant Stanislav Brodsky (“Brodsky,” and collectively with Ignis and Stanly, the “Appellants”) in the above-referenced matter.

**SUMMARY**

This concerns an appeal as of right under CPLR §5601(b)(1) because the Appellants are appealing to

the Court of Appeals “from an order of the appellate division which finally determine[d] an action where there is directly involved the construction of the constitution of the state or of the United States.” At issue is the construction of two statutes in the CPLR, namely 5015 and 5701, which create an “illegal and irrebuttable presumption” and contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and thus those statutes, “as applied” to Appellants, violate the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution, for at least two main reasons.

First, CPLR §5015, “as applied” to Appellants, violates the United States Constitution because it is so vague as to the method by which a party litigant is to proceed when requesting a lower court to vacate an order or judgment, namely by order to show cause or by notice of motion. In the court below, Appellants proceeded with their vacatur request via order to show cause, which was both denied with a one-sentence explanation, and then summarily denied appellate review.

Second, CPLR §5701, “as applied” to Appellants, violates the United States Constitution because Appellants were stripped of their right to appeal apparently because they proceeded with their vacatur request via order to show cause as opposed to notice of motion, when the guidance in the lower courts is unclear, yet the appellate division has proceeded with reviewing requests for appellate review for vacatur requests made via notice of motion, and heavily focus on the form rather than the substance. This at the very least violates the United States Constitution on an “as-applied” basis, not least because the Appellants were treated differently than other

similarly situated (if not materially identically situated) litigants.

To establish jurisdiction in this Court, Appellants rely upon the United States Supreme Court's decision in Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the First Department's decision in Amazon.com, LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 204-207 (1st Dept. 2010) and Appellants' argument in their Motion for Reargument Or, In The Alternative, For Leave to Appeal to the Court of Appeals (the "Motion for Rerargument") submitted after the Second Department issued an Order on June 26, 2020 (the "6/26/20 Decision & Order") whereby Appellants' appeal was, *sua sponte*, summarily dismissed without any briefing having taken place "on the ground that no appeal lies from the denial of an application to sign an order to show cause" citing Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010), Matter of Astoria Gas Turbine Power, LLC v. Tax Comm'n, 14 A.D.3d 553 (2nd Dept. 2005) and CPLR §5701. Both the 6/26/20 Decision & Order together with the Fourth Department's ruling in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) collectively establish both Appellants' valid "as-applied" due process challenge and valid "as-applied" equal protection claims resulting from their rights under USCS Const. Amend. 14, Sec. 1 having been violated. Therefore, the New York Court of Appeals has jurisdiction over this case.

### **PROCEDURAL HISTORY**

On March 15, 2019, in the Supreme Court of New York, County of Kings (the "Lower Court"), the Honorable Larry D. Martin entered a final order against Appellants (the "3/15/19 Final Order"): (i)

dismissing Ignis's claims in their entirety; and (ii) granting summary judgment against Stanly and Brodsky (a true and correct copy of the 3/15/19 Order is attached as Ex. A).

On February 13, 2020, in the Lower Court, Appellants filed a proposed Order to Show Cause (the "2/13/20 Proposed Order to Show Cause") requesting that Judge Martin order the appropriate noticed and interested parties to show why an Order should not be made and entered pursuant to CPLR §5015(a)(1): (i) vacating and setting aside the 3/15/19 Final Order; (ii) restoring the action to the calendar; and (iii) for such other and further relief as the Court may deem just and proper (a true and correct copy of the 2/13/20 Proposed Order to Show Cause, Affirmation in Support without exhibits and Affidavit in Support is attached as Ex. B).

The 2/13/20 Proposed Order to Show Cause provided a legal argument, as would have been provided verbatim had Appellants moved for a vacatur of the 3/15/19 Final Order by notice of motion and not by order to show cause, that the Appellants demonstrated both excusable default and a meritorious defense, thus meeting the standard, pursuant to CPLR § 5015(a)(1), for vacating the 3/15/19 Final Order (Ex. B).

On March 10, 2020, in the Lower Court, Judge Martin issued an Order (the "3/10/20 Order") declining to sign the 2/13/20 Proposed Order to Show Cause by summarily stating, without any explanation, that: "Movant failed to set forth reasonable excuse for the default" (a true and correct copy of the 3/10/20 Order is attached as Ex. C).

On June 26, 2020, after Appellants timely filed their Notice of Appeal of the 3/10/20 Order, the Second

Department the 6/26/20 Decision & Order whereby, as stated above, Appellants' appeal was summarily dismissed "on the ground that no appeal lies from the denial of an application to sign an order to show cause," citing Khanal, *supra*, Matter of Astoria Gas Turbine Power, LLC, *supra* and CPLR §5701 (a true and correct copy of the 6/26/20 Decision & Order is attached as Ex. D).

On September 14, 2020, after Appellants timely filed the Motion for Reargument (a true and correct copy of the Affirmation in Support of the Motion for Reargument without exhibits is attached as Ex. E), the Second Department issued an Order (the "9/14/20 Decision & Order") denying the Motion for Reargument (a true and correct copy of the 9/14/20 Decision & Order is attached as Ex. F).

### **JURISDICTIONAL RESPONSE**

CPLR §5601(b)(1) allows appeals to the Court of Appeals as of right "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States."

CPLR §5015(a) states that a party may be relieved from the terms of a judgment or order by reason of excusable default "on motion of any interested person with such notice as the court may direct."

CPLR §5701, which applies to matters that are appealable as of right to the appellate division, does not state that an application for an order to show cause is not appealable to the appellate division as of right.

USCS Const. Amend. 14, Sec. 1 (the "Fourteenth Amendment") states that "No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

A party may raise an "as-applied" due process challenge when the statute violates the party's Fourteenth Amendment rights as being both "irrational and irrebuttable" as applied specifically to the party (Amazon.com, LLC, *supra*, 81 A.D.3d at 204-205), when a statute: (i) creates an "illegal and irrebuttable presumption"; or (ii) contains language that is so vague that a party cannot ascertain their obligations under the statute.

Further, the United States Supreme Court has recognized that successful "as-applied" equal protection claims that violate a party's Fourteenth Amendment rights "may be brought by a class of one where the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" and that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook, *supra*, 528 U.S. at 564; Amazon.com, LLC, *supra*, 81 A.D.3d at 205-206.

Here, in this case, there is no definitive procedural guidance in the Second Department for vacating a final judgment or order pursuant to CPLR §5015(a) by either order to show cause or by motion; however, there is definitive procedural guidance in the Fourth Department, which unequivocally requires that a party must move by order to show cause for the

vacatur of a final judgment or order pursuant to CPLR §5015(a). Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) (requiring that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of by notice of motion); see also Vin-Mike Enter. v. Grigg, 2015 N.Y. Misc. LEXIS 3153 (Suffolk Cty) (U); One W. Bank FSB v. Umanzor, 2018 N.Y. Misc. LEXIS 3473 (Suffolk Cty) (U); and Wells Fargo Bank N.A. v. Stuart, 2018 N.Y. Misc. LEXIS 3231 (Suffolk Cty).

The Fourth Department, in its ruling in Smith, interpreted the procedural requirement of an application to vacate a final judgment or order under CPLR §5015(a) as follows: “CPLR 5015(a) provides that such a motion shall be brought ‘with such notice as the court may direct.’ Thus, the motion should have been brought on by order to show cause. Plaintiff’s motion was not brought on pursuant to notice directed by the court and thus jurisdiction over defendant was not obtained.” Smith, supra, 291 A.D.2d at 828.

In reliance upon the Fourth Department’s ruling in Smith and its progeny, Appellants moved to vacate the 3/15/19 Final Order in the Lower Court via the 2/13/20 Proposed Order to Show Cause and not by notice of motion.

As stated above, on June 26, 2020, the Second Department issued the 6/26/20 Decision & Order whereby Appellants’ appeal was summarily dismissed “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing the Second Department’s decisions in Khanal, supra, Matter of Astoria Gas Turbine Power, LLC, and CPLR §5701 (Ex. D).

However, Appellants, in the Motion for Reargument, argued four (4) reasons as to why their requested relief should have been granted (Ex. E). First, the words “order to show cause” simply do not appear anywhere within CPLR §5701 (cited by the Second Department in support of the 6/26/20 Decision & Order – Ex. D) nor in its Advisory Committee Notes as somehow not being entitled to an appeal as of right, and the 3/10/20 Order (Ex. C) is not explicitly excepted from being appealable as a matter of right pursuant to CPLR §5701(b), in that the 3/10/20 Order: (a) was not derived from an Article 78 proceeding; (b) did not require or refuse to require a more definite statement in a pleading; or (c) did not order or refuse to order that scandalous or prejudicial matter be stricken from a pleading;

Second, contrary to the Fourth Department’s ruling in Smith, there is absolutely no language in CPLR §5015(a) that expressly dictates that a §5015(a) application must be filed pursuant to an order to show cause, as not only do the words “order to show cause” do not appear anywhere within CPLR §5015 or in its Advisory Committee Notes, but also it is a fact that “rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven” that judges in New York *routinely* “direct” the alteration of filed ***notices of motion*** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice [Kingbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13 (2nd Dept. 2009) citing Ptasznik v. Schultz, 247 A.D.2d 197 (2nd Dept. 1998); see also Caffrey v. North Arrow Abstract & Settlement Svrs., Inc., 160 A.D.3d 121 (2nd Dept. 2018) (ruling that “judicial notice may be taken by a court at any stage of the litigation, even on appeal”)],

and thus, those “routine directions” for relief sought by ***notice of motion*** constitute “such notice as the court may direct,” within the meaning of CPLR §5015(a), rendering the distinction between relief sought by order to show cause versus motion on notice, at worst, irrelevant in that respect.

Third, the Second Department itself on numerous occasions including in 210 E. 60 St. LLC v. Rahman, 2019 App. Div. LEXIS 9062 (2nd Dept.), Ramirez v. Romualdo, 25 A.D.3d 680 (2nd Dept. 2006), and, most significantly, in Khanal, *supra* – the ***very precedent*** cited by the Second Department in the 6/26/20 Decision & Order (Ex. D) – either affirmed the granting of a ***motion***, and ***not an order to show cause***, to vacate an order pursuant to CPLR §5015(a) or, in the case of Khanal, reversed and remanded the lower court’s denial of defendant’s ***motion*** to vacate – ***again, not an order to show cause*** – pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) “public policy favors a determination of controversies on their merits.” Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett v. McCarthy, 2 A.D.3d 623 (2nd Dept. 2003) and Eastern Resources Serv. v. Mountbatten Sur. Co., 289 A.D.2d 283, 284 (2nd Dept. 2001).

Fourth, there is substantial precedent for “substance over form” with respect to an application for vacatur under CPLR §5015(a) [Estate of Taylor v. Moreno, 294 A.D.2d 821 (4th Dept. 2002) (affirming the granting of a motion to vacate pursuant to CPLR §5015(a) due to demonstrating a reasonable excuse and meritorious defense to the action); Chase Home Fin., LLC v. McManus, 2018 N.Y. Misc. LEXIS 3867 (Suffolk Cty) (disregarding the “procedural irregularity” of the movant’s §5015(a) application

having been brought by motion and adhering “to the philosophy of substance over form” in order to address the application on its merits); One W. Bank FSB, *supra* (disregarding the movant’s §5015(a) motion being “procedurally defective” and ruling on the merits); Delacruz v. Calderon-Castillo, 2017 N.Y. Misc. LEXIS 5421 (Civ. Ct. Bronx Cty) (disregarding the movant’s §5015(a) motion having a “jurisdictional defect” and electing to address the motion on the merits); HSBC Bank USA N.A. v. MacPherson, 2015 N.Y. Misc. LEXIS 4419 (Suffolk Cty) (disregarding the “procedural irregularity” of the movant’s §5015(a) application having been brought by motion and choosing to address the application on its merits); Vin-Mike Enter., *supra* (disregarding the movant’s §5015(a) motion having a “jurisdictional defect” and electing to address the motion on the merits); Eastern Sav. Bank, FSB v. Bowen, 967 N.Y.S.2d 866 (Kings Cty 2013) (disregarding the movant’s §5015(a) motion having been the “wrong procedural vehicle” and electing to address the motion on the merits); Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett, *supra* and Eastern Resources Serv, *supra* (“public policy favors a determination of controversies on their merits”)].

In sum, when taken together, because:

- (i) contrary to the Second Department’s reliance upon CPLR §5701 in the 6/26/20 Decision & Order (Ex. D), the words “order to show cause” simply do not appear within the text or Advisory Committee Notes of CPLR §5701 that would somehow give rise to the Fourth Department’s ruling in Smith and its progeny that an application for an order to show cause is not appealable as of right,

- (ii) contrary to the Fourth Department's ruling in Smith, CPLR §5015(a) does not expressly dictate that a §5015(a) application must be filed pursuant to an order to show cause, and, in fact, judges in New York *routinely* "direct" the alteration of filed **notices of motion** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice;
- (iii) the Second Department refused to address the argument by Appellants that they proved the existence of an excusable default under CPLR §5015(a) in the 2/13/20 Proposed Order to Show Cause (Ex. B) despite the Second Department having previously chosen to address motions to vacate based on excusable default under CPLR §5015(a) brought by notice of motion on their merits, including in Khanal, *supra*, the very citation relied upon by the Second Department in the 6/26/20 Decision & Order that summarily dismissed Appellants' appeal (Ex. D); and
- (iv) there is substantial precedent for "substance over form" with respect to an application for vacatur under CPLR 5015(a);

Appellants have established that jurisdiction lies in this Court, as both CPLR 5701 and CPLR 5015(a) have created an "illegal and irrebuttable presumption" and contain language that is "so vague" that Appellants "cannot ascertain their obligations under the statutes," specifically whether to request vacatur of a final order or judgment via order to show cause or notice of motion, or whether the denial of an application for an order to show cause concerning vacatur of a final order

or judgment is appealable as of right. This, by itself, results in Appellants having a valid “as-applied” due process challenge because they have properly raised the threshold Constitutional issue that the statutes, “as applied” to Appellants, violate their Fourteenth Amendment rights as being both “irrational and irrebuttable” as applied specifically to Appellants (Amazon.com, LLC, *supra*, 81 A.D.3d at 204-205). Furthermore, Appellants, having been “intentionally treated differently from others similarly situated” despite there being “no rational basis for the difference in treatment” when the Second Department issued the 6/26/20 Decision & Order (Ex. D), have a valid “as-applied” equal protection claim in that their Fourteenth Amendment rights were violated despite “the purpose of the equal protection clause of the Fourteenth Amendment (being) to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Village of Willowbrook, *supra*, 528 U.S. at 564; Amazon.com, LLC, *supra*, 81 A.D.3d at 205-206.

Therefore, the Appellants respectfully request that the Court of Appeals accept this matter as an appeal of right under CPLR §5601(b)(1), which allows appeals to the Court of Appeals as of right “from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.”

Very truly yours,  
Jason R. Mischel

cc: David A. Pellegrino, Esq.  
John Ciurcina, Esq.

Appendix O

**STATE OF NEW YORK  
COURT OF APPEALS**

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**IGNIS DEVELOPMENT INC.**, Plaintiff/Appellant,

—v.—

**LONG ISLAND COLLEGE HOSPITAL**, Defendant/  
Third-Party Plaintiff/Respondent, **ROYAL FARMS,  
INC.**, Defendant/Respondent, et al., Defendants;  
**STANLY NY ENTERPRISES, INC.**, et al., Third-  
Party Defendants/Appellants

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(Index No. 505638/2015)  
Appellate Division  
Index No. 2020-04606

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**ATTORNEY AFFIRMATION OF  
JASON R. MISCHEL, ESQ. IN SUPPORT OF  
MOTION FOR PERMISSION TO APPEAL  
PURSUANT TO CPLR 5602(a)(1)(ii)**

I, Jason R. Mischel, Esq., an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled case, affirm the following to be true under the penalties of perjury pursuant to CPLR §2106:

1. I am an attorney with DCL Firm (DeCristofaro Law), attorneys for Appellants Ignis Development Inc. (“Ignis”), Stanly NY Enterprises, Inc. (“Stanly NY”) and Stanislav Brodsky (“Brodsky,” and

collectively with Ignis and Stanly NY, the “Appellants”) and I make this Affirmation in Support of Appellants’ Motion for Leave for Permission to Appeal to the Court of Appeals Pursuant to CPLR §5602(a)(1)(ii); and for such other and further relief as the Court may seem just and equitable.

2. I am fully familiar with the facts and circumstances set forth in this Affirmation based upon a review of the file maintained by this office; all papers filed on the NYSCEF docket, Appellate Division and Court of Appeals; and communications with Appellants.

#### **PRELIMINARY STATEMENT**

3. Appellants move for permission to appeal to this Court pursuant to CPLR §5602(a)(1)(ii), as it is an appeal “in an action originating in the supreme court . . . from a final judgment of such court . . . where the Appellate Division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and . . . the final . . . determination . . . is not appealable as of right” pursuant to CPLR §5601(d). At issue in this appeal is a conflict among the departments of the Appellate Division that has raised an additional issue of public importance with respect to the construction of two statutes in the CPLR, namely 5015 and 5701, which, as a result of the conflict among the departments of the Appellate Division, have led to their creation of an “illegal and irrebuttable presumption” and contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and thus those statutes, “as applied” to Appellants, violate the due process and equal protection

provisions of the Fourteenth Amendment of the United States Constitution.

4. At issue in this appeal is what exactly is the proper procedure when moving for the vacatur of an order pursuant to CPLR §5015(a)(1). The Fourth Department has interpreted CPLR §5015(a)(1) to mean that the procedure must be via a non-appealable ***order to show cause***, as opposed to proceeding via an appealable ***notice of motion***, while the Second Department has repeatedly ruled on the merits of matters where a party had moved for the vacatur of an order pursuant to CPLR §5015(a)(1) by an appealable notice of motion despite choosing not to do so in this matter. Appellants' reliance on the Fourth Department's procedural interpretation of CPLR §5015(a)(1), combined with the Second Department's inconsistent procedures have led to inconsistent results, confusion among the profession, and most of all, as previously stated, a violation of the due process and equal protection rights of the aggrieved parties in this matter, which are sacred and inalienable, as provided in the United States Constitution. If and to the extent that the Court determines that proceeding by notice of motion is the proper procedure for vacating a default, the Appellants respectfully request that this Court do what the Second Department unfairly and unjustly failed to do, which is to grant Appellants immediate appellate review of the merits of Appellants' denied order to show cause made pursuant to CPLR §5015(a)(1).

#### **PROCEDURAL HISTORY**

5. On March 12, 2019, in the Supreme Court of New York, County of Kings (the "Lower Court"), the

Honorable Larry D. Martin issued an order (the “3/12/19 Order”): (i) dismissing Ignis’s claims in their entirety; and (ii) granting summary judgment against Stanly and Brodsky. A true and correct copy of the 3/12/19 Order is to this Affirmation attached as Ex. A.

6. On February 13, 2020, in the Lower Court, Appellants filed a proposed Order to Show Cause (attached to this Affirmation, with supporting papers, as Ex. B, the “2/13/20 Proposed Order to Show Cause”) requesting that Judge Martin order the appropriate noticed and interested parties to show why an Order should not be made and entered pursuant to CPLR §5015(a)(1): (i) vacating and setting aside the 3/12/19 Order; (ii) restoring the action to the calendar; and (iii) for such other and further relief as the Court may deem just and proper.

7. The 2/13/20 Proposed Order to Show Cause contained a well-reasoned, well-cited, and compelling legal argument, in the form of an ***order to show cause***. This is the same, well-reasoned, and well-cited legal argument that, in a ***notice of motion*** as opposed to **order to show cause**, would have been provided verbatim had Appellants ignored Fourth Department precedent and instead moved – ***by notice of motion*** – for a vacatur of the 3/12/19 Order, and not ***by order to show cause***. Indeed, Appellants demonstrated both excusable default and a meritorious defense, thus meeting the standard, pursuant to CPLR § 5015(a)(1), for vacating the 3/12/19 Order (Ex. B).

8. On March 10, 2020, in the Lower Court, Judge Martin issued an Order (the “3/10/20 Order”) declining to sign the 2/13/20 Proposed Order to Show Cause by summarily stating, without any

explanation, and incorrectly, that: “Movant failed to set forth reasonable excuse for the default.” A true and correct copy of the 3/10/20 Order is attached to this Affirmation as Ex. C.

9. On May 12, 2020, Appellants were served with the notice of entry (“the 5/12/20 Notice of Entry”) of the 3/10/20 Order. A true and correct copy of the 5/12/20 Notice of Entry is attached to this Affirmation as Ex. D.

10. On June 11, 2020, Appellants timely filed and served their Notice of Appeal (the “6/11/20 Notice of Appeal”) of the 3/10/20 Order. A true and correct copy of the 6/11/20 Notice of Appeal is attached as Ex. E.

11. On June 26, 2020, the Second Department issued a decision and order (the “6/26/20 Decision and Order”) summarily dismissing the appeal, *sua sponte*, “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010), Matter of Astoria Gas Turbine Power, LLC v. Tax Comm'n, 14 A.D.3d 553 (2nd Dept. 2005) and CPLR §5701. A true and correct copy of the 6/26/20 Decision and Order is attached to this Affirmation as Ex. F.

12. On July 24, 2020, Appellants timely filed and served their motion for reargument and leave for permission to appeal to the Court of Appeals (the “7/24/20 Motion for Reargument and Leave for Permission to Appeal to the COA”) by email to the Appellate Division Second Department Clerk (the “7/24/20 Email”) and overnight delivery. A true and correct copy of the 7/24/20 Email and 7/24/20 Motion for Reargument and Leave for Permission to Appeal to the COA is attached to this Affirmation as Ex. G.

13. On September 14, 2020, the Appellate Division Second Department served on Appellants an Order (the “9/14/20 Decision & Order”) denying the Motion for Reargument and Leave for Permission to Appeal to the COA. A true and correct copy of the 9/14/20 Decision & Order is attached to this Affirmation as Ex. H.

14. After Appellants timely filed their notice of appeal to the Court of Appeals on October 8, 2020 (the “10/8/20 Notice of Appeal”), on October 13, 2020 the Appellate Division Second Department confirmed by email (the “10/13/20 Email”) its reception of the 10/8/20 Notice of Appeal and attached its cover letter to the Court of Appeals (the “10/13/20 Letter”). A true and correct copy of the 10/8/20 Notice of Appeal, 10/13/20 Email and 10/13/20 Letter is attached to this Affirmation as Ex. I.

15. On November 16, 2020, Appellants timely filed its jurisdictional response (the “11/16/20 Jurisdictional Response”) with the Court of Appeals, as confirmed by email from the Court of Appeals the same date (the “11/16/20 Email”). A true and correct copy of the 11/16/20 Email and 11/16/20 Jurisdictional Response is attached to this Affirmation as Ex. J.

16. On December 15, 2020, the Court of Appeals dismissed Appellants’ appeal (the “12/15/20 Appeal Dismissal”) *sua sponte* “upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.” A true and correct copy of the 12/15/20 Appeal Dismissal is attached to this Affirmation as Ex. K.

17. On February 23, 2021, the Lower Court filed a final decision and order (the “2/23/21 Final Decision and Order”) that: (i) explicitly states that “on March

12, 2019, the Court issued [the 3/12/19 Order] granting . . . summary judgment against [Stanly NY] and [Brodsky]; and (ii) directs the clerk to enter judgment. A true and correct copy of the 2/23/21 Final Decision and Order is attached to this Affirmation as Ex. L.

18. On March 1, 2021, Appellants were served a notice of entry (the “3/1/21 Notice of Entry”) of the 2/23/21 Final Decision and Order. A true and copy of the 3/1/21 Notice of Entry is attached to this Affirmation as Ex. M.

19. On March 2, 2021, Appellants timely filed and served their notice of appeal (the “3/2/21 Notice of Appeal”) of the 3/1/21 Final Decision and Order. A true and correct copy of the 3/2/21 Notice of Appeal is attached to this Affirmation as Ex. N.

### **JURISDICTION**

20. Pursuant to CPLR §5602(a)(1)(ii), the Court of Appeals has jurisdiction over Appellants’ appeal of the 2/23/21 Final Decision and Order as it is an appeal “in an action originating in the supreme court . . . from a final judgment of such court . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and the final . . . determination . . . is not appealable as of right” pursuant to CPLR §5601(d).

21. In this matter, the Appellate Division’s previous orders that “necessarily affect the final determination” are the 6/26/20 Decision and Order (Ex. F) and, because it represented Appellants’ first chance to brief an argument to the Appellate Division, the 9/14/20 Decision and Order (Ex. H).

### **STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW**

22. The questions of law that are sought for Court of Appeal review, which includes a question regarding a conflict among the departments of the Appellate Division, are as follows:

- (i) Did the Appellate Division, Fourth Department err in the decision in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) requiring that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of a motion in light of:
  - a) the statutory construction of CPLR §5015(a) and CPLR §5017;
  - b) judges in New York *routinely* “directing” the alteration of filed ***notices of motion*** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice; and
  - c) the Second Department’s choosing to follow its own precedent for “substance over form” with respect to an application for vacatur under CPLR §5015(a) and substantively rule on motions for relief from judgment or order pursuant to CPLR §5015(a) brought by motion and not by order to show cause in numerous instances including in 210 E. 60 St. LLC v. Rahman, 2019 App. Div. LEXIS 9062 (2nd Dept.), Ramirez v. Romualdo, 25 A.D.3d 680 (2nd Dept. 2006) and, most significantly, Khanal, *supra*?

- (ii) Did the Appellate Division, Second Department err in summarily dismissing Appellants' appeal *sua sponte* because, despite Appellants' proper procedural reliance upon the Fourth Department's decision in Smith v. Smith, 291 A.D.2d 828 (4th Dept. 2002) and its progeny, Vin-Mike Enter. v. Grigg, 2015 N.Y. Misc. LEXIS 3153 (Suffolk Cty) (U), One W. Bank FSB v. Umanzor, 2018 N.Y. Misc. LEXIS 3473 (Suffolk Cty) (U), and Wells Fargo Bank N.A. v. Stuart, 2018 N.Y. Misc. LEXIS 3231 (Suffolk Cty), all of which having ruled that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of a motion, the Second Department ignored its own precedent for "substance over form" with respect to an application for vacatur under CPLR §5015(a)?
- (iii) Did the Appellate Division, Second Department err in summarily dismissing Appellants' appeal *sua sponte* because the Second Department's decisions in Khanal, supra and Matter of Astoria Gas Turbine Power, LLC v. Tax Comm'n, 14 A.D.3d 553 (2nd Dept. 2005), and their interpretation of CPLR §5701, upon which the Court relied in dismissing Appellants' appeal in the 6/26/20 Decision and Order (Ex. F), violate Appellants' due process rights under USCS Const. Amend. 14, Sec. 1?

**ARGUMENT****THE SECOND DEPARTMENT ERRED  
IN DISMISSING APPELLANTS' APPEAL**

23. CPLR §5602(a)(1)(ii) states that the Court of Appeals has jurisdiction over Appellants' appeal of the 2/23/21 Final Decision and Order as it is an appeal "in an action originating in the supreme court . . . from a final judgment of such court . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and the final . . . determination . . . is not appealable as of right" pursuant to CPLR §5601(d).

24. CPLR §5015(a) states that a party may be relieved from the terms of a judgment or order by reason of excusable default "on motion of any interested person with such notice as the court may direct."

25. CPLR §5701, which applies to matters that are appealable as of right to the Appellate Division, does not state that an application for an order to show cause is not appealable to the Appellate Division as of right.

26. USCS Const. Amend. 14, Sec. 1 (the "Fourteenth Amendment") states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

27. A party may raise an "as-applied" due process challenge when the statute violates the party's Fourteenth Amendment rights as being both "irrational and irrebuttable" as applied specifically to

the party, when a statute: (i) creates an “illegal and irrebuttable presumption”; or (ii) contains language that is so vague that a party cannot ascertain their obligations under the statute. Amazon.com, LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 204-205 (1st Dept. 2010).

28. Further, the United States Supreme Court has recognized that successful “as-applied” equal protection claims that violate a party’s Fourteenth Amendment rights “may be brought by a class of one where the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment” and that “the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Amazon.com, LLC, supra, 81 A.D.3d at 205-206.

29. Here, in this case, there is no definitive procedural guidance in the Second Department for vacating a final judgment or order pursuant to CPLR §5015(a) by either order to show cause or by motion; however, there is definitive procedural guidance in the Fourth Department, which unequivocally requires that a party must move by order to show cause for the vacatur of a final judgment or order pursuant to CPLR §5015(a). Smith, supra (requiring that a motion for relief from judgment or order pursuant to CPLR §5015(a) must be brought as an order to show cause instead of by notice of motion); see also Vin-Mike Enter. v. Grigg, 2015 N.Y. Misc. LEXIS 3153 (Suffolk Cty) (U); One W. Bank FSB v.

Umanzor, 2018 N.Y. Misc. LEXIS 3473 (Suffolk Cty) (U); and Wells Fargo Bank N.A. v. Stuart, 2018 N.Y. Misc. LEXIS 3231 (Suffolk Cty).

30. The Fourth Department, in its ruling in Smith, interpreted the procedural requirement of an application to vacate a final judgment or order under CPLR §5015(a) as follows: “CPLR 5015(a) provides that such a motion shall be brought ‘with such notice as the court may direct.’ Thus, the motion should have been brought on by order to show cause. Plaintiff’s motion was not brought on pursuant to notice directed by the court and thus jurisdiction over defendant was not obtained.” Smith, *supra*, 291 A.D.2d at 828.

31. In reliance upon the Fourth Department’s ruling in Smith and its progeny, Appellants moved to vacate the 3/12/19 Order (Ex. A) in the Lower Court via the 2/13/20 Proposed Order to Show Cause (Ex. B) and not by notice of motion.

32. As stated above, on June 26, 2020, the Second Department issued the 6/26/20 Decision and Order whereby Appellants’ appeal was summarily dismissed “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing the Second Department’s decisions in Khanal, *supra*, Matter of Astoria Gas Turbine Power, LLC, *supra* and CPLR §5701 (Ex. F).

33. However, Appellants, in the 7/24/20 Motion for Reargument and Leave for Permission to Appeal to the COA, argued four (4) reasons as to why their requested relief should have been granted (Ex. G). First, the words “order to show cause” simply do not appear anywhere within CPLR §5701 (cited by the Second Department in support of the 6/26/20 Decision and Order – Ex. F) nor in its Advisory Committee

Notes as somehow not being entitled to an appeal as of right, and the 3/10/20 Order (Ex. C) is not explicitly excepted from being appealable as a matter of right pursuant to CPLR §5701(b), in that the 3/10/20 Order: (a) was not derived from an Article 78 proceeding; (b) did not require or refuse to require a more definite statement in a pleading; or (c) did not order or refuse to order that scandalous or prejudicial matter be stricken from a pleading.

34. Second, contrary to the Fourth Department's ruling in Smith, there is absolutely no language in CPLR §5015(a) that expressly dictates that a §5015(a) application must be filed pursuant to an order to show cause, as not only do the words "order to show cause" do not appear anywhere within CPLR §5015 or in its Advisory Committee Notes, but also it is a fact that "rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven" that judges in New York *routinely* "direct" the alteration of filed ***notices of motion*** to reflect new return dates, court locations and methods of service to which this Court should take judicial notice [Kingbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13 (2nd Dept. 2009) citing Ptasznik v. Schultz, 247 A.D.2d 197 (2nd Dept. 1998); see also Caffrey v. North Arrow Abstract & Settlement Svrs., Inc., 160 A.D.3d 121 (2nd Dept. 2018) (ruling that "judicial notice may be taken by a court at any stage of the litigation, even on appeal")], and thus, those "routine directions" for relief sought by ***notice of motion*** constitute "such notice as the court may direct," within the meaning of CPLR §5015(a), rendering the distinction between relief sought by order to show cause versus motion on notice, at worst, irrelevant in that respect.

35. Third, the Second Department itself on numerous occasions including in 210 E. 60 St. LLC, supra, Ramirez, supra, and, most significantly, in Khanal, supra – the ***very precedent*** cited by the Second Department in the 6/26/20 Decision and Order (Ex. F) – either affirmed the granting of a ***motion***, and ***not an order to show cause***, to vacate an order pursuant to CPLR §5015(a) or, in the case of Khanal, reversed and remanded the lower court's denial of defendant's ***motion*** to vacate – ***again, not an order to show cause*** – pursuant to CPLR §5015(a) because: (i) the defendant demonstrated both a reasonable excuse and meritorious defense, and (ii) “public policy favors a determination of controversies on their merits.” Khanal, supra, 74 A.D.3d at 896, citing Scarlett v. McCarthy, 2 A.D.3d 623 (2nd Dept. 2003) and Eastern Resources Serv. v. Mountbatten Sur. Co., 289 A.D.2d 283, 284 (2nd Dept. 2001).

36. Fourth, there is substantial precedent for “substance over form” with respect to an application for vacatur under CPLR §5015(a) [Estate of Taylor v. Moreno, 294 A.D.2d 821 (4th Dept. 2002) (affirming the granting of a motion to vacate pursuant to CPLR §5015(a) due to demonstrating a reasonable excuse and meritorious defense to the action); Chase Home Fin., LLC v. McManus, 2018 N.Y. Misc. LEXIS 3867 (Suffolk Cty) (disregarding the “procedural irregularity” of the movant's §5015(a) application having been brought by motion and adhering “to the philosophy of substance over form” in order to address the application on its merits); One W. Bank FSB, supra (disregarding the movant's §5015(a) motion being “procedurally defective” and ruling on the merits); Delacruz v. Calderon-Castillo, 2017 N.Y. Misc. LEXIS 5421 (Civ. Ct. Bronx Cty) (disregarding

the movant's §5015(a) motion having a "jurisdictional defect" and electing to address the motion on the merits); HSBC Bank USA N.A. v. MacPherson, 2015 N.Y. Misc. LEXIS 4419 (Suffolk Cty) (disregarding the "procedural irregularity" of the movant's §5015(a) application having been brought by motion and choosing to address the application on its merits); Vin-Mike Enter., *supra* (disregarding the movant's §5015(a) motion having a "jurisdictional defect" and electing to address the motion on the merits); Eastern Sav. Bank, FSB v. Bowen, 967 N.Y.S.2d 866 (Kings Cty 2013) (disregarding the movant's §5015(a) motion having been the "wrong procedural vehicle" and electing to address the motion on the merits); Khanal, *supra*, 74 A.D.3d at 896, citing Scarlett, *supra* and Eastern Resources Serv, *supra* ("public policy favors a determination of controversies on their merits")].

37. In sum, when taken together, because:

- (i) contrary to the Second Department's reliance upon CPLR §5701 in the 6/26/20 Decision and Order (Ex. F), the words "order to show cause" simply do not appear within the text or Advisory Committee Notes of CPLR §5701 that would somehow give rise to the Fourth Department's ruling in Smith and its progeny that an application for an order to show cause is not appealable as of right;
- (ii) contrary to the Fourth Department's ruling in Smith, CPLR §5015(a) does not expressly dictate that a §5015(a) application must be filed pursuant to an order to show cause, and, in fact, judges in New York *routinely* "direct" the alteration of filed ***notices of motion*** to reflect new return dates, court

locations and methods of service to which this Court should take judicial notice; and

- (iii) the Second Department refused to address the argument by Appellants that they proved the existence of an excusable default under CPLR §5015(a) in the 2/13/20 Proposed Order to Show Cause (Ex. B) despite the Second Department having previously chosen to follow its own precedent to choose “substance over form” with respect to an application for vacatur under CPLR §5015(a) and address motions to vacate based on excusable default under CPLR §5015(a) brought by notice of motion on their merits, including in Khanal, *supra*, the very citation relied upon by the Second Department in the 6/26/20 Decision and Order that summarily dismissed Appellants’ appeal (Ex. F); and

Appellants have established that jurisdiction lies in this Court, as both CPLR §5701 and CPLR §5015(a) have created an “illegal and irrebuttable presumption” and contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” specifically whether to request vacatur of a final order or judgment via order to show cause or notice of motion, or whether the denial of an application for an order to show cause concerning vacatur of a final order or judgment is appealable as of right. This, by itself, results in Appellants having a valid “as-applied” due process challenge because they have properly raised the threshold Constitutional issue that the statutes, “as applied” to Appellants, violate their Fourteenth Amendment rights as being both “irrational and irrebuttable” as

applied specifically to Appellants (Amazon.com, LLC, *supra*, 81 A.D.3d at 204-205).

38. Furthermore, Appellants, having been “intentionally treated differently from others similarly situated” despite there being “no rational basis for the difference in treatment” when the Second Department issued the 6/26/20 Decision and Order (Ex. F), have a valid “as-applied” equal protection claim in that their Fourteenth Amendment rights were violated despite “the purpose of the equal protection clause of the Fourteenth Amendment (being) to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Village of Willowbrook, *supra*, 528 U.S. at 564; Amazon.com, LLC, *supra*, 81 A.D.3d at 205-206.

Should the answer to one or more of the questions presented in paragraph twenty-one (21) above be in the affirmative, Appellants respectfully request that this Court grant Appellants leave for permission to appeal to this Court so that the 2/23/21 Final Decision and Order and, by extension, the 2/13/20 Proposed Order to Show Cause (Ex. B) can be decided on the merits.

WHEREFORE, due to the nature of this injustice and Appellants’ procedural good faith, I request that the court grant Leave for Permission to Appeal to the Court of Appeals Pursuant to CPLR §5602(a)(1)(ii) and for such other and further relief as to the court may seem just and equitable.

Dated: March 31, 2021  
New York, New York

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NY Enterprises, Inc. and  
Stanislav Brodsky*

Appendix P

**STATE OF NEW YORK  
COURT OF APPEALS**

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**IGNIS DEVELOPMENT INC.**, Plaintiff/Appellant,

—v.—

**LONG ISLAND COLLEGE HOSPITAL**, Defendant/  
Third-Party Plaintiff/Respondent, **ROYAL FARMS,  
INC.**, Defendant/Respondent, et al., Defendants;  
**STANLY NY ENTERPRISES, INC.**, et al., Third-  
Party Defendants/Appellants

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(Index No. 505638/2015)  
Appellate Division  
Index No. 2020-04606

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**ATTORNEY AFFIRMATION OF  
JASON R. MISCHEL, ESQ. IN SUPPORT  
OF MOTION FOR REARGUMENT  
PURSUANT TO COURT RULE 500.24  
AND CPLR §2221**

I, Jason R. Mischel, Esq., an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled case, affirm the following to be true under the penalties of perjury pursuant to CPLR §2106:

1. I am an attorney with DCL Firm (DeCristofaro Law), attorneys for Appellants Ignis Development Inc. (“Ignis”), Stanly NY Enterprises, Inc. (“Stanly

NY") and Stanislav Brodsky ("Brodsky," and collectively with Ignis and Stanly NY, the "Appellants") and I make this Affirmation in Support of Appellants' Motion for Reargument, Pursuant to Court Rule 500.24 and CPLR §2221, of their Motion to Appeal to the Court of Appeals Pursuant to CPLR §5602(a)(1)(ii) (the "Motion for Reargument"); and for such other and further relief as the Court may seem just and equitable.

2. I am fully familiar with the facts and circumstances set forth in this Affirmation based upon a review of the file maintained by this office; all papers filed on the NYSCEF docket, Appellate Division and Court of Appeals; and communications with Appellants.

#### **PRELIMINARY STATEMENT**

3. On March 29, 2021, Appellants moved for permission to appeal to this Court pursuant to CPLR §5602(a)(1)(ii) (the "Motion for Leave to Appeal"), as Appellants argued that their appeal was an appeal "in an action originating in the supreme court . . . from a final judgment of such court . . . where the Appellate Division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and . . . the final . . . determination . . . is not appealable as of right" pursuant to CPLR §5601(d). Specifically, in the Motion for Leave to Appeal, Appellants referenced two (2) nonfinal orders in a prior appeal in this action which necessarily affected the final determination in this action, namely: (i) the Second Department's decision and order issued on June 26, 2020 (the "6/26/20 Decision and Order," a true and correct copy of which is

attached as Ex. A) that summarily dismissed the appeal, *sua sponte*, “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010), Matter of Astoria Gas Turbine Power, LLC v. Tax Comm’n, 14 A.D.3d 553 (2nd Dept. 2005) and CPLR §570; and (ii) the Second Department’s order issued on September 14, 2020 (the “9/14/20 Decision & Order,” a true and correct copy of which is attached as Ex. B) denying Appellants’ Motion for Reargument and Leave for Permission to Appeal to the Court of Appeals (the “Appellate Division Motion for Reargument”).

4. After this Court **confirmed** that the lower court had not yet entered a final order on December 15, 2020 by dismissing Appellants’ previous appeal to this Court (the “12/15/20 Appeal Dismissal,” a true and correct copy of which is attached as Ex. C) *sua sponte* “upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution,” the lower court issued its **final** decision and order on February 23, 2021 (the “2/23/21 Final Decision and Order,” a true and correct copy of which is attached as Ex. D) that: (i) explicitly states that on March 12, 2019, the lower court issued a Decision and Order granting . . . summary judgment against [Stanly NY] and [Brodsky]; and (ii) directs the clerk to enter judgment.

5. Despite the above, on September 14, 2021, this Court issued a decision and order (the “9/14/21 Decision and Order,” a true and correct copy of which is attached as Ex. E) which stated that the Motion for Leave to Appeal was “dismissed upon the ground that this Court has jurisdiction to entertain a motion for leave to appeal pursuant to CPLR 5602(a)(1)(ii) from a final order only where a prior nonfinal Appellate

Division order necessarily affects that final order, and no such prior nonfinal order exists here” (emphasis added).

6. Simply put, what has occurred in this action is a textbook example of this Court having overlooked the existence of, not one, but two nonfinal orders issued by the Appellate Division that necessarily affected the final order as explicitly stated by the lower court itself. As a further injustice to Appellants, at no time during this entire matter have Appellants been allowed to appeal the merits of the lower court’s Order issued on March 10, 2020 (the “3/10/20 Order”), upon which Appellants’ entire appeal is based, whereby the lower court declined to sign Appellants’ Proposed Order to Show Cause to reargue the lower court’s decision issued on March 12, 2019 (the “3/12/19 Order”) that both dismissed Ignis’s claims in their entirety and granted summary judgment against Stanly and Brodsky by summarily stating, without any explanation, and incorrectly, that: “Movant failed to set forth reasonable excuse for the default.” As such, the Motion for Reargument should be granted.

7. To summarily repeat the argument contained in the Motion for Leave to Appeal, at issue in this appeal is a conflict among the departments of the Appellate Division that has raised an additional issue of public importance with respect to the construction of two statutes in the CPLR, namely 5015 and 5701, which, as a result of the conflict among the departments of the Appellate Division, have led to their creation of an “illegal and irrebuttable presumption” and contain language that is “so vague” that Appellants “cannot ascertain their obligations under the statutes,” and thus those statutes, “as applied” to Appellants, violate the due process and

equal protection provisions of the Fourteenth Amendment of the United States Constitution. Specifically, at issue in the Motion for Leave to Appeal is what exactly is the proper procedure when moving for the vacatur of an order pursuant to CPLR §5015(a)(1). The Fourth Department has interpreted CPLR §5015(a)(1) to mean that the procedure must be via a non-appealable ***order to show cause***, as opposed to proceeding via an appealable ***notice of motion***, while the Second Department has repeatedly ruled on the merits of matters where a party had moved for the vacatur of an order pursuant to CPLR §5015(a)(1) by an appealable ***notice of motion*** despite choosing not to do so in this matter. Appellants' reliance on the Fourth Department's procedural interpretation of CPLR §5015(a)(1), combined with the Second Department's inconsistent procedures have led to inconsistent results, confusion among the profession, and most of all, as previously stated, a violation of the due process and equal protection rights of the aggrieved parties in this matter, which are sacred and inalienable, as provided in the United States Constitution. If and to the extent that the Court determines that proceeding by notice of motion is the proper procedure for vacating a default, the Appellants respectfully request that this Court do what the Second Department unfairly and unjustly failed to do, which is to grant Appellants immediate appellate review of the merits of Appellants' denied order to show cause made pursuant to CPLR §5015(a)(1).

8. Appellants respectfully further refer this Court to the Procedural History, Jurisdiction, Statement of the Questions Presented for Review and Argument contained in the Motion for Leave to Appeal, together with the exhibits attached thereto.

**ARGUMENT**

**THIS COURT OVERLOOKED THE EXISTENCE  
OF THE TWO NONFINAL ORDERS ISSUED  
BY THE APPELLATE DIVISION THAT  
NECESSARILY AFFECTED THE FINAL  
ORDER ISSUED IN THIS MATTER**

9. Both Court Rule 500.24 and CPLR §2221(d) state that a motion for reargument must be based on matters of fact or law “overlooked or misapprehended” by the Court.

10. As argued in the Motion for Leave to Appeal, the Court of Appeals has jurisdiction over Appellants’ appeal of the 2/23/21 Final Decision and Order as it is an appeal “in an action originating in the supreme court . . . from a final judgment of such court . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final . . . determination . . . and the final . . . determination . . . is not appealable as of right” pursuant to CPLR §5601(d).

11. As stated above:

- (i) Appellants’ entire appeal is based upon the 3/10/20 Order, whereby the lower court declined to sign Appellants’ Proposed Order to Show Cause to reargue the 3/12/19 Order that both dismissed Ignis’s claims in their entirety and granted summary judgment against Stanly and Brodsky by summarily stating, without any explanation, and incorrectly, that: “Movant failed to set forth reasonable excuse for the default.”
- (ii) in the Motion for Leave to Appeal, Appellants referenced **two** (2) **nonfinal orders** in a prior appeal in this action which **necessarily**

**affected** the final determination in this action, namely: a) the 6/26/20 Decision and Order (Ex. A) that summarily dismissed the appeal, *sua sponte*, “on the ground that no appeal lies from the denial of an application to sign an order to show cause,” citing Khanal v. Sheldon, 74 A.D.3d 894 (2nd Dept. 2010), Matter of Astoria Gas Turbine Power, LLC v. Tax Comm'n, 14 A.D.3d 553 (2nd Dept. 2005) and CPLR §570; and b) the 9/14/20 Decision & Order (Ex. B) denying the Appellate Division Motion for Reargument;

- (iii) after this Court **confirmed** that the lower court had not yet entered a final order in issuing the 12/15/20 Appeal Dismissal (Ex. C) *sua sponte* “upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution,” the lower court issued the 2/23/21 Final Decision and Order (Ex. D) that: a) explicitly states that on March 12, 2019, the lower court issued a Decision and Order granting . . . summary judgment against [Stanly NY] and [Brodsky]; and b) directs the clerk to enter judgment; and
- (iv) despite the above, this Court issued the 9/14/21 Decision and Order (Ex. E) that stated that the Motion for Leave to Appeal was “dismissed upon the ground that this Court has jurisdiction to entertain a motion for leave to appeal pursuant to CPLR 5602(a)(1)(ii) from a final order only where a prior nonfinal Appellate Division order necessarily affects that final order, **and no such prior nonfinal order exists here**” (emphasis added).

12. Given the above, the Argument contained in the Motion for Leave to Appeal and the fact that at no time during this entire matter have Appellants been allowed to appeal the merits of the 3/10/20 Order (unlike the movant in the Second Department's own ruling in Khanal, *supra*), Appellants respectfully request that: (i) "extraordinary and compelling reasons" exist pursuant to Court Rule 500.24(d) for this Court to consider Judge Jones' dissent in Gilroy v. American Broadcasting Co., 46 N.Y.2d 580, 590 (1979) whereby Judge Jones states that "an appeal would lie by permission" on "an order made on a prior appeal...which necessarily affects the final Supreme Court judgment" and (ii) the Motion for Reargument should be granted.

WHEREFORE, due to the nature of this injustice and Appellants' procedural good faith, I request that the court grant the Motion for Reargument and for such other and further relief as to the court may seem just and equitable.

Dated: October 14, 2021  
New York, New York

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