SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4752-
4753 Edwin Gomez, Index 25032/99
Plaintiff-Respondent,

-against-

The New York City Police Department
et al.,
Defendants-Appellants,

Police Officer William Morales,
Defendant.

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Michael A. Cardozo, Corporation Counsel, New York (Stephen J. McGrath of counsel), for appellants.

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 10, 2010, upon a jury verdict, awarding plaintiff the principal sum of $700,000 as against the City defendants-appellants, and bringing up for review an order, same court and Justice, entered August 10, 2009, which denied defendants' motion for a judgment notwithstanding the verdict or

a new trial and granted the alternative relief of setting aside the verdict to the extent of ordering a new trial on damages for past pain and suffering unless plaintiff stipulated to reduce the award from $1.5 million to $700,000, unanimously modified, on the facts, to vacate the award and order a new trial as to damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award in the amount of $500,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's finding that the off-duty police officer was acting within the scope of his employment when he accidentally shot plaintiff is supported by the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Riviello v Waldron*, 47 NY2d 297, 302-303 [1979]; *Collins v City of New York*, 11 Misc 2d 76, 78-79 [1958], *affd* 8 AD2d 613 [1959], *affd* 7 NY2d 822 [1959]). This is not a case, such as those on which defendants rely, in which the police officer attacked an individual for personal reasons (*see e.g. Pungello v City of New York*, 18 AD3d 216 [2005]; *Pekarsky v City of New York*, 240 AD2d 645 [1997], *lv denied* 91 NY2d 806 [1998]).

The trial court properly determined which interrogatories to submit to the jury (*see Simone v McNamara*, 59 AD3d 349, 349-350 [2009]). Apart from plaintiff's testimony that he thought he heard the officer mumble "Russian Roulette," there is no evidence to support the theory that the shooting was intentional. Morever, if the jury had believed that the shooting was intentional, it could have answered the interrogatories accordingly.

Considering the trial in its entirety, we find that defendants received a fair trial. We note that the court sustained many of defense counsel's objections to plaintiff's counsel's comments and struck the comments.

The trial court properly precluded any reference to the officer's conviction of second-degree assault for shooting plaintiff, since the prejudicial effect of such evidence would have had far outweighed its probative value, if any.

We find the damages award excessive to the extent indicated. The evidence demonstrates that plaintiff was shot in the urethra and required surgery. Plaintiff was in the hospital for five days, required various catheter tubes, was unable to normally urinate and was unable to bathe himself. After he was discharged, he required a urine catheter for three or four weeks

and was still unable to bathe himself. He was also unable to cook or clean for himself and was in pain. Nevertheless, we find that the past pain-and-suffering award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; *compare Reed v City of New York*, 304 AD2d 1, 7 [2003], *lv denied* 100 NY2d 503 [2003]). Within two and one-half months of the shooting, plaintiff fully regained normal use of his urinary function. Within a few months later, plaintiff encountered no difficulty performing his work functions and his normal activities of walking, sitting and playing sports.

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

ENTERED: JUNE 2, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

4923 Guillermo Villa, Index 115710/06
Plaintiff-Appellant,

-against-

Paradise Theater Productions, Inc., et al.,
Defendants-Respondents.

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Arnold E. DiJoseph, New York, for appellant.

Wellinghorst and Fronzuto, New York (Robert Delicate of counsel), for Emmis Communication Corp., respondent.

Jeffrey Samel & Partners, New York (David Samel of counsel), for Paradise Theater Productions, Inc., respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 29, 2009, which granted defendants' motions for summary judgment dismissing the complaint and any cross claims against them, unanimously affirmed, without costs.

Plaintiff seeks to recover damages for injuries he allegedly sustained during an assault at a rap concert promoted by defendant Emmis Communications Corp. and held at premises owned by defendant Paradise Theater Productions, Inc.

Defendants established prima facie that the security measures in place, including the provision of security guards, metal detectors, handheld metal detecting wands, a police

presence and mandatory coat check, were reasonable (*see Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]; *see also Djurkovic v Three Goodfellows*, 1 AD3d 210 [2003], *lv denied* 2 NY3d 701 [2004]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's security expert speculated that security lapses allowed the assault to occur and failed to establish that any breach in the duty to provide security proximately caused plaintiff's injury (*see Maheshwari*, 2 NY3d at 295).

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

ENTERED: JUNE 2, 2011

CLERK

Mazzarelli, J.P., Friedman, Renwick, Román, JJ.

1948-1949 Continental Casualty Company, et al., Plaintiffs-Appellants-Respondents, Index 601037/03

-against-

Employers Insurance Company of Wausau, et al., Defendants-Respondents-Appellants,

Robert A. Keasbey Company, a corporation dissolved in 2001, Defendant.

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Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Alfred L. D'Isernia of counsel), for appellants-respondents.

Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin of counsel), for Employers Liability Assurance Company, respondent-appellant.

Seward & Kissel LLP, New York (John J. Galban of counsel) and (Rolf E. Gilbertson of the bar of the State of Minnesota admitted pro hac vice), for Employers Insurance Company of Wausau, respondent-appellant.

Gilbert LLP, District of Columbia (August J. Matteis, Jr., of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Michael O'Reilly, appellant.

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered April 22, 2009, after a nonjury trial resulting in findings of fact and conclusions of law (same court and Justice), dated October 14, 2008, as amended November 24, 2008 and December 5, 2008 (also brought up for review), declaring, inter alia, (1)

that plaintiffs Continental Casualty Company and American Casualty Company of Reading, Pa. (collectively, CNA), defendant Employers Insurance Company of Wausau (Wausau) and defendant Employers Liability Assurance Company n/k/a OneBeacon America Insurance Company (OneBeacon) each had and has an equal duty to defend defendant Robert A. Keasbey Company (Keasbey) in past and future asbestos-related personal injury actions (asbestos actions) against Keasbey from the commencement of each asbestos action until it is established that the asbestos exposure alleged therein did not occur at a work site or within a time period covered by the insurer's policy, (2) that CNA is entitled to be reimbursed by OneBeacon for one quarter of the cost of defending Keasbey in the asbestos actions to the date of judgment, and (3) that indemnity obligations with respect to each asbestos action are to be allocated pro rata to each year of asbestos exposure at a given site, with each insurer obligated to pay for years and sites within its coverage and with any OneBeacon coverage to be deemed primary to any CNA or Wausau coverage, unanimously reversed, on the law and the facts, without costs, the judgment vacated, Supreme Court's findings of fact reversed to the extent inconsistent herewith and new findings substituted as set forth below, and it is declared that

(1) CNA has no further obligation to defend or indemnify Keasbey in asbestos actions pursuant to the primary comprehensive general liability insurance policies it issued to Keasbey covering, in aggregate, the period from February 15, 1970 to February 15, 1987, and Wausau has no further obligation to defend or indemnify Keasbey in asbestos actions pursuant to the primary comprehensive general liability insurance policies it issued to Keasbey covering, in aggregate, the period from February 15, 1968 to February 15, 1970,

(2) CNA is not entitled to be reimbursed by OneBeacon for any portion of the costs of defending Keasbey in asbestos actions from March 1, 2003 to September 30, 2007, or for any portion of the costs of defending the same actions after September 30, 2007, because CNA has failed to establish that it gave OneBeacon timely notice of any of those actions,

(3) to the extent CNA has paid for Keasbey's defense in any asbestos actions commenced against Keasbey after September 30, 2007, any claim by CNA against OneBeacon for reimbursement of such defense costs is barred unless CNA establishes that it provided OneBeacon with timely notice of that particular action under the terms of the OneBeacon policies,

and CNA's complaint dismissed to the extent it seeks relief different from, in addition to, or inconsistent with the foregoing, and the matter remanded for entry of judgment consistent herewith.

Keasbey (which ceased operating in the mid-1990s and was dissolved in 2001) installed asbestos insulation at numerous sites in the tri-state area over many years. Wausau issued Keasbey two successive primary comprehensive general liability

(CGL) policies covering the period from February 1968 to February 1970, and CNA issued Keasbey 17 successive primary CGL policies covering the period from February 1970 to February 1987. None of the foregoing CNA and Wausau policies contains an asbestos exclusion.

Although Keasbey never purchased a policy directly from OneBeacon, it was covered by two "wrap-up" policies issued by OneBeacon, each of which provided liability coverage to all contractors on a specified construction project at the Indian Point Nuclear Power Plant for claims arising from work on that project during the policy period. Specifically, OneBeacon issued one wrap-up policy covering all contractors involved in construction work at Unit 2 at Indian Point from February 1966 to April 1974 and another, similar, policy covering all contractors involved in construction work at Unit 3 at Indian Point from June 1967 to July 1977. During the periods of these policies, Keasbey installed asbestos-containing insulation in the turbines at Unit 2 and Unit 3 at Indian Point, which in each case involved approximately two months of work. Each of the foregoing OneBeacon policies provides that it "applies only to work performed at the [specified] project." Neither OneBeacon policy contains an asbestos exclusion provision.

Pursuant to its policies' products/completed operations coverage, CNA began defending Keasbey in asbestos actions in the 1970s. This coverage under Keasbey's primary CNA policies was exhausted by 1992, as was similar coverage under the Wausau policies and all other primary policies. Thereafter, excess insurers, including CNA under policies other than those at issue on this appeal, assumed Keasbey's defense. CNA continued to defend Keasbey as an excess insurer until August 2000, when it believed its excess coverage had been exhausted.[1] Another excess insurer continued to defend Keasbey until 2002.

In May 2001, attorneys for claimants in the asbestos actions sent CNA a letter asserting that Keasbey's exposure to asbestos liability fell within the scope of the CNA primary policies' operations coverage, which (unlike the long-exhausted products/completed operations coverage) has no aggregate limit. CNA responded by filing suit against the claimants in October 2001, seeking a declaration that Keasbey's potential asbestos liability is not within the CNA policies' operations coverage. To avoid default judgments, however, CNA took over Keasbey's

[1]An additional CNA excess policy that was later discovered also has been exhausted, as we determined on the preceding appeal in this matter (60 AD3d 128, 150-151 [2008], *lv denied* 13 NY3d 710 [2009]).

defense in 2002.

The claimants' assertion that their claims fell within CNA's operations coverage prompted CNA to undertake a review of Keasbey's records to determine whether any other primary coverage was available. Since the 1980s, those records had been in the possession of the law firm CNA had retained to defend Keasbey in the asbestos cases. In February 2003, CNA found evidence in Keasbey's records that Keasbey was covered by the aforementioned OneBeacon wrap-up policies. By letter dated February 24, 2003, CNA notified OneBeacon of an asbestos action brought by a claimant (Michael O'Reilly) allegedly exposed to asbestos while working at Indian Point from 1968 to 1975, and tendering the defense of the case to OneBeacon. Thereafter, in April 2003, CNA commenced the present declaratory judgment action (superseding the action commenced in October 2001), naming as defendants (in addition to the personal injury claimants, who have been certified as a class) OneBeacon and Wausau.[2] CNA's complaint seeks a judgment declaring, inter alia, (1) that Keasbey's potential asbestos liability falls under the exhausted products/completed operations coverage of the CNA policies (not

[2]Although Wausau has since settled with CNA, it participated in this appeal.

the operations coverage), (2) that OneBeacon is obligated to assume Keasbey's defense in present and future asbestos actions, and (3) that OneBeacon is obligated to reimburse CNA for the amounts the latter has spent on Keasbey's defense in asbestos actions since March 1, 2003 (after the February 24, 2003 letter).[3]

On the appeal taken from the order entered after the Phase I trial in this matter (60 AD3d 128 [2008], *supra*), this Court, reversing the trial court's order, determined that Keasbey's potential asbestos liability falls under the exhausted products/completed operations coverage of the CNA policies, not the operations coverage, from which it follows that CNA has no further obligation to defend or indemnify Keasbey in asbestos actions.[4] The Phase II trial was conducted before the Phase I appeal was decided, and resulted in a judgment (the Phase II judgment) declaring, inter alia, that the four insurers before

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[3]CNA claims that, from March 1, 2003 to September 30, 2007 (about a month before the Phase II trial began), it spent $31,360,874.01 on Keasbey's defense in asbestos actions. This amount excludes the cost of one settlement reached in 2007 after a jury returned a verdict against Keasbey. CNA represents that it does not seek reimbursement for that settlement or for the defense and settlement costs it incurred before March 1, 2003.

[4]It is not disputed that the same reasoning applies to the Wausau policies.

the court (the two CNA subsidiaries, OneBeacon and Wausau) are obligated to share equally the cost of Keasbey's defense in all asbestos actions (past, present and future) and that OneBeacon's coverage is primary as to indemnity (although apparently not as to the duty to defend). All parties now appeal from the Phase II judgment, each to the extent it is aggrieved thereby. Given the disposition of the Phase I appeal and CNA's failure to prove that it gave OneBeacon timely notice of any underlying asbestos action, the Phase II judgment must be reversed.

As noted, the trial court held that defense costs should be shared equally among the two CNA subsidiaries, OneBeacon and Wausau. This ruling cannot stand. Given this Court's determination on the Phase I appeal that the only applicable coverage under the subject CNA primary policies was the coverage for products/completed operations, which (it is undisputed) was exhausted almost 20 years ago, there is no occasion to allocate coverage between CNA and other primary insurers with regard to the defense costs at issue, namely, those that may be incurred in the future or that CNA has incurred since March 1, 2003. However, that CNA did not owe Keasbey any coverage when it defended Keasbey in asbestos actions since March 2003 does not necessarily mean that CNA is entitled to reimbursement for such

costs from OneBeacon. While OneBeacon raises a number of arguments against CNA's reimbursement claim, we need address only the argument based on lack of timely notice, which is dispositive.[5]

Where an insured gives only one of two insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from the other insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances (*see Matter of Crum & Forster Org. v Morgan*, 192 AD2d 652, 654 [1993]). Here, although each OneBeacon policy contained a notice-of-claim provision requiring the insured to "immediately forward to [OneBeacon] every demand, notice, summons or other process received by him or his representative," it is undisputed that Keasbey never furnished any notice of any asbestos claim to OneBeacon. Hence, CNA's ability to seek reimbursement from OneBeacon for the costs of defending any given claim against Keasbey "turns on whether [CNA] provided notice [of that claim] to [OneBeacon] within a reasonable time under all the

[5]The notice issue was raised but not resolved on the preceding appeal. Contrary to CNA's contention, the oblique reference to the notice issue in the decision on the preceding appeal does not constitute law of the case precluding our consideration of the issue on the merits on this appeal.

circumstances" (*State of New York v Blank*, 27 F3d 783, 795 [2d Cir 1994] [citing *Crum & Forster*, 192 AD2d at 654]). Contrary to CNA's arguments, it plainly failed to provide OneBeacon with such notice.

CNA contends that it gave OneBeacon sufficient notice of all the asbestos actions for which it now seeks reimbursement -- namely, all the thousands of actions that it defended on behalf of Keasbey between March 1, 2003 and September 30, 2007 -- by sending the February 24, 2003 letter advising OneBeacon of the O'Reilly claim, which was about to be scheduled for trial, and inviting OneBeacon (without identifying any other claim against Keasbey) "to contact us as soon as possible so that we can discuss the range of possible strategies for defense of this and comparable other Keasbey asbestos cases." To the extent further notice was required, CNA contends that it was furnished by the complaint it served to commence this coverage action in April 2003, to which is appended a schedule setting forth the names of 174 claimants against Keasbey and the law firms representing them. CNA also refers to a number of e-mails and letters it subsequently sent to OneBeacon's coverage counsel during the pendency of this action discussing a number of the asbestos actions against Keasbey.

In our view, the February 24, 2003 letter, the complaint in this action, and CNA's subsequent correspondence with OneBeacon's coverage counsel do not constitute reasonably timely notice even of the claims to which they refer, much less to the thousands of other claims for which CNA seeks reimbursement. To begin, CNA cites no authority for deeming a notice as to certain claims against an insured to constitute notice of other claims not identified in the notice. Even as to the claims referenced by name in the documents on which CNA relies, however, notice was not sufficient. The OneBeacon policies required that any process against Keasbey be "immediately forward[ed]" to OneBeacon; CNA does not identify a single case in which this occurred. With regard to the O'Reilly claim referenced in CNA's letter of February 23, 2003, for example, the letter apprised OneBeacon of the case just as it was about to be scheduled for trial -- by which time the case presumably already had a substantial history. CNA argues that it contacted OneBeacon promptly after it first learned of the existence of the OneBeacon policies in February 2003, and could not have been expected to provide notice any earlier than that. We disagree. The Keasbey records from which CNA learned of the OneBeacon policies had been in the possession of asbestos defense counsel chosen and paid by CNA since the

1980s. CNA could have reviewed those records for evidence of additional insurance at any time it chose. It did not see fit to do so until 2003, when the claimants sought to revive its long-expired primary policies on the theory (rejected on the preceding appeal) that operations coverage applied to the asbestos actions. While CNA's sudden interest in finding an untapped primary insurer in response to this unexpected development may be understandable, it does not change the fact that the means to discover the OneBeacon policies had been available to CNA for more than a decade. Further, the possibility of prejudice to OneBeacon from the delay in notice is obvious, given that the OneBeacon policies, unlike the comprehensive CNA policies, covered Keasbey only for work at two particular sites where Keasbey had been present, in the case of each site, for only about two months. Given the vast difference in the scope of coverage between the CNA policies and the OneBeacon policies, it cannot be assumed that OneBeacon's interests were adequately protected by CNA's defense of Keasbey in the asbestos actions (*see State of New York v Blank*, 27 F3d at 797).[6]

[6]At the Phase II trial (which opened in October 2007), CNA presented evidence of defense costs it incurred through the end of September 2007 in support of its reimbursement claim. Accordingly, this decision disposes of any claim for

We reject the theory apparently adopted by the trial court after the Phase I trial (*see* 16 Misc 3d 223, 253-254 [2007], *revd on other grounds* 60 AD3d 128 [2008], *lv denied* 13 NY3d 710 [2009]) that OneBeacon received adequate notice of an action as against Keasbey if it received notice of the action from a different insured under the wrap-up policies. Where each insured has an independent duty to give timely notice under the policy, notice by one insured cannot be imputed to another (*see National Cas. Co. v Paxson Communications Corp.*, 304 AD2d 391, 394 [2003]; *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [2002]; *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, [1998]).

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reimbursement as to any asbestos action commenced in September 2007 or earlier. To the extent CNA has defended Keasbey in any asbestos actions commenced after September 2007, it can seek reimbursement from OneBeacon for defense costs incurred in each such action only if it establishes that it provided OneBeacon with timely notice of that particular action in accordance with the terms of the OneBeacon policies.

In view of the foregoing, we need not reach the parties' remaining arguments.

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

ENTERED: June 2, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3919 The People of the State of New York, Ind. 6433/05
Respondent,

-against-

Paul Cortez,
Defendant-Appellant.

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Marc Fernich, New York and Jeffrey Lichtman, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered March 23, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, affirmed.

Defendant was not deprived of his right to conflict-free counsel. Defendant asserts that both of the attorneys who represented him at trial operated under conflicts between their own interests and those of their client. However, we find that, at most, only one attorney had a conflict, that defendant validly waived this conflict, and that there is no record evidence of prejudice.

At the outset of the trial, the court held defendant's lead attorney in contempt and imposed a fine for her unjustified

failure to appear. This was not enough to create a conflict. Defendant's claim that the contempt citation would have placed the attorney in fear of further antagonizing the court and would have inhibited her ability to zealously defend her client rests on speculation and is unsupported by anything in the record.

At the time of trial, there was an unrelated criminal case pending in the same county against defendant's other attorney. Since the attorney was not accused of any crime relating to the charges against defendant, the conflict was waivable (*see e.g. United States v Perez*, 325 F3d 115, 125-127 [2d Cir 2003]). After the court conducted a sufficient inquiry pursuant to *People v Gomberg* (38 NY2d 307 [1975]), defendant made a valid waiver of the conflict, and we reject defendant's arguments to the contrary.

In any event, the existing record is insufficient to show that the conduct of the defense was affected by the operation of either or both of these alleged conflicts of interest (*see People v Konstantinides*, 14 NY3d 1, 10-13 [2009]; *People v Longtin*, 92 NY2d 640, 644-645 [1998]). Defendant asserts that his attorneys mishandled various aspects of the extensive forensic evidence against him, by failing to take certain investigative steps and otherwise. Whether these claims are viewed as evidence that the

conflict or conflicts operated on the defense, or as general ineffective assistance of counsel claims, they are unreviewable on direct appeal, and thus procedurally defective, because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). If the attorneys reasonably believed that the lines of attack on the prosecution's forensic evidence suggested by defendant on appeal would have been futile or counterproductive, their conduct would not have fallen below an objective standard of reasonableness. Similarly, if these lines of attack would have actually been futile or counterproductive, counsel's failure to pursue them would not have been prejudicial. Accordingly, the present, unexpanded record, which is silent as to these matters, fails to satisfy either the reasonableness or prejudice prongs contained in either the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court's ruling regarding evidence of defendant's journal entries does not warrant reversal. Defendant does not challenge entries relating to his antagonism toward the victim, who was his former girlfriend, but challenges the introduction of entries pertaining to two other women. At trial, he only argued that

this constituted evidence of uncharged crimes or bad acts. However, that argument was meritless, because the entries only reflected hostile thoughts (*see generally People v Flores*, 210 AD2d 1, 2 [1994], *lv denied* 84 NY2d 1031 [1995]). Defendant's remaining contentions concerning this evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. In the context of this case, defendant's hostility toward women, not limited to the victim, had a bearing on motive and was not unduly prejudicial (*see People v Moore*, 42 NY2d 421, 428 [1977]). In any event, any error regarding the receipt of this evidence, or the absence of a limiting instruction, was harmless in light of the overwhelming evidence of guilt.

One of the many links in the chain of circumstantial evidence against defendant was provided by a witness who did not identify him in court, but gave a detailed description of the man she saw on a relevant occasion. Since defendant matched the description, the evidence was plainly admissible, and defendant's arguments go to the weight to be accorded the evidence, not its admissibility (*see generally People v Mirenda*, 23 NY2d 439, 452-454 [1969]). Defendant also argues that the court unduly restricted his cross-examination of this witness. However, by

failing to make an offer of proof, and by acquiescing in the court's ruling, he failed to preserve that claim, including his constitutional argument (*see People v George*, 67 NY2d 817, 819 [1986]), and we decline to review it in the interest of justice. As an alternative holding, we find no violation of defendant's right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Of defendant's challenges to the prosecutor's summation, the only one that is arguably preserved is his claim that the prosecutor ended his summation with an improper appeal to the jury's emotions. Although we find that the prosecutor's rhetoric was excessive, we find the error to be harmless. By failing to object, by making general objections or objections that did not articulate the grounds asserted on appeal, or by failing to request further relief after the court took curative actions, defendant failed to preserve his remaining summation claims, and we decline to review them in the interest of justice. As an alternative holding, we find that most of the challenged remarks were generally permissible, and that the court's curative actions were sufficient to prevent defendant from being prejudiced by any improprieties (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114,

118-119 [1992], *lv denied* 81 NY2d 884 [1993]). In any event, any errors were likewise harmless. In particular, we note that the evidence clearly supported the conclusion that defendant left his fingerprint in the victim's blood, which had spattered on a wall of her apartment, and it refuted the theory that this was a latent fingerprint left by defendant on a previous visit, over which the blood had spattered. Accordingly, it was entirely proper for the prosecutor to make summation arguments along these lines. Moreover, the fingerprint itself provided evidence of defendant's guilt, and when combined with an extensive amount of other circumstantial evidence, it provided overwhelming evidence of defendant's guilt.

All concur except Freedman, J. who concurs in a separate memorandum as follows:

FREEDMAN, J. (concurring)

I write only to emphasize my concern with the aspect of the prosecutor's summation where he connected defendant's diary entries from 1999 and 2000 regarding former girlfriends to what happened to the victim here. The prosecutor claimed that these diary entries, of questionable relevance, demonstrated that defendant had become increasingly more "hostile to women," and that previous rejections had caused a "murderous rage" to develop in defendant. I believe that these "psychological opinions" went beyond fair comment on the evidence.

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

ENTERED: JUNE 2, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4520 The People of the State of New York, Ind. 4033/07
Respondent,

-against-

Kenny King,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 29, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender, to concurrent terms of 9 years, 9 years, and 4 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the third-degree sale and possession convictions to 6 years each, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the

jury's credibility determinations. The evidence established that an officer had an ample opportunity to observe the drug sale at issue by way of a surveillance camera that permitted him to see defendant's conduct as if he were only three or four feet away. The evidence also established the possession charges on an acting-in-concert theory.

In this case, in responding to a note from the deliberating jury, the court properly exercised its discretion in declining defendant's request that it add the standard Criminal Jury Instructions (CJI) charge on accessorial liability to its supplemental instructions. In *People v Hill* (52 AD3d 380 [2008]), we reversed the conviction where the same court gave the same acting-in-concert charge at issue here. We stated that "[a]lthough a trial judge is not obligated to use the standard jury instructions ... each time a judge declines to employ the carefully thought-out measured tone of the standard jury charge in favor of improvised language, an additional risk of reversal and a new trial is created" (52 AD3d at 382 [internal quotation marks and citation omitted]). However, *Hill* does not control here. In that case, where the offense was gang assault in the second degree, the "orchestra" analogy in the accessorial liability charge was erroneous because it did not adequately

convey that, in order to find the defendant guilty of gang assault in the second degree, the defendant had to intend to cause physical injury and intend to aid the main actor in engaging in conduct constituting the offense. In this case, the court's instructions adequately conveyed that the People had the burden of proving beyond a reasonable doubt that defendant intended to sell and possess a controlled substance and intended to aid the main actor in engaging in such conduct. Nevertheless, we repeat the admonition that the better practice for the trial courts is, when feasible, to utilize the charges contained in the Criminal Jury Instructions.

Defendant did not preserve any of his other challenges to the court's main and supplemental charges, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Although, again, the CJI charge would have minimized the potential for jury confusion, it cannot be said that in instructing the jury as it did the court did not satisfactorily explain the concept of acting in concert as related to the facts (*see People v Brooks*, 217 AD2d 492 [1995], *lv denied* 86 NY2d 840 [1995]). Similarly, none of the other challenged portions of the main and supplemental charges deprived defendant of a fair trial.

We find the sentence to be excessive to the extent indicated.

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

ENTERED: JUNE 2, 2011

CLERK

CORRECTED ORDER - JUNE 3, 2011

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4985 Linda P. Nash, Index 129074/93
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey,
Defendant-Appellant.

- - - - -

Steering Committee In Re World Trade
Center Bombing Litigation,
Intervenor-Respondent.

Weil, Gotshal and Manges LLP, New York (Gregory Silbert of counsel), for appellant.

Louis A. Mangone, New York, for Linda P. Nash, respondent.

Davis Wright Tremaine LLP, New York (Edward J. Davis of counsel), for Steering Committee, respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered January 15, 2010, insofar as appealed from as limited by the briefs, awarding post-judgment interest at the fixed rate of nine percent per annum, unanimously affirmed, without costs.

McKinney's Unconsolidated Laws of NY § 7106 states that both New York and New Jersey consent to liability on the part of defendant Port Authority for tortious acts "to the same extent as

though it were a private corporation." By its plain meaning, the statutory language indicates that the Port Authority should be treated as if it were a private corporation, which requires that a fixed interest rate of nine percent, as applies to private corporations pursuant to CPLR 5004, is applicable. Given the express language of section 7106, we reject the Port Authority's claims that it is entitled as a "public corporation" to the specialized interest rate provisions of Unconsolidated Laws § 2501.

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

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5232 The People of the State of New York, Respondent, SCI. 7349/03 Ind. 6942/04

-against-

Anonymous, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about January 26, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court met its statutory obligation to "offer an opportunity for a hearing and bring the applicant before it" (CPL 440.46[3] [incorporating by reference provisions of 2004 Drug Law Reform Act (L 2004, ch 738, § 23)]) when defendant was "brought before the court and given an opportunity to be heard" (*see People v Soler*, 45 AD3d 499 [2007], *lv denied* 9 NY3d 1009 [2007]). Where the critical facts are uncontested, that is all the statute requires (*see People v Burgos*, 44 AD3d 387 [2007], *lv denied* 9 NY3d 990 [2007]).

The court properly exercised its discretion in determining that substantial justice dictated denial of the application with regard to defendant's February 2005 conviction of criminal sale of a controlled substance in the third degree. The court properly considered the totality of circumstances, including defendant's very extensive criminal record, the substantial quantities of drugs and cash involved in his drug selling activities, his unfavorable prison disciplinary record, and his multiple failures to appear in court (*see e.g. People v Aguirre*, 47 AD3d 489 [2008], *lv denied* 10 NY3d 761 [2008]).

The court properly found defendant ineligible for resentencing as to his January 2005 conviction of fifth-degree criminal sale of a controlled substance, a class D felony. CPL 440.46(2) authorizes resentencing on a class C, D, or E drug felony where the sentence for such an offense was "imposed by the sentencing court at the same time or [was] included in the same order of commitment as such class B felony." Defendant's class D drug felony was the subject of a separate indictment, a separate sentencing proceeding, and a separate commitment order from his class B felony. Contrary to defendant's argument, the indication, in the commitment order for the B felony, that the sentence was to run concurrently with the previously imposed sentence for the D felony did not bring the latter sentence

within the ambit of the statute. The statutory language plainly applies where a defendant is actually committed to custody on a lower level drug felony in the same order that commits him to custody on a B felony, not where an offense for which the defendant has previously been sentenced and committed is merely referenced in the later order.

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5235-
5236 &
M-1998
M-2536

Hudson Valley Federal Credit Union,
Plaintiff-Appellant,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

– – – – –

Credit Union Association of
New York, National Association
of Federal Credit Unions and The
United States Of America,
Amici Curiae.

Index 106732/09

_____

K&L Gates LLP, New York (Eli R. Mattioli of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Cecelia C. Chang of counsel), for respondents.

Michael Lanotte, Albany, for Credit Union Association of New York, Amicus Curiae.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for The National Association of Federal Credit Unions, Amicus Curiae.

Preet Bharara, United States Attorney for the Southern District of New York, New York (Alicia M. Simmons of counsel), for The United States of America, Amicus Curiae.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered July 21, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered

May 20, 2010, which granted defendants' motion to dismiss, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks a declaration that it and other federal credit unions are exempt from the New York State mortgage recording tax (MRT), in connection with mortgages given to secure loans made by them to their members, under the Federal Credit Union Act of 1934 (FCUA) (12 USC §§ 1751-1795k) and the Supremacy Clause of the US Constitution. The motion court correctly concluded that the MRT is not a tax on property and therefore not included in the FCUA tax exemption (12 USC § 1768).

Plaintiff contends that the United States Supreme Court has held that MRTs are property taxes, not privilege taxes, regardless of how the State characterizes them. However, the federal statutes that the Court was construing in the decisions on which plaintiff relies all expressly exempted the "mortgages," "loans," or "advances" in question from the particular state MRTs at issue (*see Federal Land Bank of New Orleans v Crosland*, 261 US 374 [1923]; *Pittman v Home Owners' Loan Corp. of Washington, D.C.*, 308 US 21 [1939]; *Laurens Fed. Sav. & Loan Assn. v South Carolina Tax Commn.*, 365 US 517, 518-522 [1961]). These

decisions therefore have no bearing on whether the term "property" in the FCUA extends to mortgages held by federal credit unions or the right to record the mortgages.

Nor do this State's precedents compel the result plaintiff urges here. Indeed, the Court of Appeals has expressly held that the MRT is a tax on the privilege of recording a mortgage, not a tax on property (*see Franklin Socy. v Bennett*, 282 NY 79 [1939], *appeal dismissed* 309 US 640 [1940]; *Matter of S.S. Silberblatt, Inc. v Tax Commn. of State of N.Y.*, 5 NY2d 635 [1959], *cert denied* 361 US 912 [1959]). Contrary to plaintiff's contention, the Court did not, in *Franklin Socy.* (282 NY at 79), leave open the possibility that the MRT could be deemed a property tax in other contexts. It stated that, in determining whether the MRT survived a challenge to the State constitutional prohibition on ad valorem property taxes (*see* NY Const art XVI), it was bound to follow its precedents holding that the MRT is an excise or privilege tax (*see e.g. People v Trust Co. of Am.*, 205 NY 74, 77 [1912]). The Court expressly considered and rejected the argument that the United States Supreme Court holds that MRTs are property taxes, and concluded that "nothing said or decided in *People v. Trust Company of America* (208 N.Y. 463) or in any other case has weakened the force of the characterization" of the MRT

as an excise tax (*Franklin*, 282 NY at 87). Plaintiff's reliance on *Matter of Hotel Waldorf-Astoria Corp. v State Tax Commn.* (86 AD2d 330 [1982], *lv denied* 58 NY2d 603 [1982]) and *Matter of City of New York v Tully* (88 AD2d 701 [1982], *lv denied* 57 NY2d 606 [1982]) and certain Department of Taxation & Finance Advisory Opinions is equally misplaced, since those decisions and opinions address whether state entities, not federal instrumentalities governed by federal statute, were exempt from various forms of state taxation in accordance with state law.

We also reject plaintiff's contention that the FCUA should be interpreted so as to exempt federal credit unions' mortgage loans, and the right to record them, from the MRT because the imposition of the tax undermines the statute's main policy of making low-cost credit available to average Americans by increasing the cost of mortgage loans. At the time the FCUA was enacted by Congress, federal credit unions did not have the authority to make home loans. Although Congress has amended the FCUA over the years to permit federal credit unions to make residential mortgage loans, it has never amended the statute specifically to exempt federal credit unions' mortgage loans from state MRTs (*see generally* 12 USC § 1757).

Because Congress has spoken on the issue of federal credit

unions' exemption from state taxation, and state court precedents hold that the exemption does not apply to the MRT, we need not consider whether federal credit unions are impliedly exempt from the MRT under the Supremacy Clause (*see Director of Revenue of Missouri v CoBank ACB*, 531 US 316, 321-322 [2001]).

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

M-1998 & M-2536 - *Hudson Valley Fed. Cred. Un. v. NYS Dep. of Taxation and Finance*
Motion seeking leave to amend reply brief denied.
Motion to seal the file on M-1998 granted.

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5237-
5237A

Ana C. Feliz,
Plaintiff-Appellant,

-against-

Joseph M. Fragosa et al.,
Defendants-Respondents.

Index No. 302898/08

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellant.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered October 28, 2010, dismissing the complaint and bringing up for review an order, same court and Justice, entered October 20, 2010, which granted defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants established prima facie that plaintiff did not sustain a "permanent loss of use" or a "permanent consequential limitation of use" of the cervical and lumbar spines within the meaning of Insurance Law § 5102(d). The affirmed reports of

defendants' orthopedic experts stated that plaintiff had full range of motion of her cervical and lumbar spines both shortly after and two years after the accident (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *see also DeJesus v Cruz*, 73 AD3d 539, 539 [2010]). The experts' failure to review plaintiff's MRI reports or medical records does not require denial of defendants' motion (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [2010]). Plaintiff improperly raises for the first time on appeal her argument that defendants' orthopedic reports are deficient because they cite different standards for normal range of motion and make different findings as to range of motion, and we decline to consider it (*see Alicea v Troy Trans, Inc.*, 60 AD3d 521, 521-522 [2009]). In any event, even if we were to consider it, we would reject it because the differences are not significant and both doctors concluded that plaintiff's range of motion was normal.

Defendants also established prima facie that any injury to the cervical spine was not caused by the accident by submitting the affirmed report of defendants' radiologist, who opined that the bulging discs in plaintiff's cervical spine were degenerative, consistent with plaintiff's age and the normal aging process, and not caused by plaintiff's accident (*see*

Pommells v Perez, 4 NY3d 566, 579 [2005]; *Rodriguez v Abdallah*, 51 AD3d 590, 590-591 [2008]). The doctor's detailed non-conclusory explanation for his opinion was sufficient to shift the burden of proof on the issue of causation to plaintiff (*cf. June v Akhtar*, 62 AD3d 427, 428 [2009]).

In opposition, plaintiff failed to raise an issue of fact. The affirmation of plaintiff's radiologist contained no conclusion as to causation, and thus failed to rebut defendants' radiologist's conclusion as to the causation of the bulging discs (*see Pommells*, 4 NY3d at 580; *Rodriguez*, 51 AD3d at 592). In addition, the orthopedic report submitted by plaintiff was insufficient to refute the range-of-motion findings of defendants' orthopedist, since he never examined her and, although a physician at the facility where plaintiff received treatment, failed to provide the medical records on which he based his conclusions (*see Euvino v Rauchbauer*, 71 AD3d 820, 820 [2010], *lv denied* 15 NY3d 713 [2010]; *see also Bandoian v Bernstein*, 254 AD2d 205, 205 [1998]). Plaintiff also failed to submit any evidence of current limitations in range of motion (*see Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 326-327 [2005]).

On appeal, plaintiff has failed to address her fracture or

90/180-day claims. Nor does she assert any serious injury with respect to any body part other than her cervical and lumbar spines.

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5242-
5243 In re Reginald A.,
Petitioner-Respondent,

-against-

Lottice A.,
Respondent-Appellant.

Carol Lipton, Brooklyn, for appellant.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about November 17, 2009, which awarded custody of the subject child to petitioner father, unanimously affirmed, without costs.

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

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5245-
5246 Thomas Burke, et al., Index 101670/08
590059/09
Plaintiffs-Respondents,

-against-

Hilton Resorts Corporation, et al.,
Defendants-Appellants-Respondents,

-and-

Century Maxim Construction Corp.,
Defendant-Respondent-Appellant.

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Hilton Resorts Corporation, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Century Maxim Construction Corp.,
Third-Party Defendant-Respondent-Appellant,

-and-

Construction and Realty Safety Group, et al.,
Third-Party Defendants,

Rebar Lathing Corp.,
Third-Party Defendant-Appellant-Respondent.

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Hoffman & Roth, LLP, New York (Timothy S. Nelson of counsel), for HIlton Resorts Corporation and Tishman Constructions, appellants-respondents.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Rebar Lathing Corp., appellant-respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

Malapero & Prisco, LLP, New York (John J. Peplinski of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 1, 2010, which, insofar as appealed from, granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim as against defendants Hilton Resorts Corporation (Hilton) and Tishman Construction Corporation of New York (Tishman), and denied, as untimely, the respective cross motions of Hilton, Tishman, defendant Century Maxim Construction Corporation (Century) and third-party defendant Rebar Lathing Corporation (Rebar) for summary judgment, unanimously modified, on the law, to the extent of finding Rebar's cross motion timely and remanding the matter to Supreme Court for consideration of the cross motion, and, upon a search of the record, granting plaintiffs summary judgment on the issue of liability on the Labor Law § 240(1) claim as against Century, and otherwise affirmed, without costs.

Plaintiff Thomas Burke fell approximately 15 feet through an unprotected hole in the floor of a construction site. Plaintiffs established their entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action as against Hilton (owner) and Tishman (construction manager) (*see*

John v Baharestani, 281 AD2d 114 [2001]). The evidence demonstrates that insufficient safety devices were provided (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9-10 [2011]; *see also Vargas v City of New York*, 59 AD3d 261 [2009]), and there is inadequate support for the claim that plaintiff was the sole proximate cause of the accident (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]).

Moreover, although plaintiffs did not appeal the court's denial of the motion for summary judgment on the section 240(1) claim as against Century, a search of the record shows that summary judgment should have also been granted as against Century (*see e.g. Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]; *Valentin v Pomilla*, 59 AD3d 184, 187 [2009]). Century had contractual supervisory authority over the worked performed by its subcontractor, Rebar (plaintiff's employer), and was therefore a statutory agent of Tishman, even if it did not exercise that supervisory authority with respect to plaintiff's particular task (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Weber v Baccarat, Inc.*, 70 AD3d 487 [2010]).

The court incorrectly found that Rebar's cross motion for summary judgment was untimely. The court's January 21, 2010

order provided that the parties had the right to move for summary judgment within 45 days of the date of the last deposition, which took place on March 12, 2010. Rebar served its cross motion on April 26, 2010, which was the last day within the deadline. As further discovery may be warranted with respect to issues raised in Rebar's cross motion, the matter is remanded to Supreme Court for a determination of the cross motion and, in its discretion, any related issues.

We have considered the remaining arguments of Hilton, Tishman and Century, including those regarding the timeliness of their respective cross motions, and find them unavailing.

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

ENTERED: JUNE 2, 2011

CLERK

Acosta, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5248 Coastal Sheet Metal Corp., Index 400303/06
Plaintiff-Respondent,

-against-

RJR Mechanical Inc., et al.,
Defendants-Appellants.

New York State University
Construction Fund, et al.,
Defendant.

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Loanzon Sheikh LLC, New York (Umar A. Sheikh of counsel), for appellants.

Sullivan Gardner PC, New York (Brian Gardner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 10, 2010, which denied vacatur of a judgment, same court and Justice, entered April 22, 2009, after a jury trial, awarding plaintiff $280,000.95 as against defendants-appellants, inclusive of interest, costs and disbursements, unanimously affirmed, without costs.

Supreme Court did not abuse its discretion in refusing to vacate the judgment pursuant to CPLR 5015(a)(2). The record reveals that the "newly-discovered evidence" upon which defendants base their motion is a settlement so-ordered by the United States District Court for the District of New Jersey on

November 30, 2009.

Evidence only qualifies as "newly-discovered" if it was in existence at the time of the original order or judgment, but was undiscoverable with due diligence (*Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 453 [1987]). Because the settlement of the New Jersey action occurred some seven months after judgment in the instant action was entered, it is not "newly-discovered evidence" within the meaning of CPLR 5015(a)(2).

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5249 Peter Voutsas, Index 109888/07
Plaintiff-Appellant,

-against-

Blake N. Soper, et al.,
Defendants-Respondents.

_____

Gregory A. Sioris, New York, for appellant.

Barton Barton & Plotkin LLP, New York (Randall L. Rasey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about November 20, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's failure to disclose his present fraud claims as an asset in his prior 1999 bankruptcy proceeding deprived him of the legal capacity to bring these claims (*see Whelan v Longo*, 7 NY3d 821 [2006]; *Barranco v Cabrini Med. Ctr.*, 50 AD3d 281 [2008]). Defendants made a prima facie showing that plaintiff knew or should have known, before the filing of the bankruptcy petition, of defendants' filing of the certificate of dissolution with the Secretary of State. Defendants submitted evidence showing that (1) plaintiff had received and cashed a distribution

check from the dissolved company in April 1996; (2) the last income tax return and schedule K-1 for the company showed they were for the tax year ending May 24, 1996 and were marked "Final Return" and "Final K-1"; (3) plaintiff stopped reporting income from the company in his personal income tax returns since 2000; (4) he did not disclose his interest in the company as an asset in his 1999 bankruptcy petition; and (5) he had not discussed the company with defendants since 1996, although they spoke on the phone daily while plaintiff was on sales trips. The company's accountant also testified at his deposition that he had apprised plaintiff of the dissolution in the spring of 1999, shortly before plaintiff filed the bankruptcy petition. Plaintiff's contentions in opposition to the motion are unsupported by the evidence, and thus, fail to raise triable issues of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5250 The People of the State of New York, Ind. 4145/08
Respondent,

-against-

Jose Mojica,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

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Judgment, Supreme Court, New York County (James A. Yates, J.), rendered February 26, 2009, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 2 years, with 3 years' postrelease supervision, unanimously affirmed.

To the extent the existing record permits review, it fails to support defendant's contention that the court intended to impose the minimum permissible term of postrelease supervision, but mistakenly believed that term to be three years.

Defendant's valid waiver of his right to appeal forecloses

review of his claim that his PRS period should be reduced in the interest of justice. As an alternative holding, we reject that claim.

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5251-
5252 Richard DeSilva, Jr., et al.,
Plaintiffs-Appellants,

-against-

Plot Realty, LLC, et al.,
Defendants-Respondents.

– – – – –

Plot Realty, LLC, et al.,
Plaintiffs-Respondents,

-against-

Richard DeSilva, Jr., et al.,
Defendants-Appellants.

– – – – –

And Another Action.

Index 108951/04
42983/05
601976/06

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Jeffrey S. Ween & Associates, New York (Jeffrey S. Ween of counsel), for appellants.

Lawrence A. Omansky, New York, for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 18, 2010, which, insofar as appealed from, denied the cross motion of DeSilva and Desco Appliances (collectively DeSilva) to disqualify Plot Realty, LLC's counsel, unanimously affirmed, without costs. Order, same court and Justice, entered February 4, 2010, which, sua sponte, amended the January 18, 2010 order to the extent of granting Plot Realty's

motion to consolidate two actions pending in Supreme Court and another in Civil Court, unanimously affirmed, without costs.

The cross motion was properly denied since DeSilva failed to establish that Plot Realty's attorney, who was also its controlling member and was effectively representing himself, was a necessary witness (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 446 [1987]; *Nimkoff v Nimkoff*, 18 AD3d 344, 346 [2005]).

Consolidation of the actions was appropriate since the matters have common questions of law and fact, and DeSilva failed to carry his burden of showing prejudice to a substantial right (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [2005]); DeSilva's claims of possible jury confusion and poisoning of any jury that would hear the nuisance and slander of title actions together are unpersuasive. Contrary to DeSilva's argument, the amended consolidation order did not contravene this Court's affirmance of a different Justice's order consolidating the actions for the limited purposes of discovery (45 AD3d 312 [2007]), inasmuch as this Court's prior order was intended as a

temporary case management ruling. Nor did the amended order violate the rule against sua sponte consolidation because the initial order had been the result of a motion and only its reconsideration was sua sponte (*see* CPLR 602; *compare AIU Ins. Co. v ELRAC, Inc.*, 269 AD2d 412 [2000]).

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

ENTERED: JUNE 2, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3933 Raimundo Nascimento, Index 110581/08
Plaintiff-Respondent,

-against-

Bridgehampton Construction Corp., et al.,
Defendants,

Bayview Building & Framing Corp.,
Defendant-Appellant.

_____

Fischetti & Pesce, LLP, Garden City (John E. McLoughlin of counsel), for appellant.

The Durst Law Firm, P.C., New York (John E. Durst, Jr., of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 15, 2010, modified, on the law, so as to deny plaintiff's motion, and otherwise affirmed, without costs.

Opinion by Saxe, J., All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Karla Moskowitz
Rolando T. Acosta
Helen E. Freedman, JJ.

3933
Index 110581/08

_____x

Raimundo Nascimento,
Plaintiff-Respondent,

-against-

Bridgehampton Construction Corp., et al.,
Defendants,

Bayview Building & Framing Corp.,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered January 15, 2010, which, insofar as appealed from, granted plaintiff's motion for summary judgment as against Bayview Building & Framing Corp. on the issue of liability for violations of Labor Law §§ 240(1) and 241(6), and denied Bayview's motion for summary judgment dismissing the Labor Law claims as against it.

Fischetti & Pesce, LLP, Garden City (John E. McLoughlin of counsel), for appellant.

The Durst Law Firm, P.C., New York (John E. Durst, Jr., of counsel), for respondent.

SAXE, J.

This appeal brings up questions concerning subcontractor liability under the Labor Law's strict liability provisions.

Plaintiff was injured while employed as a laborer for what amounts to a sub-sub-subcontractor on a renovation project: the general contractor, defendant Bridgehampton Construction Co., subcontracted the framing work to defendant Bayview Building and Framing Corp., the appellant here, which in turn subcontracted that work to defendant R&L Carpentry Corp., which further subcontracted the work to defendant Figueiredo Construction, plaintiff's employer.

In response to a motion by plaintiff for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6), Bayview cross-moved for summary judgment dismissing plaintiff's Labor Law claims as against itself. Bayview's position was that it did not have the authority to coordinate or supervise the work in order to control worker safety at the work site. It further argued that plaintiff's motion for summary judgment on the issue of Labor Law liability should be denied, inasmuch as differing witness testimony creates a question of fact as to whether the Labor Law was violated, and necessitates further discovery. Specifically, while plaintiff asserted that he fell into the basement while descending a ladder from a 14-foot-high platform

which would become the first floor of the house, when the extended portion of the extension ladder, unsecured to the platform, slid down, an observer said he "saw a workman fall from the rafters" and "[t]here was no ladder in the area where the workman had fallen from."

The motion court granted plaintiff's motion, and denied Bayview's cross motion.

Initially, we agree with the motion court that the difference between the witnesses' factual recitations does not create a material issue of fact as to whether Labor Law § 240(1) was violated. A violation of Labor Law § 240(1) is stated whether plaintiff's fall was caused by an unsecured extension ladder that slipped or malfunctioned (*Dowling v McCloskey Community Servs. Corp.*, 45 AD3d 1232 [2007]), or whether it happened because he was required to work on rafters without safety devices protecting him from a fall through the open space to the basement area below (*see Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [2008]).

Nor may Bayview avoid summary judgment under Labor Law § 240(1) by suggesting that discovery is still necessary.

> "[W]hile determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent, [a] determination of summary judgment cannot be avoided by a claimed need for discovery

> unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"

(*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536 [2010] [citation and internal quotation marks omitted]). Bayview failed to provide a basis for the claim that further discovery would lead to additional relevant evidence.

Bayview argues that summary judgment on a Labor Law § 240(1) case must be denied where there are conflicting versions of the accident. However, the cases it relies on are inapposite; all of them address inconsistencies in the plaintiff's various versions of the events, creating a need for cross-examination and justifying a challenge to his credibility (*see Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125 [1996]; *Colazo v Tower Assoc.*, 209 AD2d 339 [1994]; *Wilson v Haagen-Dazs Co.*, 215 AD2d 338 [1995], *lv dismissed* 86 NY2d 838 [1995]).

However, with regard to whether there was a violation of a particular Industrial Code provision as a predicate for liability under Labor Law § 241(6), the differing factual assertions as to how the accident occurred do preclude a determination as a matter of law, and in that respect, a grant of summary judgment was improper.

A more complex question is raised by Bayview's contention that as a subcontractor rather than the general contractor, it

was entitled to summary judgment dismissing the claim against it because it did not have the authority to oversee the work plaintiff was performing or the site's safety conditions. In opposition to this contention, plaintiff argues that all subcontractors in the "chain of command" must be as liable as the general contractor.

Initially, we reject plaintiff's broad assertion; the law does not hold that all subcontractors in the "chain of command" are necessarily as liable as the general contractor. Rather, as a subcontractor rather than the general contractor, Bayview may be held liable for plaintiff's injuries under Labor Law §§ 240(1) and 241(6) only if it had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor's statutory agent (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Murphy v Herbert Constr. Co.*, 297 AD2d 503 [2002]; *Vieira v Tishman Constr. Corp.*, 255 AD2d 235 [1998]). To be treated as a statutory agent, the subcontractor must have been "delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury" (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1990]). If the subcontractor's area of authority is over a different portion of the work or a different area than the one in which the

plaintiff was injured, there can be no liability under this theory (*see Sabato v New York Life Ins. Co.*, 259 AD2d 535 [1999]; *Headen*, 160 AD2d at 319).

Subcontractors have been held to be the statutory agents of general contractors in situations in which provisions of the subcontracts explicitly granted supervisory authority (*see Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [2010]; *Nephew v Klewin Bldg. Co.*, 21 AD3d 1419, 1421 [2005]), and those in which evidence showed that the subcontractors actually exercised supervisory authority (*see Everitt v Nozkowski*, 285 AD2d 442, 444 [2001]). Additionally, evidence that a subcontractor delegated the requisite supervision and control to another subcontractor has been cited as forming part of the proof that the first subcontractor formerly possessed that authority, and may justify imposing Labor Law liability on the first subcontractor as a statutory agent of the general contractor (*see Weber v Baccarat*, 70 AD3d at 488; *Everitt v Nozkowski*, 285 AD2d at 444).

In *Weber*, the plaintiff fell from a defective ladder while installing an HVAC system. This Court found that the plaintiff was entitled to summary judgment against the HVAC subcontractor, King Freeze, because "King Freeze had the authority to supervise and control the work being done by plaintiff pursuant to the terms of its subcontract with IDI. Moreover, it demonstrated

this authority by subcontracting a portion of the HVAC work to plaintiff's employer" (70 AD3d at 488 [citations omitted]). The Court also observed that "[t]he fact that IDI possessed concomitant or overlapping authority to supervise the entire renovation, including the installation of the HVAC system, does not negate King Freeze's authority to supervise and control the installation of the HVAC system. Whether King Freeze actually supervised plaintiff is irrelevant" (*id.*).

In *Everitt*, the plaintiff was injured while installing drywall during construction of a model home. The Second Department noted that "[t]he general contractor . . . had entered into an oral subcontract with the defendant George S. Shuback to provide all materials and labor necessary for the installation of drywall (or sheetrock) in the model home[, and] Shuback further subcontracted the drywall installation work to the plaintiff's employer" (285 AD2d at 442-443). The Court affirmed the denial of Shuback's motion for summary judgment dismissing the Labor Law claim against him because

> "the evidence establishes that Shuback did indeed have the authority to supervise and control the drywall installation. Shuback subcontracted out the work he was hired to perform, [but] . . . he visited the work site on a daily basis to check on the drywall installation crew and, more importantly, he instructed [his subcontractor] and his crew as to how and where to install the drywall" (*id.* at 444).

Bayview relies on the assertion by its president that it did not coordinate and supervise the project and was not empowered to enforce safety standards, and points out that there was no written contract between Bayview and Bridgehampton Construction from which the terms of Bayview's authority may be definitively established. The record merely contains a written proposal from Bayview naming the work and its price, and Bayview's written subcontract with its subcontractor, R&L Carpentry, which provided that R&L was agreeing "to provide all labor, tools, equipment, *supervision* and other items necessary to execute the [framing] work" (emphasis added).

We conclude that Bayview's protestations do not entitle it to summary judgment. A finder of fact could find that when Bayview undertook responsibility for the framing work, and then subcontracted out that work, *specifying that the subcontract included the responsibility to supervise the work*, it acknowledged that the job it was subcontracting out *included supervision of the framing work*. The use of the word "supervision" in the subcontract does not alone establish the exact nature and extent of the assignment Bayview had been given by Bridgehampton; however, the particular circumstances presented here may permit the factfinder to infer that supervision of the framing work was part of the job Bayview had undertaken and, in

turn, delegated to R&L. Moreover, nothing in its claim that it did not coordinate and supervise the work establishes as a matter of law that it lacked the authority to do so. As this Court held in *Weber v Baccarat* (70 AD3d at 488), "Whether [the subcontractor] actually supervised plaintiff is irrelevant." Bayview's claims merely create a question of fact as to whether it possessed the necessary authority to be cast as a statutory agent for purposes of the Labor Law.

Importantly, once a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity (*Inga v EBS North Hills, LLC*, 69 AD3d 568, 570 [2010]). If it undertook the supervision of the framing work, Bayview cannot avoid liability under the Labor Law by having further subcontracted the work to Figueiredo.

In view of the foregoing, the affidavit by Bayview's president fails to conclusively establish Bayview's entitlement to summary judgment. Rather, a question of fact is presented as to the authority Bayview was given when the work was originally subcontracted to it. Therefore, the denial of Bayview's cross motion for summary judgment was correct.

However, the question of fact regarding whether Bayview qualified as a statutory agent of Bridgehampton Construction requires us to reverse the grant of plaintiff's motion for

summary judgment on the issue of liability.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered January 15, 2010, which, insofar as appealed from, granted plaintiff's motion for summary judgment as against defendant Bayview Building & Framing Corp. on the issue of liability for violations of Labor Law §§ 240(1) and 241(6), and denied Bayview's motion for summary judgment dismissing the Labor Law claims as against it, should be modified, on the law, so as to deny plaintiff's motion, and otherwise affirmed, without costs.

All Concur.

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

ENTERED: June 2, 2011.

CLERK