SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 23, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Renwick, Richter, Gische, JJ.

9422-
9423 Theresa Vasquez, etc., Index 106891/09
Plaintiff-Respondent-Appellant,

-against-

Cohen Brothers Realty Corporation,
Defendant-Appellant-Respondent.

- - - - -

Theresa Vasquez, etc., et al.,
Plaintiffs-Respondents,

-against-

Cohen Brothers Realty Corporation,
Defendant-Appellant.

_____

Greenberg Traurig, LLP, New York (Loring I. Fenton of counsel), for appellant-respondent/appellant.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for respondent-appellant/respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 23, 2012, which denied plaintiff's motion for partial summary judgment on liability on her Labor Law § 240(1) claim, and denied defendant's cross motion for summary judgment dismissing the claim, unanimously modified, on the law, to grant plaintiff conditional partial summary judgment, and otherwise affirmed, without costs. Order, same court, Justice, and entry

date, which denied defendant's motion for summary judgment dismissing the complaint on the ground that the action is barred by the exclusivity provision of the Workers' Compensation Law, unanimously affirmed, without costs.

Plaintiff Theresa Vasquez brought this action against defendant Cohen Brothers Realty Corporation after her husband, David Vasquez (Vasquez), died during the course of his employment at a building managed by defendant. Prior to his death, Vasquez was employed by the property owner as an engineer. On October 3, 2008, Vasquez, along with other members of the property's engineering crew, was replacing ceiling tiles in the drop ceiling of the building's loading dock. The tiles had been removed by a plumbing contractor hired to work on the sprinkler heads. The drop ceiling consisted of a grid that hung below the actual ceiling. Ceiling tiles and florescent lights fit into the rectangular sections in the grid. The drop ceiling was approximately 15 feet above the concrete floor of the loading dock.

To complete the work, Vasquez and a coworker, James O'Brien, used a two-man scissor lift to reach the drop ceiling. While replacing the tiles, Vasquez saw that a fluorescent light was missing from the grid. Vasquez asked O'Brien, who was operating the scissor lift, to raise it higher so he could see if the light

fixture had been placed above the drop ceiling. When the lift was raised, Vasquez saw that the light fixture had been placed on an exhaust duct. The lift could not be raised above the drop ceiling as it would collide with the grid. In order to complete his repair work on the ceiling, Vasquez stepped onto the guardrail of the lift, climbed out of the lift basket and onto the exhaust duct. From his position on the duct, he reinstalled the fluorescent light.

Vasquez then attempted to replace the two ceiling tiles on the other side of the light fixture. Although he was able to replace the first tile, he had difficulty placing the second tile in the grid as it was further away from his position on the exhaust duct. Using a stick O'Brien handed him, Vasquez attempted to push the tile into place. As he was doing so, he lost his balance, falling to the ground and fatally hitting his head.

Plaintiff commenced this action, asserting that defendant was liable for her husband's death under Labor Law § 240(1) for failing to provide him with the proper safety device to complete his work. The complaint also asserted causes of action for negligence and violations of Labor Law §§ 200 and 241. Plaintiff moved for partial summary judgment on liability on the 240(1) claim and defendant cross-moved to dismiss the claim. Defendant

also moved for summary judgment dismissing the entire action as barred by the exclusivity provision of the Workers' Compensation Law. The motion court denied each of the motions. On the issue of 240(1) liability, the court found there was an issue of fact whether Vasquez could have completed his work without leaving the lift.

Defendant's motion for summary judgment, made on the ground that the complaint is barred by the exclusivity provision of the Workers' Compensation Law (*see* Workers' Compensation Law §§ 11, 29[6]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 555 [1991]), was properly denied. Defendant maintains that it was Vasquez's special employer because it hired all building employees, including Vasquez, and was also responsible for firing. However, plaintiff asserts the evidence establishes that defendant was not Vasquez's special employer. Specifically, the property owner, not defendant, paid and provided benefits to Vasquez. Defendant's evidence failed to establish as a matter of law that it "control[led] and direct[ed] the manner, details and ultimate result of" Vasquez's work (*Thompson*, 78 NY2d at 558), and plaintiff acknowledges questions of fact exist on this issue. If the issue of defendant's status as a special employer is resolved in plaintiff's favor, plaintiff is entitled to partial summary judgment on liability on her Labor Law § 240(1) claim.

An owner or its agent is liable under Labor Law § 240(1) if the plaintiff was injured while "engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). The statute requires "owners and their agents" to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building (Labor Law § 240(1); *see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). The purpose of the statute "is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner" (*Gordon*, 82 NY2d at 559, quoting 1969 NY Legis Ann at 407), and Labor Law § 240(1) imposes strict liability on the owner for a "breach of the statutory duty which has proximately caused injury" (*Gordon*, 82 NY2d at 559).

Here, the work Vasquez was completing when the accident occurred falls squarely within the protection of Labor Law § 240(1). Vasquez was working from an elevated height to repair the ceiling, and defendant failed to provide him with an adequate safety device. It is undisputed that besides the lift, defendant did not supply the workers with harnesses or safety lines.

We reject defendant's assertion that Vasquez's decision to leave the lift was the sole proximate cause of his death.

Although the building manager, Joseph Tesoriero, stated in his affidavit that months prior to the accident he told Vasquez not to stand on the guardrails of the lift or leave the lift basket while it was elevated, an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008]).

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: APRIL 23, 2013

CLERK

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

9642 & M-1458 Louis Nadal, Plaintiff-Appellant, Index 18246/06

-against-

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

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Allen & Overy LLP, New York (Molly Spieczny of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 20, 2012, which granted defendants' motion for summary judgment dismissing the causes of action alleging false arrest/imprisonment and malicious prosecution, unanimously affirmed, without costs.

Dismissal of the false arrest/imprisonment claim was proper where plaintiff was arrested for the shooting death of another pursuant to a facially valid arrest warrant, which is a complete defense to the cause of action (*see Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006]). Moreover, plaintiff was indicted by a grand jury, which creates a presumption that probable cause existed (*see Colon v City of New York*, 60 NY2d 78, 82-83 [1983]; *Lawson v City of New York*, 83 AD3d 609, 610 [1st

Dept 2011], *lv dismissed* 19 NY3d 952 [2012]), and the fact that plaintiff was ultimately acquitted after trial does not negate the existence of probable cause (*see Jenkins v City of New York*, 2 AD3d 291, 292 [1st Dept 2003]). Plaintiff's argument that one of the witnesses was coerced to change her testimony is unsupported by the record and, thus is inadequate to rebut the presumption of probable cause afforded by the indictment (*see Colon*, 60 NY2d at 83).

It is further noted that at plaintiff's second criminal trial, the trial court found that probable cause existed, and therefore, plaintiff is collaterally estopped from attempting to relitigate that issue (*see Martin v Rosenzweig*, 70 AD3d 1112, 1113-1114 [3d Dept 2010]; *Velaire v City of Schenectady*, 235 AD2d 647, 648-649 [3d Dept 1997], *lv denied* 89 NY2d 816 [1997]).

The existence of probable cause is also fatal to plaintiff's claim for malicious prosecution (*see Shapiro v County of Nassau*, 202 AD2d 358 [1st Dept 1994], *lv denied* 83 NY2d 760 [1994]). The claim is also deficient in light of plaintiff's failure to show that the criminal proceeding against him was "brought out of actual malice" (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]; *see Shapiro* at 358).

We have considered plaintiff's remaining arguments, including that he is entitled to an award of punitive damages in light of defendants' improper actions, and find them unavailing.

M-1458 - ***Louis Nadal v The City of New York***

Motion seeking recusal denied.

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

ENTERED: ENTERED APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9857 The People of the State of New York, Respondent, Ind. 4045/08

-against-

Alonzo England, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 23, 2009, convicting defendant, after a jury trial, of assault in the second degree and aggravated criminal contempt, and sentencing him to concurrent terms of one year, unanimously affirmed.

The verdict 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, including its evaluation of the victim's background and the fact that she had given conflicting versions of a prior incident between her and defendant.

Defendant's challenges to the prosecutor's summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an

alternative holding, we find that the challenged remarks generally constituted permissible responses to defense arguments, and that there was nothing sufficiently egregious to warrant reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent defendant's postsummations mistrial motion could be viewed as preserving any issues (*but see Romero*, 7 NY3d at 912), we find that the court properly exercised its discretion in denying the motion.

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9858 Galina Olshantesky, Index 105792/09
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Respondent.

_____

O'Connor Redd LLP, White Plains (Amy L. Fenno of counsel), for appellant.

Steven S. Efron, New York (Renée L. Cyr of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered July 19, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to reinstate the jury verdict and to vacate the court's declaration of a mistrial, unanimously modified, on the law and the facts, to reinstate the verdict on damages, and order a new trial as to liability only, and otherwise affirmed, without costs.

Immediately after receiving the verdict in this personal injury action, an off-the-record discussion with the jury revealed that they had consulted an online dictionary to define the term "substantial."

Although plaintiff contends for the first time on appeal that the court erred in declaring a mistrial after the jury was discharged based on "unsworn testimony" of the jury foreperson,

appellate review of the argument is appropriate because it involves an essential question of whether the trial court exceeded its power and the issue "is apparent upon the face of the record and could not have been avoided if raised at the proper juncture" (*Rafa Enters. v Pigand Mgt. Corp.*, 184 AD2d 329, 330 [1st Dept 1992]).

The record shows that the jury had not been discharged when the court began its inquiry into the jury's misconduct. Indeed, after the court received the jury's verdict and thanked the jury for its service, the jury remained in the courtroom during an off-the-record discussion that revealed the misconduct and during a follow-up discussion on the record (*cf. Winters v Brooklyn & Queens Tr. Corp.*, 236 App Div 819 [2d Dept 1932]; *International-Madison Bank & Trust Co. v Silverman*, 234 App Div 619 [2d Dept 1931]).

In any event, regardless of whether the jury was discharged, the court properly engaged in an inquiry regarding external influences on the jury (*see Sharrow v Dick Corp.*, 86 NY2d 54, 61 [1995]; *Alford v Sventek*, 53 NY2d 743, 744 [1981]). Further, the court properly determined that the jury's act of consulting an outside dictionary on a term critical to its decision constitutes misconduct warranting a mistrial, especially since the foreperson indicated that the jury was "confused" about the term

"substantial" and the court was unable to give curative instructions (*compare Maslinski v Brunswick Hosp. Ctr.*, 118 AD2d 834 [2d Dept 1986], *and Long v Payne*, 198 App Div 667, 668 [4th Dept 1921], *with Kraemer v Zimmerman*, 249 AD2d 159, 160 [1st Dept 1998], *and DiRende v Cipollaro*, 234 AD2d 78, 78-79 [1st Dept 1996], *lv denied* 90 NY2d 806 [1997]).

However, because the jury's misconduct related only to the issue of liability, and there is no evidence that it affected the jury's determination on damages, we reinstate the verdict on damages (*see Pope v 818 Jeffco Corp.*, 74 AD3d 1165 [2d Dept 2010]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9859 In re Walid Hassan, etc., Index 250389/11
Petitioner-Appellant,

-against-

New York City Department
of Correction, et al.,
Respondents-Respondents.

_____

Carol L. Kahn, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 27, 2011, denying the petition seeking to annul a determination of respondent New York City Department of Correction (DOC), dated on or about March 24, 2010, which found petitioner guilty of disrespect to staff and refusal to obey a direct order, and imposed penalties, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for further proceedings consistent with this decision.

On appeal, petitioner does not contest that the determination is supported by substantial evidence. Rather, he argues that the record before the Supreme Court was incomplete because it lacked a record of the disciplinary hearing,

respondent's answer, and a written statement by Correction Officer Stevens, which the Hearing Officer was required to show petitioner pursuant to DOC Directive 6500R-B(III)(C)(25) and (26). We agree. Further, it cannot be determined on this record whether the Hearing Officer's failure to show petitioner the written statement by Correction Officer Stevens prejudiced petitioner's defense (*see Matter of Caldwell v Rock*, 93 AD3d 1048 [3d Dept 2012]; *cf. Matter of Brown v New York City Dept. of Correction*, 288 AD2d 162, 163 [1st Dept 2001]). Accordingly, we remand for respondent to submit an answer pursuant to CPLR 7804(d) and any appropriate submissions pursuant to CPLR 7804(e), including a record of the hearing and a written witness statement by Correction Officer Stevens (*see Matter of Ghiazza v Putnam County Dept. of Consumer Affairs*, 75 AD3d 641 [2d Dept 2010]; *Matter of Jacob v Winch*, 121 AD2d 446 [2d Dept 1986]). Upon such submissions, Supreme Court shall determine whether the failure to provide petitioner with the written statement was harmless error.

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9860 In re Estate of Seymour Schneiderman, Deceased.

File No. 736/10
Index 600323/10

- - - - -

Sonya Schneiderman, etc., Plaintiff-Petitioner-Appellant,

-against-

Gerald Barandes, etc., Defendant-Respondent-Respondent,

Merrill Lynch & Co., Inc., Defendant-Respondent.

_____

Davidoff Hutcher & Citron LLP, New York (Martin H. Samson of counsel), for appellant.

McCarthy Fingar LLP, White Plains (Phillip C. Landrigan of counsel), for Gerald Barandes, respondent.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered November 9, 2012, which granted defendant Gerald Barandes's (defendant) motion for summary judgment dismissing the petition for a declaratory judgment to invalidate the creation of a $1 million trust on grounds of undue influence and constructive fraud, and declared defendant the owner of the trust, unanimously reversed, on the law, without costs, the motion denied, and the petition reinstated.

Defendant served as decedent's attorney on personal and corporate matters for more than 40 years and thus held a

fiduciary relationship with decedent. Defendant therefore had the burden of proving by clear evidence that there was no fraud or undue influence in connection with decedent's gift of $1 million, made weeks before his death at the age of 82, and deposited in a trust account held jointly by decedent and defendant, clearly for defendant's benefit (*see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699 [1978]]; *see Sepulveda v Aviles*, 308 AD2d 1, 7 [1st Dept 2003]).

Surrogate's Court erred in dismissing the claim of undue influence as there were conflicting inferences of both undue influence and the lack thereof. For example, the evidence showed that, from September 2009 to January 2010, as decedent's health continued to deteriorate, defendant repeatedly wrote and called decedent to request the creation of a $1 million trust account and suggested that he would suffer a financial crisis if he did not receive it, and decedent complained to plaintiff (his wife) that defendant would not stop asking him for money. While such evidence allowed for an inference of undue influence, the evidence presented by defendant suggested that decedent on occasion expressed a desire to compensate defendant for legal services defendant had performed and might perform for decedent's company after his death, by the creation of this account. Under the circumstances presented, defendant failed to overcome the

presumption of undue influence and failed to eliminate any triable issue of fact warranting dismissal of the count (*see Radin v Opperman*, 64 AD2d 820 [4th Dept 1978]; *compare Matter of Walther*, 6 NY2d 49 [1959]).

Surrogate's Court further erred in concluding that decedent had the benefit of consulting with independent counsel regarding the $1 million gift. Decedent's estate planning counsel were introduced to him by defendant to advise decedent regarding his will. Counsel, who were not truly independent, further averred that they did not advise decedent regarding the $1 million gift and instead told him to contact his financial advisor should he wish to proceed. When decedent terminated the representation and obtained other independent counsel, it was solely for purposes of revising his will, and there was no evidence to suggest that he consulted with them regarding the $1 million gift. Thus, there was no meaningful consultation with independent counsel that would support a finding that decedent was not unduly influenced by defendant (*see Matter of Henderson*, 80 NY2d 388, 394 [1992]).

The count of constructive fraud was also improperly dismissed. Defendant, who had a substantial net worth at the time of decedent's death, nevertheless repeatedly represented that his savings were deteriorating and that he would suffer a financial crisis if decedent did not give him the $1 million.

While decedent was aware of the salary paid to defendant over the years as counsel to decedent's company, this alone did not amount to clear evidence to eliminate any triable issue of fact as to whether defendant had misrepresented his financial condition, and whether decedent relied upon it (*see Brown v Lockwood*, 76 AD2d 721 [2d Dept 1980]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9861 Emmanuel Boachie, Index 402903/08
Plaintiff-Appellant,

-against-

57-115 Associates, L.P.,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew J. Potak of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 8, 2012, which, in this personal injury action arising from plaintiff's alleged fall on a stairway in defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that it did not create or have actual or constructive notice of the wet condition on the stairway by submitting the testimony of plaintiff, the testimony of the area and maintenance supervisors for the subject building, and the log book entry for the date of the accident, which failed to indicate a hazardous condition in the area of the accident (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact.

The court properly determined that the doctrine of res ipsa loquitur is inapplicable under the circumstances (*see generally Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9864 In re Jian Hua Tan, Index 112072/11
Petitioner-Appellant,

-against-

New York City Transit Authority,
Respondent-Respondent.

_____

Christopher Chen, Flushing, for appellant.

Martin B. Schnabel, Brooklyn (Mariel A. Thompson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 20, 2012, denying the petition to annul a determination of nonparty New York State Division of Human Rights, dated August 24, 2011, which denied petitioner's complaint of disability discrimination by nonparty Manhattan and Bronx Surface Transit Operating Authority in terminating his employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that there was no probable cause to believe that petitioner was subjected to disability-based discrimination was rationally based (*see Matter of Pajooh v State Div. of Human Rights*, 82 AD3d 609 [1st Dept 2011]; *Matter of Allen v Division of Human Rights*, 82 AD3d 585 [1st Dept 2011]). Indeed, the record demonstrates that petitioner falsified his

time sheets to show that he was working during times when he was absent from the office (*see e.g. Costello v St. Francis Hosp.*, 258 F Supp 2d 144, 155 [ED NY 2003] ["(a)n employee's falsification of a time sheet can constitute a legitimate, nondiscriminatory reason for terminating an employee"]).

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

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9865-
9865A &
M-1565

Warren Cole,
Plaintiff-Appellant-Respondent,

Index 604784/99

-against-

Harry Macklowe,
Defendant-Respondent-Appellant.

_____

Shapiro Forman Allen & Sava LLP, New York (Robert W. Forman of counsel), for appellant-respondent.

Akin Gump Strauss Hauer & Feld LLP, New York (Steven M. Pesner of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 24, 2012, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered November 21, 2011, which, inter alia, denied plaintiff damages for breach of contract with respect to his interests in 145 East 76th Street, limited plaintiff's award of such damages with respect to a portfolio of distressed debt known as the Coolidge investments, and awarded plaintiff such damages with respect to 342 Madison Avenue, unanimously modified, on the law, to grant plaintiff damages with respect to 145 East 76th Street, grant additional damages with respect to the Coolidge investments, remand for a recalculation of damages and interest, and otherwise affirmed, without costs. Appeal from the aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

Where, as here, "it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of damages which he has caused is uncertain" (*Randall-Smith v 43rd St. Estates Corp.*, 17 NY2d 99, 106 [1966] [internal quotation marks omitted]).

Here, plaintiff's expert used an investment valuation analysis because he determined that there was no market for the 76th Street property – a conclusion with which the lower court agreed. Despite this agreement, the court, mistakenly believing that this Court's previous order required a market value analysis even if no such market existed, found that plaintiff failed to meet his burden of proof. This was error, especially where, as here, the court had the means to make a market value determination if it so desired.

It was also error for the court to limit plaintiff's recovery regarding his interest in the Coolidge investments. The court relied on financial statements prepared by defendant to determine an amount due to plaintiff on closed investments as of the breach date, but declined to rely on that same spreadsheet

for a figure as to what plaintiff's recovery would be if the entire portfolio had been fully liquidated or closed as of the breach date. The court premised its decision on the fact that the latter figure constituted an "adjustment" made at plaintiff's request. As argued by plaintiff, however, no such "adjust[ment]" occurred or was even necessary. Plaintiff's portion of the Coolidge investments was a straight percentage (either 15% or 25%) of defendant's portion. Thus, if the figure representing defendant's portion was reliable, so too was the figure representing plaintiff's portion. The only thing that was done to the spreadsheet was that the CFO added a column for plaintiff which accounted for his proper percentage. Such was not an adjustment, but rather a straightforward calculation. Defendant fails to explain what possible difference it makes that the particular column was not included in previous reports.

To the extent defendant's cross appeal relies on the argument that plaintiff failed to meet his burden of proof because his expert submitted an investment value analysis instead of a market value analysis, such arguments are rejected.

We also reject defendant's arguments that the court erred in refusing to hear evidence that amounts awarded to plaintiff should have been discounted.

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

M-1565 - *Cole v Macklowe*

Motion to enlarge record denied.

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9866 The People of the State of New York, Ind. 2173N/10
Respondent,

-against-

Jeffrey Garcia,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about June 17, 2011,

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

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

ENTERED: APRIL 23, 2013

CLERK

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

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9867- 9867A — The People of the State of New York, Respondent, — Ind. 992/08, 1212/08

-against-

Tyrone Hecker,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

_____

Judgments, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 17, 2008, convicting defendant, upon his pleas of guilty, of robbery in the first and third degrees, and sentencing him, as a second violent felony offender and as a second felony offender, to consecutive terms of 10 years and 2 to 4 years, respectively, unanimously affirmed.

Defendant's contention that the court erred in granting him an unduly limited suppression hearing is unpreserved, as well as being forfeited by defendant's guilty plea. Rather than issuing an order that finally denied any part of defendant's suppression motion, which would be a prerequisite for appellate review (*see* CPL 710.70[2]), the court ordered a hearing. While the court's order contained language limiting the issues that could be raised at the hearing, and the limiting language (which appears to have

been inserted inadvertently) was inapplicable to the fact pattern, it was incumbent upon defendant to alert the court to the problem. Instead, defendant pleaded guilty before any hearing was held, thereby forfeiting review (*see People v Fernandez*, 67 NY2d 686, 688 [1986]).

We perceive no basis for reducing the sentences or directing that they run concurrently.

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, J.P., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9868 In re Estate of Grace T. Rella, etc., Deceased. - - - - - Vincent Rella, et al., Objectants-Appellants, Gilbert F. Rella, Executor-Respondent. File No. 2633/10

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Harry Amer, White Plains, for appellants.

Howard W. Rachlin, New York (Louis Klieger of counsel), for respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered March 29, 2012, which granted executor-respondent's motion for partial summary judgment dismissing the objections, unanimously affirmed, without costs.

Objectants failed to raise a triable issue as to capacity, where they offered only the general comment by one of them that decedent, for the period of about a year was "at times confused," and executor offered the testimony of three disinterested witnesses - decedent's doctor, lawyer, and accountant - who all met with her at or just before the making of the gift, and found her fully aware and alert (*see Feiden v Feiden*, 151 AD2d 889 [3d Dept 1989]). Nor was the Surrogate bound by our prior decision on the objections of a different objectant in 2000, as that

determination was made before much of the relevant discovery. Objectants failed to show that executor had a confidential relationship with decedent. Thus, they bore the burden of showing undue influence. Because they failed to show anything more than routine dealings of children assisting an ailing parent, summary judgment was proper dismissing this claim (*Feiden*, 151 AD2d at 891 [mere family relationship or sickness of decedent not sufficient, per se, to demonstrate undue influence]).

Finally, given the litigation over the note of issue, the years of post notice discovery, the introduction of wholly new objections after that discovery, and the transfer of the action to New York County, the Surrogate did not abuse her discretion in finding that executor had good cause for moving for partial summary judgment after the expiration of the 120 days (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 128-129 [2000]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9869 The People of the State of New York, Ind. 5260/06
Respondent,

-against-

Deshun Jackson,
Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Margaret E. Knight of counsel), and Lankler Siffert & Wohl LLP, New York (Matthew G. Coogan of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered March 31, 2009, as amended April 16, 2009, convicting defendant of two counts each of robbery in the first and second degrees and two counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, unanimously affirmed.

Defendant did not provide a record sufficient to permit review of his claim that the court failed to comply with the procedural requirements set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]) in responding to three jury notes. Viewed in light of the presumption of regularity that attaches to

judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]), the existing record, to the extent it permits review, does not establish that the court failed to fulfill its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]). There is no evidence that the court prevented defense counsel from knowing the specific contents of the notes, or from suggesting different responses from those the court provided (*see People v Starling*, 85 NY2d 509, 516 [1995]). Assuming, without deciding, that the procedure adopted by the court in responding to the jury's notes may have been error, it was not a mode of proceedings error (*see People v Kadarko*, 14 NY3d 426, 429-430 [2010]). Accordingly, defense counsel's failure to object at that time, when the error could have been cured, renders defendant's claim unpreserved for review (*see People v Ramirez*, 15 NY3d 824, 826 [2010]), and we decline to review it in the interest of justice.

The jury's first note, which requested certain trial exhibits and a readback of a portion of the testimony of one witness, was ministerial in nature (*see People v Ochoa*, 14 NY3d 180, 188 [2010]; *see also People v Ziegler*, 78 AD3d 545 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]), and "any input by counsel would have been minimal" (*People v Snider*, 49 AD3d 459, 460 [1st Dept 2008], *lv denied* 11 NY3d 795 [2008]). In any case, with

respect to the part of the note requesting a readback, defendant fails to demonstrate a mode of proceedings error since the record shows that the court read that specific request into the record in open court and gave notice of its intent to comply with the request (*see Starling*, 85 NY2d at 516). Moreover, there was no mode of proceedings error with respect to the remaining portion of the first jury note, which identified specific exhibits requested for review, because before deliberations began, defense counsel had expressly agreed to permit the jury to examine the exhibits in evidence upon request (*see People v Green*, 82 AD3d 593, 593 [1st Dept 2011], *lv denied* 17 NY3d 816 [2011]).

As for the second jury note, the court read the note into the record and provided notice of its intended response before recalling the jury into the courtroom, and defendant's unsupported contention that his counsel was denied the opportunity to participate meaningfully in crafting the court's response does not rise to the level required for defendant to overcome the presumption of regularity (*see Velasquez*, 1 NY3d at 48). To the extent defendant objects, for the first time on appeal, to the substance of the supplemental jury charge given in response to the second jury note, such objection is unpreserved (*see Starling*, 85 NY2d at 516).

Finally, defendant's challenge to the procedure employed by

the court in responding to the third jury note is without merit, since the record reveals that the court read the note verbatim into the record before advising counsel that it would give the jury "quick summaries." To the extent this procedure departed from the recommended procedure set forth in *O'Rama*, such departure does not amount to a mode of proceedings error and defense counsel's failure to timely voice any objection renders the claim unpreserved.

We have considered and rejected defendant's remaining arguments concerning the *O'Rama* issues.

The court properly denied defendant's suppression motion. Defendant's arguments concerning the initial intrusion into his pocket are similar to arguments this Court rejected, without elaboration, on a codefendant's appeal (*People v Butler*, 81 AD3d 484, 485 [1st Dept 2011], *lv denied* 16 NY3d 893 [2011]), and are in any event unavailing.

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9871 Copeland Clifford, et al., Index 305519/08
Plaintiffs-Appellants,

-against-

Plaza Housing Development
Fund Company, Inc., et al.,
Defendants-Respondents.

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Rubenstein & Rynecki, Brooklyn (Kliopatra Vrontos of counsel), for appellants.

Torino & Bernstein, P.C., Mineola (Thomas B. Hayn of counsel), for Plaza Housing Development Fund Company, Inc. and Plaza Residences, L.P., respondents.

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for Guardsman Elevator Co., Inc., respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 2, 2012, which granted the motion of defendants Plaza Housing Development Fund Co., Inc. and Plaza Residences L.P. (collectively Plaza Residences) and the cross motion of defendant Guardsman Elevator Co., Inc., for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff handyman was injured when he attempted to exit a stalled elevator in the apartment building where he worked. Plaintiff and three of his coworkers entered the subject elevator at the basement level and pushed the button for the first floor.

The elevator stopped on the first floor and then proceeded to a point between the second and third floors, where it stopped and the doors opened automatically. The elevator was about four feet above the hallway of the second floor, and two of the men successfully jumped out of the elevator onto the floor below. However, when plaintiff attempted his jump, he landed on the floor but then fell backwards and down the elevator shaft.

"As a general rule, when an employee is injured in the course of his employment, his sole remedy against his employer lies in his entitlement to a recovery under the Workers' Compensation Law" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]). The Workers' Compensation exclusivity provision applies to those employers, and their agents, that exercise supervision and control over an employee (*see Kudelski v 450 Lexington Venture*, 198 AD2d 157 [1st Dept 1993]). Here, the evidence establishes that an actual employment relationship exited between plaintiff and Plaza Residences. Such evidence includes Plaza Residences' payroll records, state withholding tax and unemployment returns, plaintiff's own W-2 form, and copies of cancelled paychecks. Each of these documents identified Plaza Residences as plaintiff's employer, and the fact that Plaza Residences relinquished all authority to nonparty Wavecrest Management, Inc., which directed and controlled plaintiff's work,

did not preclude Plaza Residences from asserting the Workers' Compensation defense.

Plaintiff's argument that he never heard of Plaza Residences and that Wavecrest was his employer, is unavailing since he had no personal knowledge of the corporate relationship between Plaza Residences and Wavecrest (*see Gherghinoiu v ATCO Props. & Mgt., Inc.*, 32 AD3d 314 [1st Dept 2006], *lv denied* 7 NY3d 716 [2006]).

The record further demonstrates that dismissal of the complaint was warranted because plaintiff's act of jumping from the stalled elevator was an unforeseeable, superseding cause of his accident (*see Rhodes v East 81st, LLC*, 81 AD3d 453 [1st Dept 2011]). There was no emergency situation necessitating plaintiff's jump from the elevator, particularly where the record indicates that plaintiff was in the stalled elevator for no more than 10 minutes before he decided to jump out (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]). Plaintiff's claim that he was afraid of suffocating is belied by the testimony of one of

his coworkers who alerted plaintiff that the elevator fan was on and there was sufficient ventilation.

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: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9872 Edwin R. Pagan, Index 150042/10
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

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Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for appellants.

Kahn Gordon Timko & Rodriques, P.C., New York (Lester C. Rodriques of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 1, 2012, which, in this personal injury action arising from plaintiff's alleged slip and fall on water on the floor of defendant Metro-North Railroad's train, to the extent appealed from, denied defendant's motion for summary judgment, unanimously affirmed, without costs.

An issue of fact exists as to whether defendant's employee created the alleged hazardous condition by leaving an end door open, allowing rainwater to enter the subject car. Under the circumstances, the fact that it was raining at the time of the incident is not a defense to liability (*see Cook v Rezende*, 32 NY2d 596, 599 [1973]). Defendants failed to preserve their contention that plaintiff's affidavit submitted in opposition to

their motion created a feigned issue of fact. In any event, the motion court properly considered the affidavit because it does not contradict plaintiff's prior testimony, but rather amplifies it (*see Castro v New York City Tr. Auth.*, 52 AD3d 213, 214 [1st Dept 2012]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9874 The People of the State of New York, Ind. 114/09
Respondent,

-against-

Michael Green,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 19, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years, unanimously affirmed.

Defendant was not prejudiced by the fact that the indictment charged him with both entering and remaining unlawfully, and by the court and prosecutor's references to these mutually exclusive theories of burglary (*see People v Gaines*, 74 NY2d 358 [1989]) at early stages of the trial. The court's final instructions conveyed the correct elements of second-degree burglary under a theory of unlawful entry only. Furthermore, it was clear from the evidence that the People were proceeding under a theory of unlawful entry, not a theory of unlawful remaining, under which

"a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates" (*id.* at 363). Given the evidence and the court's instructions, there is no reasonable possibility that the jury convicted defendant under an improper theory that he entered the victims' apartment unlawfully, but without criminal intent, and then formed such an intent while in the apartment (*see e.g. People v Agrelo-Travieso*, 257 AD2d 514, 515 [1999], *lv denied* 93 NY2d 870 [1999]).

Defendant's argument that the submission of two theories of second-degree burglary to the grand jury impaired the integrity of the proceeding is unpreserved and we decline to review it in the interest of justice. Defendant's generalized reference to grand jury instructions in his pretrial omnibus motion was insufficient to preserve this claim (*see People v Brown*, 81 NY2d 798 [1993]). Moreover, defendant had an opportunity to challenge the grand jury instructions when the entering/remaining issue came up at trial, but he did not do so. As an alternative holding, we reject it on the merits. The prosecutor's reading of the relevant statutory provisions was sufficient to enable the grand jury to determine whether a crime was committed and whether legally sufficient evidence existed to establish the material elements of that crime (*see People v Calbud, Inc.*, 49 NY2d 389,

394-396 [1980]; *People v Scott*, 175 AD2d 625, 626 [4th Dept 1991] *lv denied* 78 NY2d 1130 [1991]).

Those portions of the prosecutor's summation to which defendant objected, during the summation itself, as burden-shifting were constitutionally permissible comments on the evidence in response to defense arguments, and the court properly exercised its discretion in denying defendant's mistrial motion. Defendant's remaining challenges to the prosecutor's summation, as well as his challenges to the court's responses to inquiries from the deliberating jury, are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]; *see also People v Padro*, 75 NY2d 820 [1990]) and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We have considered and rejected defendant's arguments concerning his motion to suppress identification testimony (*see e.g. People v Ramos*, 261 AD2d 149 [1st Dept 1999], *lv denied* 93 NY2d 1025 [1999]), and his claim that he was entitled to a

pretrial determination of whether his statements to police could be used to impeach him should he choose to testify (*see People v Whitney*, 167 AD2d 254 [1st Dept 1990] *lv denied* 77 NY2d 912 [1991]).

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

ENTERED: APRIL 23, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9875-
9875A In re Joanna Matos, et al.,
Petitioners,

-against-

Dr. Dora Schriro, etc., et al.,
Respondents.

Index 113378/11

Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

Determinations of respondent Commissioner of the New York City Department of Correction, dated August 1, 2011, suspending petitioner Matos and petitioner Stevens from their positions as New York City correction officers for sixty days and thirty days, respectively, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul Wooten, J.], entered April 3, 2012), dismissed, without costs.

The determinations that petitioner Matos used excessive force against an inmate and made false and misleading statements, and that petitioner Stevens engaged in misconduct in preparing an official report and made false and misleading statements, were supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

The penalty imposed does not shock one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

ENTERED: APRIL 23, 2013

CLERK

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

8273 The People of the State of New York, Ind. 41/08
Respondent,

-against-

Jennifer Bartholomew,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 24, 2009, convicting defendant, after a jury trial, of promoting prison contraband in the first degree, and sentencing her to a prison term of one to three years, reversed, as a matter of discretion in the interest of justice, and the matter remanded for further proceedings.

This case involves allegations that defendant, a former correction officer, used a shoebox containing sneakers to smuggle a knife into the Manhattan Detention Complex (MDC) for the purpose of giving the contraband to her boyfriend, James Wright, an inmate.

During cross-examination of defendant, the prosecutor introduced irrelevant and inflammatory considerations that had no legitimate bearing on defendant's credibility or any other issue in the case. The prejudicial effect of these lines of

questioning was compounded by the trial court's instruction that the jury could consider that evidence in evaluating defendant's credibility. Although defendant's objections were only partially preserved, given the gravity of the errors in this case and their undeniably prejudicial effect, we reach these issues in the exercise of our interest of justice jurisdiction (*see* CPL 470.15(3)(c); *People v Council*, 52 AD3d 297 [1st Dept 2008], *lv dismissed* 10 NY3d 957 [2008]; *People v Engstrom*, 86 AD3d 580 [2d Dept 2011]).

The criminal history of defendant's boyfriend was irrelevant to whether defendant "knowingly and unlawfully introduce[d] any dangerous contraband into a detention facility" (Penal Law § 205.25[1]). The fact that Wright was a gang member with an extensive criminal history has no bearing on whether or not defendant knew she was introducing dangerous contraband into the facility, and could only serve to inflame the jury and prejudice defendant. As defendant correctly argues, this evidence served "no purpose but to suggest that defendant was associated with a disreputable person" (*People v Ortiz*, 69 AD3d 490, 491 [1st Dept 2010] [error for prosecutor to refer on cross-examination to defendant's non-testifying girlfriend's criminal history and to introduce her mugshot, notwithstanding meritless argument that girlfriend's recent arrest tended to support a missing witness inference]; *People v Shivers*, 63 AD2d 708, 709 [2d Dept 1978] [reversing conviction after defendant, who had no criminal

record, was cross-examined about her husband's criminal record, noting "[t]he tactic employed by the prosecutor was grossly prejudicial to defendant's right to a fair trial and should not have been allowed . . . he was not entitled to deliberately attempt to associate defendant with her husband's criminal record"]).

The People's putative rationales for putting Wright's criminal history before the jury do not withstand scrutiny. Since the knife was inherently dangerous, Wright's criminal history was not necessary to establish that it was "dangerous contraband" within the meaning of the statute. Although the trial court recognized that the identity of the recipient was irrelevant to the determination of whether defendant knowingly introduced a knife into the system, precluding the introduction of such evidence on the People's direct case, the court later abandoned this sound position. The court ruled, prior to defendant's cross, that the People could "go into her knowledge of [Wright's] criminal record or anything of that nature," and inexplicably instructed the jury that it could use Wright's criminal history in assessing defendant's credibility, essentially allowing the jury to dismiss defendant's testimony based on her poor judgment in romantic partners.

Cross-examination of defendant concerning her knowledge of Wright's gang membership also served no purpose but to suggest that she was affiliated with a disreputable person. Cross-

examination of a defendant about his putative gang membership, absent a connection between the membership and the crime, is prohibited; a fortiori, cross-examination of a defendant about *a friend's* gang membership is even less relevant.

Similarly, periods of unemployment during which defendant was on public assistance were irrelevant and had no bearing on her credibility. Although the trial court found that the evidence of defendant's receipt of public assistance served to give the jury a complete picture of her work history, it would have sufficed for the prosecutor to have elicited that defendant had been unemployed for brief periods. It was not necessary to ask questions about going "to the welfare office" that might serve to prejudice some jurors. Being on public assistance cannot constitute a "prior bad act" for purposes of cross-examination, and the matter was not relevant to any of the issues in the case. Since there was no evidence that defendant fraudulently procured benefits or misrepresented her eligibility, it was error for the prosecutor to attempt to impeach her through questioning about visiting the welfare office. The court compounded this error by instructing the jury that it could consider defendant's receipt of public assistance in evaluating her credibility.

The trial court also erred in permitting the prosecutor to ask defendant, over counsel's objection, to retrieve the phone number of her boyfriend's mother from her cell phone's memory

during cross-examination. The demand left the jury with the impression that defendant had a duty to provide the number, wrongfully suggesting that defendant had impeded the prosecutor's case by failing to furnish the number. Since defendant had no duty to provide the number, this line of questioning was patently unfair and constituted improper burden shifting under the circumstances.

The cumulative effect of these errors cannot be dismissed as harmless. The combined effects of these errors served to deprive defendant of her fundamental right to a fair trial and require reversal of the judgment.

In light of our holding, it is unnecessary for us to reach defendant's further contention as to whether the court properly exercised its discretion in replacing a sworn juror with an alternate juror.

All concur except Andrias, J.P. and Friedman, J. who dissent in a memorandum by Friedman, J. as follows:

FRIEDMAN, J. (dissenting)

I am compelled to dissent from the reversal of this conviction. The rulings at trial concerning the scope of the People's cross examination of defendant that the majority finds to constitute reversible error — even assuming that these rulings were, indeed, erroneous — were harmless in view of the overwhelming evidence of defendant's guilt. So overwhelming was the uncontroverted evidence of defendant's guilt, and so ludicrous was her testimony attempting to explain away that evidence, that one can only conclude that there is no significant probability that the jury would have acquitted defendant had the People not been permitted to explore the matters in question in cross-examining defendant (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]). In determining whether any errors at trial were harmless, it should of course be considered whether defendant offered a "ridiculous explanation" as her defense against a prosecution case based on undisputed evidence (*see People v Hall*, 18 NY3d 122, 132 [2011]; *People v Wilson*, 93 AD3d 483, 484 [1st Dept 2012], *lv denied* 19 NY3d 978 [2012]). This the majority completely fails to do. Indeed, as discussed more fully below, the majority reverses the conviction without engaging in any meaningful harmless-error analysis at all — essentially buying the bridge that the jury rejected.

Defendant, a former correction officer, was convicted of the crime of promoting prison contraband in the first degree, which is defined in relevant part as "knowingly and unlawfully introduc[ing] any dangerous contraband into a detention facility" (Penal Law § 205.25[1]). The People's direct case was based on the testimony of correction officers who had been on duty at the relevant time at the Manhattan Detention Complex (MDC), where defendant's then-boyfriend, James Wright, was in custody. Defendant never raised any challenge to the accuracy or credibility of the testimony of these officers. Accordingly, the People established that, on January 17, 2008, defendant showed up at the visitors' entrance to MDC with a bag of items for Wright. The officer on duty told her that weapons and cell phones, among other items, could not be brought into the facility. At this point, defendant told the officer that she knew that cell phones were not permitted because she herself was a former correction officer, but she had nonetheless brought a cell phone with her. Defendant went to put the cell phone somewhere else and then returned to the entrance, whereupon the officer allowed her inside. The officer then removed the items in the bag for inspection. One of the items was a beaten-up shoebox. When the officer opened the shoebox, she found inside a pair of sneakers, and observed an object that looked like a "stick" inside one of

the shoes. She removed the object and found that it was a kitchen knife. Defendant, who claimed that she had just bought the shoes and had not known about the knife, was arrested.

To reiterate, defendant made no attempt at trial to challenge or discredit any of the testimony against her. Instead, she took the stand in her own defense. She testified that she had received a call from Wright on the morning of the day in question, in which he asked her to bring him some clothing and a pair of sneakers that would comply with MDC regulations. That afternoon, she went to VIM, a discount store in Brooklyn, to buy the items Wright had requested. In the sneaker department, she found "hundreds and hundreds of boxes" stacked "on top of each other." She grabbed a shoebox marked with Wright's size from the middle of a stack. She purchased the box, which did not appear brand new, without ever looking inside, although, as a former correction officer, she knew that inmates at MDC were permitted to wear only white sneakers. She testified that she did not know there was a knife in the shoebox until the box was inspected at MDC.

Defendant, while not denying that there was a knife in the shoebox she was bringing to her boyfriend at MDC, offered a self-evidently absurd explanation for the presence of the knife. She asked the jury to believe that it was entirely a matter of bad

luck and sheer coincidence that, out of the hundreds of shoeboxes on sale at VIM, she had chosen to buy for her boyfriend the one shoebox that just happened to have a knife in it. Through a further twist of bad luck, she had not thought to look inside the shoebox before bringing it to MDC, although she was well aware that only white sneakers were permissible. It is difficult to imagine any jury naive enough to believe this story, let alone a jury of New Yorkers.

In light of the overwhelming evidence of defendant's guilt, any prejudice to her from the trial rulings of which she complains pales into insignificance. Regarding the court's ruling permitting the People to question defendant about Wright's criminal record, it seems to me that Wright's history of violent crime was arguably relevant to the People's direct case insofar as it tends to show that he had a motive to ask defendant to bring him a weapon (*see People v Moore*, 42 NY2d 421, 428 [1977] [evidence of a person's motive is admissible even if it reflects negatively on that person's character], *cert denied* 434 US 987 [1977]). The trial court, while it did not permit the People to offer evidence of Wright's criminal history as part of their direct case, seems ultimately to have come to this conclusion, since, in permitting the People to question defendant about this matter on cross-examination, it observed that Wright's record

might be relevant "in the context of [determining] why [defendant was bringing him] a knife, as distinct from a piece of celery, or drugs, or anything else."

While the majority correctly states that Wright's criminal record was not admissible to impeach defendant's credibility (*see People v Ortiz*, 69 AD3d 490, 491 [1st Dept 2010]), defendant never objected to the court's instruction directing the jury to consider that evidence only for the purpose of evaluating her credibility.[1] In any event, given that it was no secret that Wright was being held at MDC (and thus obviously had been arrested), any additional prejudice that might have accrued to defendant from the jury's learning that this was not Wright's first encounter with the criminal justice system would have been minimal. In this regard, the prosecutor never once mentioned Wright's record of convictions or arrests in his summation. Again, whether there was any reasonable possibility that defendant would have been acquitted but for the error, if any, in permitting the People to question her about Wright's criminal history must be assessed against the background of the overwhelming proof of her guilt and the absurdity of her attempt

[1]Indeed, given the admission of evidence of Wright's criminal record, the instruction limiting the jury's use of such evidence to the evaluation of defendant's credibility was actually favorable to defendant.

to explain that proof away. For example, in *People v Sellan* (143 AD2d 690, 691 [2d Dept 1988], *lv denied* 73 NY2d 860 [1988]), the Second Department affirmed a conviction notwithstanding the trial court's error in permitting the prosecutor to cross-examine the defendant about his gang membership, which had no connection to the crime charged. The *Sellan* court found that "in light of the compelling proof of guilt, . . . there was no reasonable possibility that the jury would have acquitted the defendant had this evidence not been introduced" (143 AD2d at 691). Notably, the majority fails even to discuss *Sellan*.

The majority finds that the trial court also erred in permitting the People, upon their cross-examination of defendant, to bring out that she had been on public assistance during periods of unemployment and to ask her to retrieve the phone number of Wright's mother from her cell phone. Here, again, any error must be deemed harmless, given the compelling proof of defendant's guilt. Nor is it clear that any error was involved in these rulings. In her direct testimony, defendant described her educational and work history, without mentioning her periods of unemployment and receipt of public assistance, creating the impression that she had never been unemployed. It was only fair to permit the prosecution to give a more complete picture on cross-examination, and to instruct the jury that this matter

could be considered in evaluating defendant's credibility. The request that defendant retrieve the phone number of Wright's mother was part of the People's entirely permissible (but ultimately unsuccessful) attempt to establish grounds for a missing witness charge with regard to Wright (plainly, a material witness in the case). I see no basis for the majority's speculation that the request for the phone number somehow "left the jury with the impression that defendant had a duty to provide [it]" and "constituted improper burden shifting under the circumstances."

The majority's writing is unbalanced in that it devotes its attention exclusively to the alleged errors of which defendant complains while simply asserting, in conclusory fashion and without supporting analysis, that those errors were harmful to defendant. The sum total of the majority's discussion of the harmless error issue is as follows:

> "The cumulative effect of these errors cannot be dismissed as harmless. The combined effects of these errors served to deprive defendant of her fundamental right to a fair trial and require reversal of the judgment."

The majority seems to regard the alleged errors as if they rose to the level of an error in the mode of proceedings, and therefore could be deemed to require a new trial regardless of the strength of the People's case. Of course, the alleged trial

errors of which defendant complains were simply evidentiary in nature and, therefore, would warrant a reversal only if there were a significant probability that she would have been acquitted but for the making of those errors (*see Crimmins*, 36 NY2d at 241-242). Plainly, one cannot assess whether this is the case without analyzing the strength of the People's case. The majority offers no such analysis, instead choosing to ignore both the undisputed evidence the People presented against defendant and defendant's ludicrous attempt to explain away that undisputed evidence in a manner consistent with her innocence. The majority never addresses the basic question that the doctrine of harmless error requires us to answer about this case, namely, but for the errors in question, is there a significant probability, or even a reasonable possibility, that the jury would have credited defendant's claim that she had no idea there was a knife in the shoebox that she purchased and brought to MDC for her boyfriend? The question fairly answers itself, which is presumably why the majority cannot bring itself to face it.

In sum, this is a case in which the defendant has admitted that she brought a shoebox to MDC that turned out to contain a knife. The only issue is whether she did so knowingly. The circumstances show compellingly that she did. In order to refute the inescapable inference that she knew there was a knife in the

shoebox, she presented a story that would be credible only to the sort of person who could be persuaded to buy the Brooklyn Bridge. Unfortunately, the majority, by fastening on rulings that were at most insignificant trial errors (if they were errors at all) in order to reverse, buys the bridge that the jury did not. It seems to me that what the majority points to is hardly the sort of matter that warrants the expenditure of scarce judicial and prosecutorial resources for a retrial.

In view of the foregoing, and given that I also see no merit in defendant's remaining contention, I would affirm the judgment of conviction.

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

ENTERED: APRIL 23, 2013

CLERK

Tom, J.P., Sweeny, Degrasse, Freedman, Manzanet-Daniels, JJ.

8861 Kent Frezzell, Index 116366/07
Plaintiff-Appellant,

-against-

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

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Parker Waichman, LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 14, 2011, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action for personal injuries arising from a collision between two marked police cars being operated during an undisputed emergency operation. Defendants' proof established that defendant Steve Tompos, a police officer, did not act in "reckless disregard for the safety of others" while operating his vehicle in the wrong direction on a one-way street (*see* Vehicle and Traffic Law § 1104[e]). Tompos testified that his vehicle's emergency lights and siren had been activated prior to the accident, and the evidence showed that he reduced his speed

before turning onto the subject street and that he veered to his right in an attempt to avoid impact (*see Gervasi v Peay*, 254 AD2d 172 [1st Dept 1998]; *compare Rockhead v Troche*, 17 AD3d 118 [1st Dept 2005]). We note in particular that Tompos's partner testified that Tompos reduced the vehicle's speed to 10 miles per hour as he turned into the street where the accident occurred. Plaintiff's testimony that Tompos was driving at a "high" rate of speed, which plaintiff was admittedly unable to estimate, is conclusory and speculative (*see Gallagher v McCurty*, 85 AD3d 1109 [2nd Dept 2011]; *cf. Barraco v DePew*, 33 AD2d 816 [3d Dept 1969]). We therefore disagree with the dissent's view that issues of fact preclude summary judgment.

In opposition, plaintiff police officer failed to raise a triable issue of fact. There was no evidence that Tompos's view of traffic was obstructed and evidence that his siren was not on constantly did not rise to the level of conduct required to meet the "reckless disregard" standard (*see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]).

All concur except Freedman and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

On the night of September 20, 2006, plaintiff and his partner were on patrol in a marked police car in the area of the Douglas Houses, on 104th Street between Columbus and Amsterdam Avenues. Over the radio, plaintiff heard a transmission from another officer that he was in pursuit of an individual with a gun in their vicinity. Plaintiff and his partner activated the emergency lights and siren on the vehicle and responded to the call, traveling eastbound on 104th Street, a one-way street. As they proceeded down the street, plaintiff saw another police vehicle going the wrong way on Columbus Avenue. The vehicle then made a left turn onto 104th Street, heading the wrong way. Plaintiff could not recall whether the vehicle had its emergency lights or siren on as it turned onto 104th Street. Plaintiff testified that the vehicle came toward his vehicle "at a high rate of speed." Attempting to avoid the other vehicle, plaintiff pulled over to the right as far as possible and came to a complete stop. Nonetheless, the other vehicle failed to stop, hitting plaintiff's car in the middle of the driver's side. Plaintiff described the impact as "[e]xtremely intense, very, very hard." Plaintiff could not recall whether the lights and sirens on the other vehicle were activated at the time of impact.

Defendant Tompos, the driver of the other vehicle, was

assigned to the Central Park precinct, which covered the entire park from 59th to 110th Street and from Fifth Avenue to Central Park West. When Tompos heard a 10-13 or 10-85 call on the radio of an officer in foot pursuit of a man with a gun, he and his partner, Richard Brunjes, decided to respond. Tompos did not know "exactly how [Brunjes] was working the siren," and was unsure whether operation of the siren was manual or automatic. He was certain, however, that "the sirens were on."[1] Tompos admitted that he and his partner had never been directed by any superior to respond to the call and admitted that they did so without advising command of their intentions or their position, notwithstanding the fact that multiple units were responding to the call.

Tompos, going the wrong way up Columbus Avenue, admitted that he could not see the face of the traffic signal as he approached the corner of 104th Street and Columbus. Nevertheless, he chose to make a left turn into 104th, a one-way street. He traveled approximately three or four car lengths before seeing plaintiff's vehicle. He testified that the lights and sirens on the vehicle were still on, and estimated that he

[1]Brunjes could not specifically recall whether the lights and siren were on.

was traveling at approximately 20 miles per hour.[2] He estimated that plaintiff's vehicle was moving at approximately the same speed. He remembered seeing the roof lights on plaintiff's vehicle. Tompos testified that he tried to avoid impact by turning his car to the right.

The official police accident report stated that the accident occurred when Tompos, responding to the radio run of a man with a gun, turned onto 104th Street and an "ESU truck was parked on the corner. Went around and struck another RMP." At his deposition, however, Tompos did not recall the presence of an ESU truck at the scene or reporting same to his supervisor. Brunjes similarly could not recall whether they had to negotiate around an ESU vehicle immediately preceding the accident.

The court granted defendants' motion for summary judgment, ruling that Tompos's actions, as a matter of law, did not rise to the level of reckless disregard necessary to impose liability on a police officer under the circumstances. The majority now affirms.

The reckless disregard standard requires proof that an officer intentionally committed "an act of an unreasonable

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[2]Brunjes similarly estimated that their vehicle was traveling at approximately 10-20 miles per hour prior to impact. He testified that Tompos slowed down as he made the turn onto 104th Street.

character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (*see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). In my view, issues of fact preclude entry of summary judgment in defendants' favor. On this record, there is an issue as to whether an ESU vehicle blocked Tompos's view of the intersecting street (*see Burrell v City of New York*, 49 AD3d 482 [2d Dept 2008]). Although the police report indicates that an ESU vehicle obstructed Tompos's view of the intersection, and thus of plaintiff's vehicle, Tompos could not recall seeing any such ESU vehicle. Similarly, there is a question as to whether or not the lights and siren on the Tompos vehicle had been activated. Tompos himself admitted that he entered the intersection without ever seeing the face of the traffic signal. In *Badalamenti v City of New York* (30 AD3d 452 [2d Dep't 2006]), the court held that questions of fact precluded summary judgment on the issue of reckless disregard where the record indicated that the officer did not stop at the stop sign controlling the intersection, that his view of the intersection was partially blocked by a parked truck, and a question existed as to whether the vehicle's turret lights and siren had been activated prior to entering the intersection (*id.; see also Elnakib v County of Suffolk*, 90 AD3d 596 [2d Dept 2011] [evidence legally sufficient that defendant police officer acted with

reckless disregard where he drove through a stop sign at a view-obstructed intersection at a high rate of speed]; *Tutrani v County of Suffolk*, 64 AD3d 53 [2d Dept 2009] [evidence legally sufficient where officer abruptly came to a stop, without warning, mere seconds before collision]).

A jury could certainly find that entry into a one-way street in disregard of the traffic signal, in the absence of lights and siren and in the presence of an obstructing truck, when other units were already in pursuit of the suspect and defendant had undertaken on his own initiative to pursue the chase, constituted reckless disregard. I would accordingly reverse, and deny defendants' motion for summary judgment.

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

ENTERED: APRIL 23, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9084 Zenaida Rodriguez, et al., Index 23513/04
Plaintiffs-Respondents,

-against-

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

"John Does," et al.,
Defendants.

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Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Kenneth J. Gorman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 9, 2012, which denied a motion by defendant the City of New York for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against the City. The Clerk is directed to enter judgment accordingly.

Plaintiffs are pedestrians who were seriously injured on January 19, 2004 when struck by a 1992 Buick that mounted a sidewalk while being driven by defendant Korey Bullock. The City's proof established that on the day of the accident, three officers were on patrol in an unmarked car that was stopped on Prospect Avenue facing northbound in the direction of Westchester

Avenue. Police Officer John Caruso, the operator of the police vehicle, testified that he saw the Buick being driven eastbound on Westchester Avenue and noted that Bullock, the driver, appeared to be too young to be driving. Caruso also noticed that the Buick had a broken side view mirror and a defective brake light. Caruso activated his emergency lights and siren after he and his partners attempted to pull the Buick over due to the equipment violations. The officers saw the Buick go through two red lights as they pursued it eastbound on Westchester Avenue. After passing the second red light Bullock made a left turn onto Bryant Avenue where he skidded, lost control of the vehicle and struck plaintiffs. It is alleged in the bill of particulars that the police officers were reckless and negligent in pursuing Bullock on icy and slippery roadways at an excessively high rate of speed. The City moved for summary judgment on the ground that the police officers did not act recklessly and, that Caruso, as the operator of an emergency vehicle involved in an emergency operation, was entitled to the conditional privileges set forth under Vehicle and Traffic Law § 1104. The motion court denied summary judgment, finding issues of fact as to whether the police officers were engaged in an emergency operation within the contemplation of the statute and whether they acted recklessly. We reverse.

Vehicle and Traffic Law § 1104 affords drivers of emergency vehicles a qualified exemption from certain traffic laws when they are involved in emergency operations (*see Kabir v County of Monroe*, 16 NY3d 217, 222-224 [2011]). The pursuit of an actual or suspected violator of the law is defined as an "emergency operation" under Vehicle and Traffic Law § 114-b. Here, there is unrefuted evidence that Caruso himself went through a red light during the pursuit. Therefore, Caruso's conduct falls within the protection of Vehicle and Traffic Law § 1104. Notwithstanding plaintiffs' argument, nothing in the record refutes Caruso's testimony that he saw Bullock pass through two red lights on Westchester Avenue. Bullock admitted as much in a statement that he signed approximately six hours after the accident. Bullock's admission is not contradicted by an undated and unsigned statement that plaintiffs proffer. In the latter statement, Bullock purportedly wrote that he "went stop [*sic*] for two red light [*sic*] on Prospeck [*sic*]." That statement does not raise an issue of fact because, according to Caruso's testimony, Bullock ran the two red lights after he was first spotted near the intersection of Westchester and Prospect Avenues.[1] Plaintiffs

[1]We note parenthetically that it is indicated in both statements that Bullock believed that the police vehicle was going to pass him before he made the left turn at Bryant Avenue. This belies plaintiffs' claim that the officers' pursuit caused Bullock to drive recklessly.

also misplace their reliance on a newspaper quote attributed to a neighborhood resident who purportedly said that the police vehicle bumped the Buick before it crashed. This hearsay statement, unaccompanied by any other evidence tending to show that there was contact between the vehicles, is insufficient to demonstrate the existence of an issue of fact (*see e.g. Rodriguez v 3251 Third Ave. LLC*, 80 AD3d 434 [1st Dept 2011]). Moreover, another person's statement that the Buick made the left turn at 50 miles per hour is insufficient to raise an issue of fact as to whether Caruso was driving at the same speed during the pursuit. Also, nothing in the record is sufficient to raise an issue of fact as to whether the police officers engaged in reckless conduct by intentionally doing "an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994][internal quotation marks omitted]). We are not persuaded by plaintiffs' argument that summary judgment should be denied because the City has exclusive possession of evidence needed to oppose the motion (*see*

CPLR 3212[f]). Plaintiffs waived this argument by filing a note of issue and certificate of readiness (*see e.g. Melcher v City of New York*, 38 AD3d 376 [1st Dept 2007]). We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: APRIL 23, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9099 UMG Recordings, Inc., Index 100152/10
Plaintiff-Appellant,

-against-

Escape Media Group, Inc.,
Defendant-Respondent.

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Recording Industry Association
of America,
Amicus Curiae.

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Jenner & Block LLP, New York (Andrew H. Bart of counsel), for appellant.

Rosenberg & Giger P.C., New York (John J. Rosenberg of counsel), for respondent.

Pryor Cashman LLP, New York (Donald S. Zakarin of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 10, 2012, reversed, on the law, with costs, and the motion granted.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Rosalyn H. Richter
Judith J. Gische
Darcel D. Clark, JJ.

9099
Index 100152/10

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UMG Recordings, Inc.,
Plaintiff-Appellant,

-against-

Escape Media Group, Inc.,
Defendant-Respondent.
- - - - -
Recording Industry Association
of America,
Amicus Curiae.

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Plaintiff appeals from the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 10, 2012, which, insofar as appealed from, denied plaintiff's motion to dismiss defendant's fourteenth affirmative defense.

Jenner & Block LLP, New York (Andrew H. Bart, Gianni P. Servodidio, Lindsay W. Bowen and Alison I. Stein of counsel), for appellant.

Rosenberg & Giger P.C., New York (John J. Rosenberg, Matthew H. Giger and Brett T. Perala of counsel), for respondent.

Pryor Cashman LLP, New York (Donald S. Zakarin, Frank P. Scibilia and Erich C. Carey of counsel), for amicus curiae.

MAZZARELLI, J.P.

Defendant Escape Media Group, Inc. developed, owns and operates an Internet-based music streaming service called Grooveshark. Users of Grooveshark can upload audio files (typically songs) to an archive maintained on defendant's computer servers, and other users can search those servers and stream recordings to their own computers or other electronic devices. Defendant has taken some measures to ensure that the Grooveshark service does not trample on the rights of those who own copyrights in the works stored on its servers. For example, it is a party to license agreements with several large-scale owners and licensees of sound recordings. In addition, it requires each user, before he or she uploads a work to Groovesharks servers, to confirm ownership of the recording's copyright or license, or some other authorization to share it.

Defendant concedes that it cannot ensure that each work uploaded to its servers is a non-infringing work. However, it has operated Grooveshark with the assumption that it is shielded from infringement claims by copyright owners by 17 USC § 512, popularly known as the Digital Millenium Copyright Act (DMCA). The DMCA, which was enacted in 1998 as an amendment to the federal Copyright Act, provides "safe harbors" to operators of certain Internet services, including defendant. Defendant relies

on the protections delineated in section 512(c) of the DMCA, which provides:

> "(1) In general. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -
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> "(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
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> "(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
>
> "(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."

Plaintiff UMG Recordings, Inc. is the owner of the rights in many popular sound recordings that have been uploaded to Grooveshark. Many of those recordings were made prior to

February 15, 1972[1] (the pre-1972 recordings). That date is significant, because when the Copyright Act was amended in 1971 to include sound recordings, Congress expressly extended federal copyright protection only to recordings "fixed" on February 15, 1972 or after. Indeed, the Act expressly provided that "[w]ith respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this Title until 2067"[2] (17 USC § 301[c]). UMG claims in this action that by permitting the pre-1972 recordings to be shared on Grooveshark, defendant infringed on its common-law copyright in those works, and that the DMCA does not apply to those recordings.

In its answer, defendant asserted as its fourteenth affirmative defense that the pre-1972 recordings sat within the safe harbor of section 512(c) of the DMCA. UMG moved, inter alia, to dismiss that defense pursuant to CPLR 3211(b). It argued that the DMCA could not apply to the pre-1972 recordings

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[1] Indeed, many of the recordings at issue are iconic, including songs from the early days of rock and roll, such as "Peggy Sue" by Buddy Holly and "Johnny B. Goode" by Chuck Berry, and Motown classics like "My Girl" by the Temptations and "Baby Love" by the Supremes, to name but a few of the legendary songs to which UMG owns the copyright.

[2] Originally the pre-1972 recordings were set to come within the Act's coverage in 2047, but that date was extended by Congress in 1998.

because that would conflict with Congress's directive in section 301(c) of the Copyright Act that nothing in the Act would "annul" or "limit" the common-law copyright protections attendant to any sound recordings fixed before February 15, 1972. In response, defendant asserted that nothing in the plain language of the DMCA limited its reach to works fixed after that date. Further, it maintained that a ruling in UMG's favor would eviscerate the DCMA, insofar as companies like it would still need to expend massive resources policing the works posted on its servers, rather than being able to wait until a copyright holder or licensee notified it that its rights were being infringed.

The motion court denied plaintiff's motion. Relying heavily on *Capitol Records, Inc. v MP3tunes, LLC* (821 F Supp 2d 627 [SD NY 2011]), in which the United States district court tackled precisely the same issue and found that the DMCA embraced sound recordings fixed before February 15, 1972, the court stated that "there is no indication in the text of the DMCA that Congress intended to limit the reach of the safe harbors provided by the statute to just post–1972 recordings." It agreed with the district court that, although § 301(c) is an anti-preemption provision ensuring that the grant of federal copyright protection did not interfere with common-law or state rights established prior to 1972, that section does not prohibit all subsequent

regulation of pre-1972 recordings. The court further noted that, as the district court found, the text of the DMCA does not draw any distinction between federal and state law, and the phrases "copyright owner" and "infringing" found in the DMCA were "applicable to the owner of a common-law copyright no less than to the owner of a copyright under the Copyright Act." Further, the court quoted the district court's observation that

> "the DMCA was enacted to clarify copyright law for internet service providers in order to foster fast and robust development of the internet. Limiting the DMCA to recordings [fixed] after 1972, while excluding recordings before 1972, would spawn legal uncertainty and subject otherwise innocent internet service providers to liability for the acts of third parties. After all, it is not always evident...whether a song was recorded before or after 1972.'" (quoting *Capitol Records, Inc*. at 642).

Finally, the court addressed a December 2011 report from the Office of the Register of Copyrights, addressed to the Speaker of the U.S. House of Representatives, recommending that Congress extend federal copyright protection to sound recordings fixed on or before February 15, 1972, and that the safe harbor provisions of § 512 be applicable to such recordings. The motion court acknowledged that the report took the position that *Capitol Records, Inc. v MP3tunes* was wrongly decided and that congressional action was necessary before pre-1972 recordings

were embraced by the DMCA. Nevertheless, the court concluded that its reading of the DMCA was a reasonable interpretation of what Congress intended.

On appeal, UMG argues that, were the DMCA to be interpreted as protecting services like Grooveshark from infringement liability for pre-1972 recordings, section 301(c) of the Copyright Act would have been effectively repealed. That is because, it contends, section 301(c) forbids the Act from "annull[ing]" or limit[ing]" the common-law rights and remedies of owners of such works, and the DMCA, if it were to bar infringement actions against Internet companies that otherwise comply with the DMCA, would do just that. UMG characterizes section 301(c) as creating "reverse pre-emption" of state law copyright remedies, meaning that Congress is not permitted to trample on the state of copyright laws in any way.

UMG further argues that the motion court ignored the DMCA's provision that a copyright infringer is, for purposes of the legislation, "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122" (17 USC §501[a]). It contends that, because each of those sections refers to works which were fixed after February 15, 1972 and so are unquestionably covered by the Copyright Act, a "copyright infringer" entitled to the protections of the DMCA is

by definition not entitled to protection with respect to works fixed before that date. As further evidence that Congress intended the DMCA only to apply to post-1972 works, UMG notes that section 512(c) of the statute refers to a work's "copyright owner," which is defined by the Act as the owner of "any one of the exclusive rights comprised in a copyright" (17 USC §101). UMG then refers to the Senate and House reports that accompanied the Copyright Act, which stated that those exclusive rights were the ones delineated in section 106 of the Act.

Finally, UMG points to the report of the United States Copyright Office, which was commissioned by Congress as part of its investigation into extending the Copyright Act to pre-1972 recordings. It stresses that the report concluded that the DMCA does not currently apply to such works, and that *Capitol Records, Inc. v MP3tunes, LLC*, upon which the motion court so heavily relied, was premised on "highly questionable grounds."

Defendant argues that there is no tension between the DMCA and section 301(c) of the Copyright Act. It contends that any references in the DMCA to "copyrights" and "infringements" thereof are generic, and that there is no indication that Congress intended to limit the statute's reach to works covered by the Copyright Act. It further claims that had Congress intended only to protect companies such as defendant from claims

by owners of federal copyright claims, it would have so stated.

Defendant maintains that if UMG's interpretation of the DMCA were adopted, that act would be eviscerated. It points to legislative history stating that the purpose behind the DMCA was to promote efficiency in Internet operations, and argues that Grooveshark, and other Internet companies that provide similar services such as Youtube and Google, would become inefficient if they had to research the provenance of works before permitting them to be posted to their sites. Defendant additionally argues that the DMCA does not annul or limit any of UMG's rights in the pre-1972 recordings, because, notwithstanding the DMCA's safe harbor provisions, UMG still retains its common-law rights in those works, such as the ability to exploit the works, license them and create derivative works.

Finally, defendant downplays the significance of the Copyright Office report. It argues that the Copyright Office is managed by a political appointee and so is entitled to little deference. Further, it questions the logic behind the report's conclusion that *Capitol Records, Inc. v MP3tunes, LLC* was wrongly decided.

In interpreting any statute, we are required, first and foremost, to pay heed to the intent of the legislature, as reflected by the plain language of the text (*see Majewski v*

Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]).

In addition,

> "[i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*id.* [internal quotation marks omitted]).

Repeal or modification of a statute by implication is disfavored (*Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation*, 71 NY2d 186, 195 [1988]).

> "'Generally speaking, a statute is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for two statutes, that construction should be adopted'" (*People v Newman*, 32 NY2d 379, 390 [1973] *cert denied* 414 US 1163 [1974], quoting *Matter of Board of Educ. of City of N.Y. v Allen*, 6 NY2d 127, 141-142 [1959]).
>
> "These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently. Moreover, as to statutes enacted in a single legislative session, there is a presumption against implied repeal; the Legislature would hardly repeal a fresh enactment without doing so expressly" (*Alweis v Evans*, 69 NY2d 199, 204-205 [1987] [internal citations omitted]).

Initially, it is clear to us that the DMCA, if interpreted in the manner favored by defendant, would directly violate section 301(c) of the Copyright Act. Had the DMCA never been enacted, there would be no question that UMG could sue defendant in New York state courts to enforce its copyright in the pre-1972 recordings, as soon as it learned that one of the recordings had been posted on Grooveshark. However, were the DMCA to apply as defendant believes, that right to immediately commence an action would be eliminated. Indeed, the only remedy available to UMG would be service of a takedown notice on defendant. This is, at best, a limitation on UMG's rights, and an implicit modification of the plain language of section 301(c). The word "limit" in 301(c) is unqualified, so defendant's argument that the DMCA does not contradict that section because UMG still retains the right to exploit its copyrights, to license them and to create derivative works, is without merit. Any material limitation, especially the elimination of the right to assert a common-law infringement claim, is violative of section 301(c) of the Copyright Act.

For defendant to prevail, we would have to conclude that Congress intended to modify section 301(c) when it enacted the DMCA. However, applying the rules of construction set forth above, there is no reason to conclude that Congress recognized a

limitation on common-law copyrights posed by the DMCA but intended to implicitly dilute section 301(c) nonetheless. Again, such an interpretation is disfavored where, as here, the two sections can reasonably co-exist, each in its own "field of operation" (*People v Newman*, 32 NY2d at 390). Congress explicitly, and very clearly, separated the universe of sound recordings into two categories, one for works "fixed" after February 15, 1972, to which it granted federal copyright protection, and one for those fixed before that date, to which it did not. Defendant has pointed to nothing in the Copyright Act or its legislative history which prevents us from concluding that Congress meant to apply the DMCA to the former category, but not the latter.

To the contrary, reading the Copyright Act as a whole, which we are required to do (*see Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012]), it is reasonable to interpret the references in the DMCA to "copyright" or "copyright infringers" as pertaining only to those works covered by the DMCA. The DMCA expressly identifies the rights conferred *by the Copyright Act* in stating who a "copyright infringer" is for purposes of the DMCA. Had Congress intended to extend the DMCA's reach to holders of common-law rights it would have not have provided so narrow a definition. Defendant's argument that by

not affirmatively excluding works not otherwise covered by the Act, Congress was implicitly including them, is simply unreasonable, and contrary to the maxim *expressio unius est exclusio alterius*, which dictates that the specific mention of one thing implies the exclusion of others (*see Matter of Mayfield v Evans*, 93 AD3d 98, 106 [1st Dept 2012], citing McKinney's Cons Laws of NY, Book 1, Statutes § 240).

Moreover, in the same Congressional session as it enacted the DMCA (indeed one day before), Congress amended section 301(c) of the Copyright Act to extend for an additional 20 years the amount of time before the Act could be used to "annul" or "limit" the rights inherent in pre-1972 recordings. Thus, Congress was acutely aware that the DMCA could be used to modify 301(c) in the way advocated by defendant, and so, in the absence of language expressly reconciling the two provisions, there is an even stronger presumption that it did not intend for the DMCA to do so (*see Alweis v Evans*, 69 NY2d at 204-205). We make this determination based strictly on the plain language and context of the statute and its legislative hostory, and so we need not decide whether the report by the Copyright Office, which reaches the same conclusion, has any authoritative effect.

Finally, we reject defendant's argument that the very purpose of the DMCA will be thwarted if it is deemed not to apply

to the pre-1972 recordings. The statutory language at issue involves two equally clear and compelling Congressional priorities: to promote the existence of intellectual property on the Internet, and to insulate pre-1972 sound recordings from federal regulation. As stated above, it is not unreasonable, based on the statutory language and the context in which the DMCA was enacted, to reconcile the two by concluding that Congress intended for the DMCA only to apply to post-1972 works. In any event, defendant's concerns about interpreting the statutes in the manner advocated by UMG are no more compelling than UMG's concerns about interpreting the statutes in the manner advanced by defendant. Under such circumstances, it would be far more appropriate for Congress, if necessary, to amend the DMCA to clarify its intent, than for this Court to do so by fiat.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 10, 2012, which, insofar as appealed from, denied plaintiff's motion to dismiss defendant's fourteenth affirmative defense, should be reversed, on the law, with costs, and the motion granted.

All concur.

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

ENTERED: APRIL 23, 2013

CLERK