SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 16, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9419 Walter Allen, et al., Index 113570/11
Plaintiffs-Respondents,

-against-

The Riese Organization, Inc., et al.,
Defendants-Appellants.

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Littler Mendelson, P.C., New York (Barbara A. Gross of counsel), for appellants.

Simon Eisenberg & Baum, LLP, New York (Eric M. Baum of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered June 29, 2012, which, to the extent appealed from, denied defendants' motion to dismiss plaintiffs' claims of employment discrimination, retaliation and hostile work environment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In January 2009, plaintiffs were terminated from their positions as maintenance workers at defendant A.R.O. Construction

Corp. Upon their discharge, plaintiffs each signed a Severance Agreement and Release that "release[d] and forever discharge[d] [A.R.O., its corporate affiliates, officers and employees] . . . from all claims[,] causes of action, grievances, and liabilities of any nature whatsoever that [plaintiffs] may now have or could have, . . . including without limitation any claims or liabilities arising pursuant to any employment relations statute, including all claims arising under . . . the New York State Human Rights Law[] [and] the New York City Administrative [C]ode."

The top of each page of the release bears the notation "BEFORE SIGNING THIS AGREEMENT, YOU SHOULD CONSULT AN ATTORNEY." The release explicitly states that it is executed voluntarily by plaintiffs with a full understanding of its terms, and after having the opportunity to obtain the advice of counsel. The release further notes that the parties intended it to be a "general release" effective to the fullest extent allowable by law.

The release states that plaintiffs had sufficient time to consider the terms, and each plaintiff acknowledged: "I HAVE READ AND UNDERSTAND THIS [RELEASE], THIS [RELEASE] IS WRITTEN IN TERMS THAT I UNDERSTAND, AND I AM AWARE THAT I MAY BE GIVING UP IMPORTANT RIGHTS." The release includes a "cooling off" clause

which provides that plaintiffs could revoke the release during the seven-day period after signing it. In the release, plaintiffs state that they understand their right of revocation, and that if they choose not to exercise it during the seven-day period, the release would become effective and enforceable. It is undisputed that plaintiffs never exercised their revocation rights.

As consideration for the release, plaintiffs agreed to accept a severance payment in an amount equivalent to two weeks pay. In the release, plaintiffs acknowledge that they were not entitled to the severance payment other than by reason of the release, and that the payment constituted adequate consideration. Subsequent to signing the release, plaintiffs each received the full severance payments promised.

In December 2011, approximately three years after executing the releases and accepting the severance payments, plaintiffs commenced this action against A.R.O., its corporate parent and three of its officers or employees. The complaint asserts causes of action under the state and city human rights laws for race discrimination, retaliation and hostile work environment, and a claim for intentional infliction of emotional distress. The complaint does not contain any reference to the releases

plaintiffs had signed.

On February 6, 2012, defendants moved to dismiss the complaint based on the releases (CPLR 3211[a][5]) and documentary evidence (CPLR 3211[a][1]). They also sought dismissal of the emotional distress claim on statute of limitations grounds (CPLR 3211[a][5]). In support of their motion, defendants submitted the signed releases, and payroll records showing that plaintiffs had received the severance payments. In their opposition, dated March 29, 2012, plaintiffs admitted that they had signed the releases, but contended for the first time that they were not enforceable because they were procured by duress and fraud. Plaintiffs did not dispute that they had received the severance payments. In reply, defendants argued that plaintiffs' allegations, even if true, do not sufficiently allege fraud or duress. In the alternative, defendants argued that plaintiffs had ratified the releases by accepting the severance payments and waiting almost three years before filing this action. The motion court dismissed the emotional distress claim, but denied the remainder of defendants' motion, finding issues of fact as to the validity of the releases.[1] The court did not address the

[1] The court's dismissal of the emotional distress claim is not a subject of this appeal.

ratification argument. Defendants now appeal.

The motion court should have dismissed the complaint in its entirety. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). A release will not be treated lightly because it is a "a jural act of high significance without which the settlement of disputes would be rendered all but impossible" (*Mangini v McClurg*, 24 NY2d 556, 563 [1969]). Where the language is clear and unambiguous, the release is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake (*Centro*, 17 NY3d at 276; *Johnson v Lebanese Am. Univ.*, 84 AD3d 427 [1st Dept 2011]).

Here, there is no question that plaintiffs executed general releases that clearly and unambiguously waived all claims against defendants, and specifically claims arising under the state and city human rights laws. On appeal, plaintiffs do not dispute that the releases cover their discrimination, retaliation and hostile work environment claims, but instead contend that the releases are not enforceable because they were the product of duress and overreaching. Specifically, plaintiffs claim that

their supervisor threatened that if they did not sign the releases, he would withhold their last paycheck and block their unemployment benefits.[2]

Assuming arguendo that issues of fact exist as to duress and overreaching, plaintiffs are nevertheless barred from challenging the releases on those grounds because they ratified the releases. Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it (*Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 493-494 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Thus, a plaintiff cannot claim that he or she was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement (*Foundry Capital Sarl v International Value Advisers, LLC*, 96 AD3d 620, 621 [1st Dept 2012]; *Stacom v Wunsch*, 162 AD2d 170, 171 [1st Dept 1990] ["a party seeking to repudiate a contract procured by

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[2] Plaintiffs also claim that they were fraudulently induced into signing the releases. To avoid a release based on that ground, "a party must allege every material element of fraud with specific and detailed evidence in the record sufficient to establish a prima facie case" (*Touloumis v Chalem*, 156 AD2d 230, 232-233 [1st Dept 1989]; *see Centro*, 17 NY3d at 276). Plaintiffs' affidavits, read in the light most favorable to them, fail to meet this exacting standard.

duress must act promptly lest he or she be deemed to have elected to affirm it"] [internal quotation marks omitted], *lv dismissed* 77 NY2d 873 [1991]).

This Court has consistently applied the doctrine of ratification in cases involving releases. For example, in *Napolitano v City of New York* (12 AD3d 194 [1st Dept 2004]), the plaintiff employee settled disciplinary charges against him by accepting certain retirement benefits and giving the defendants a general release. We concluded that having accepted the benefits of the settlement and waiting two years before filing the complaint, the plaintiff had ratified the release and was barred from alleging duress in its execution (*id.* at 195; *see also Foundry Capital*, 96 AD3d at 620; *Khalid v Scagnelli*, 290 AD2d 352 [1st Dept 2002]; *Liberty Marble v Elite Stone Setting Corp.*, 248 AD2d 302 [1st Dept 1998]; *Fruchthandler v Green*, 233 AD2d 214 [1st Dept 1996]).

Here, plaintiffs' acceptance of benefits under the releases and their inordinate delay in challenging them bar any claims of alleged duress and overreaching. Plaintiffs raise no challenge to defendants' documentary evidence showing that they received payments under the releases, namely, the severance checks they were not otherwise entitled to (*see Khalid v Scagnelli*, 290 AD2d

at 354 [the plaintiff's acceptance of benefits by cashing settlement check constituted ratification of the release]). Nor do plaintiffs dispute that more than three years passed between the alleged duress and the time they sought to repudiate the releases. Such a prolonged period cannot under any circumstances be considered prompt (*see Napolitano*, 12 AD3d at 195 (finding ratification after two-year delay).

Plaintiffs' claims of duress and overreaching are further undermined by the "cooling off" provision contained in the releases. On two separate pages, plaintiffs explicitly acknowledged that they could revoke the releases at any time during the seven-day period following execution. They further acknowledged that if they did not exercise their revocation rights, the releases would be fully effective and enforceable. Plaintiffs, however, never sought to rescind the releases, reaped the benefits of the severance payments, and only challenged the releases after three years. Under these circumstances,

plaintiffs are barred from asserting their duress and overreaching claims.

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: MAY 16, 2013

CLERK

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

10005- Ind. 5131/07
10006 The People of the State of New York,
Respondent,

-against-

Antonio Badia,
Defendant-Appellant,
- - - - -
Immigrant Defense Project, and
Post-Deportation Human Rights
Project, etc.,
Amici Curiae.

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

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

Dawn M. Seibert, New York, for amici curiae.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 13, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing him to concurrent terms of one year, unanimously affirmed. Order, same court and Justice, entered on or about May 15, 2011, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously reversed, on the law, and the motion remanded for further proceedings in accordance with this memorandum.

Initially, we note that the People do not dispute the applicability, to defendant's CPL 440.10 motion, of *Padilla v Kentucky* (559 US __, 130 S Ct 1473 [2010]), which was decided while defendant's direct appeal was pending.

The motion court erred in holding that it was "constrained," by *People v Diaz* (7 NY3d 831 [2006]), to deny defendant's *Padilla*-based motion to vacate his conviction because defendant had been deported and was no longer within the court's jurisdiction. Defendant's physical inability to appear in court was not a proper basis for failing to entertain the motion (*see People v Ventura*, 17 NY3d 675 [2011]). We take no position on the merits of defendant's motion.

With regard to the direct appeal, defendant has not shown any basis for reversal of the judgment of conviction.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Freedman, Gische, JJ.

8959 Robert Boyd, et al., Index 114739/07
Plaintiffs-Appellants, 590206/08

-against-

Schiavone Construction Co., Inc., et al.,
Defendants-Respondents,

Vollmer Associates, LLP,
Defendant.

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Schiavone Construction Co., Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Hayward Baker, Inc.,
Third-Party Defendant-Respondent.

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Kelner and Kelner, New York (Gail S. Kelner of counsel), for appellants.

Greenblatt Lesser LLP, New York (Lynn Abelson Liebman of counsel), for Schiavone Construction Co., Inc., Granite Halmar Construction Company, Inc. and Schiavone Construction Co., Inc./Granite Halmar Construction Company Inc., respondents.

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for Hayward Baker, Inc., respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 12, 2012, which denied plaintiffs' motion for summary judgment on the issue of liability as to the Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Defendants Schiavone Construction Co. and Granite Halmar Construction Company, a joint venture (Schiavone), were retained by the Transit Authority to build a new structural box and subway track at the South Ferry subway station. Schiavone hired third-party defendant Hayward Baker, Inc. to install subterranean mini-piles to support the existing railway structure and subway tunnel. Plaintiff Robert Boyd, a drill operating engineer, worked on a Hayward Baker crew that included dock builder foreman Wayne Clark and dock builder journeyman Russell Ellis. The crew was supervised by Gary Amato, Hayward Baker's project superintendent.

The project used two drill rigs secured to Nolan carts with adjustable "chain binders" attaching chains to the front and rear of the cart. C-clamps were used to keep the carts from rolling on the tracks. Hammers and other drilling equipment were mounted to a boom attached to the drill rig, which was kept in a vertical position during drilling. The boom was lowered when the drill rig was being moved.

Clark and plaintiff testified at their depositions that before the accident Amato told the crew to start cleaning up and that they were going to use the drill rig as a crane to move material and equipment to another cart. Towards that end, the

drill rig had to be pivoted so that it faced the other cart. Clark and plaintiff testified that to pivot the drill, the chain binder and chains securing the drill rig to the cart had to be removed.

After the chains were removed and the drill rig positioned for cleanup, Clark either received instructions or decided on his own to continue to drill. This required that the rig be pivoted again, a hammer affixed, and the boom plumbed (made vertical). With the chains still detached, plaintiff moved the boom to a vertical position. When Clark reached for a level, plaintiff, who testified that he was just standing on the cart waiting for the boom to be plumbed, felt the cart tip, and the drill rig fell toward him, knocked him off the cart and pinned him to the tracks below. Clark and plaintiff testified that the chains had to remain off for the boom to be plumbed.

After the accident, Amato saw that the chain securing the front end of the drill rig to the cart was not attached. Amato acknowledged at his deposition that the drill rig could not be moved in any direction once it was chained. However, he claimed that to move the drill rig, plumb the mast, or remove or replace the hammer, the chains did not have to be removed but only had to be loosened enough to create a little play.

Henry R. Naughton, defendants' professional engineer and engineering consultant, opined that the use of chains and chain binders to hold the drill rig to the Nolan carts and the use of c-clamps to secure the carts to the rail were reasonable and adequate protections for the workers while Hayward Baker installed mini-piles. Citing Clark's initial testimony that plaintiff was the one who removed the chains, Naughton opined that the sole proximate cause of the accident was plaintiff's decision to operate the drill rig after removing, rather than loosening, the chains. In this regard, he stated that plaintiff's testimony that he was not drilling and that his hands were off the controls in the instant before the drill rig became unstable was "questionable."

Supreme Court denied plaintiffs' motion for summary judgment, finding that there were triable issues of fact whether plaintiff was the sole proximate cause of his injuries. We now reverse.

The sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). However, "the Labor Law does not require a

plaintiff to have acted in a manner that is completely free from negligence" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] [internal quotation marks omitted]) and "contributory negligence . . . is not a defense to a section 240(1) claim" (*Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

Plaintiff did not unilaterally elect to remove the chains and chain binders. Clark, the dock builder foreman who had the discretion to make the determination in the field as to the manner in which the drill rig would be moved, determined that the drill rig could not be pivoted with the chain binders attached, a belief plaintiff shared (*see Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750-751 [2d Dept 2009]; *compare Plass v Solotoff*, 5 AD3d 365, 366-367 [2d Dept 2004], *lv denied* 2 NY3d 705 [2004]). Although Amato testified that the chain should have been loosened, not removed, he was not present when the decision was made and defendants offered no evidence that workers were instructed to loosen rather than remove the chains when they had to move the drill rig, plumb the mast, or remove or replace the hammer (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

Naughton's affidavit does not suffice to raise a material issue of fact whether plaintiff was the sole proximate cause of

his injuries. Naughton based his opinion on the assumption that plaintiff removed the chains himself. However, plaintiff testified that a dock worker, probably Clark, removed the chains. Although Clark testified initially that the chains were removed by plaintiff, he later conceded that he did not remember and that another member of the crew, or even Clark himself, may have removed them. Naughton's opinion is also based on his belief that plaintiff's testimony that he was not operating the drill rig when it tipped is not credible. However, there is nothing in the record to controvert plaintiff's testimony that when the drill rig tipped, he was waiting for Clark to level the boom. Moreover, Naughton's only reference to the notion that the chains should have been loosened, not removed, is an unsubstantiated statement in the "Wherefore" clause of his affidavit, and he does not address plaintiff and Clark's testimony that the chains had to be removed in order to pivot the drill, install a hammer and plumb the boom.

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

ENTERED: MAY 16, 2013

CLERK

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

9269 Domingos Mouta, et al., Index 307749/08
Plaintiffs-Respondents, 83768/09
83824/09

-against-

Essex Market Development LLC,
Defendant-Appellant-Respondent,

JF Contracting Corp.,
Defendant-Respondent-Appellant,

MSS Construction Corp.,
Defendant.

- - - - -

Essex Market Development LLC,
Third-Party Plaintiff-
Appellant-Respondent,

-against-

Marangos Construction Corp.,
Third-Party Defendant-
Respondent-Appellant.

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JF Contracting Corp.,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

Marangos Construction Corp.,
Third-Party Defendant-
Respondent-Appellant.

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Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (James V. Derenze of counsel), for appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for JF Contracting Corp., respondent-appellant.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for Marangos Construction Corp., respondent-appellant.

Siegel & Coonerty, LLP, New York (Steven Aripotch of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 31, 2012, which granted plaintiffs' motion for summary judgment as to liability under Labor Law § 240(1), denied defendant/third-party plaintiff JF Contracting Corp.'s (JF) motion for summary judgment dismissing the complaint as against it, for summary judgment on its claims for common-law and contractual indemnification and breach of contract against third-party defendant Marangos Construction Corp. (Marganos), to strike Marangos's answer for failure to provide insurance information, and to compel defendant/third-party plaintiff Essex Market Development LLC (Essex) to produce copies of its relevant insurance policies, and denied Essex's motion for summary judgment on its common-law and contractual indemnification claims against JF and Marangos, unanimously modified, on the law, to grant JF's motion for summary judgment dismissing as against it the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claims insofar as they are predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.8, 23-

1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.24, 23-5.3, 23-5.4, 23-5.5, 23-5.6, and 23-5.7, and for summary judgment on its contractual indemnification claims against Marangos, to conditionally grant its cross motion for summary judgment on its common-law indemnification claims against Marangos, and to deny Essex's motion for summary judgment on its indemnification claims against Marangos, with leave to renew, and, upon a search of the record, to grant summary judgment to Essex and defendant MSS Construction Corp. dismissing as against them the Labor Law § 241(6) claims insofar as they are predicated on the above-cited violations of the Industrial Code, and otherwise affirmed, without costs.

Plaintiff Domingos Mouta was injured when he stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and he fell from the fourth floor to the second. There is no question that plaintiff's was a "gravity-related . . . fall[] from a height," and that plaintiff was provided with no safety devices, such as a harness, to prevent the fall. Marangos's conclusory claims that safety devices were available are not sufficient to raise an issue of fact. Thus, defendants are liable for Mouta's injuries pursuant to Labor Law § 240(1) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

To the extent the Labor Law § 241(6) claim is predicated on Industrial Code (12 NYCRR) §§ 23-1.5 (general responsibilities of employers), 23-1.8 (personal protective equipment), 23-1.11 (lumber and nail fastenings), 23-1.15 (construction of safety railings), 23-1.16 (safety belts, harnesses, tail lines and lifelines), 23-1.17 (life nets), 23-1.24 (work on roofs), and 23-5.3, 5.4, 5.5, 5.6, and 5.7 (various types of scaffolds), it must be dismissed as against all defendants because these provisions either are too general to support a § 241(6) claim or are simply inapplicable to the facts of this case.

JF demonstrated that it did not supervise and control plaintiff's work or the area of the work site in which plaintiff's accident occurred, and therefore cannot be held liable for plaintiff's injuries under Labor Law § 200 or common-law negligence principles (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587 [1st Dept 2009]). The record demonstrates that Marangos, plaintiff's employer, which pursuant to its contract with JF was responsible for site safety, was in charge of all aspects of the work at issue, including safety.

The contract between JF and Marangos obligated Marangos to indemnify JF against losses arising out of Marangos's negligent performance of its work. Since the record establishes that

plaintiff's accident was not caused by any negligence on JF's part, that JF's liability is purely vicarious under Labor Law § 240(1), and potentially under § 241(6), and that Marangos was responsible for the accident, JF is entitled to summary judgment on its contractual indemnification claim against Marangos (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 64-65 [1st Dept 1999]). JF is also entitled to conditional summary judgment on its common-law indemnification claim against Marangos, subject to whether plaintiff is found to have suffered from a grave injury (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]).

Essex failed to include a copy of the third-party complaint in its motion for summary judgment on its indemnification claims against Marangos and JF (*see* CPLR 3212[b]). We therefore affirm the denial of Essex's motion, without prejudice to renewal upon proper papers (*see Krasner v Transcontinental Equities*, 64 AD2d 551 [1st Dept 1978]). The court correctly denied JF's motion as to the insurance policies procured by Marangos and Essex.

The Decision and Order of this Court entered herein on February 19, 2013 is hereby recalled and vacated (*see* M-1243 and M-1387 decided simultaneously herewith).

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

ENTERED: MAY 16, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9548N In re The Board of Education of the City School District of the City of New York, etc., et al., Petitioners-Appellants, Index 451040/12

-against-

Michael Mulgrew, etc., et al., Respondents-Respondents.

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

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered August 2, 2012, which denied petitioner The Board of Education's (DOE) petition to vacate the arbitration award and granted the cross-petition of respondents Michael Mulgrew, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT Union), and Ernest Logan, as President of the Council of School Supervisors and Administrators, Local 1, American Federation of School Administrators, AFL-CIO (collectively Unions), to confirm the arbitration award, unanimously affirmed, without costs.

The DOE filed a plan seeking approval and grant money from the State Education Department (SED) to close 24 underperforming

schools and to subsequently reopen 24 "new" schools in the identical locations and facilities. The SED conditionally approved the plan. The Unions filed grievances to the extent that the plan proposed to "excess" the staff of the closing schools, claiming that the plan to open new schools was a pretext to circumvent established procedures in the collective bargaining agreements (CBAs) for removing unsatisfactory teachers and other personnel. The Unions also claim that the plan circumvented the CBAs' requirements that excessing of teachers, referring to those let go through no fault of their own, be done on the basis of seniority.

After a six day hearing, the arbitrator concluded that although the DOE had not waived its right to contest whether the parties' dispute was arbitrable, it was, nonetheless, arbitrable. On the merits, he concluded that the plan had as its primary, if not sole, objective, avoiding undesirable teachers by excessing them under CBA provisions relating to closed or phased out schools, which violated CBA requirements that excessing be done on the basis of seniority. The Supreme Court denied the petition to vacate the award and granted the cross-petition to confirm the arbitration award.

We find that the grievances were arbitrable under the CBAs

and that the arbitrator neither exceeded his powers under the CBAs, nor violated public policy in resolving the merits of the parties' disputes. The CBAs provide that unresolved grievances concerning the application or interpretation of the CBAs are subject to arbitration. As relevant here, the definition of a grievance under the CBAs does not include any matter for which a method of review is proscribed by law, or any rule or regulation of the SED having the effect of law. The CBAs further provide that an arbitrator is without power to make any decision "[l]imiting or interfering in any way with the powers, duties or responsibilities of the Board under its by-laws, applicable law and rules and regulations having the effect of law."

At their core, the grievances seek only to have the arbitrator consider the interpretations of the CBAs and whether the plan, if implemented as written, violates the contractual rights and responsibilities of the parties. DOE's argument that arbitration necessarily interferes with the SED's statutory and regulatory authority is unpersuasive. While broadly referencing educational laws and regulations, the DOE fails to identify any law that "prohibit[s], in an absolute sense, [the] particular matters [to be] decided" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn, Local 1000, AFSCME, AFL-CIO, County of*

Chautauqua Unit 6300, Chautauqua County Local 807, 8 NY3d 513, 519 [2007] [quotations and citations omitted]), nor is there a showing of non-arbitrability, or a violation of public policy (*id.*, *see also Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 81 [2003] ["[i]t is only when the interest in maintaining adequate standards is attached to a well-defined law that public policy is implicated"]). The underlying grievance in no way impinges on the authority of the SED to approve a plan for the closure or the reopening of the 24 underperforming schools as new schools under the Education law (Education Law § 2590-h). Nor can the DOE rely on its own inclusion of proposed staffing changes in its plan to close schools to support its argument that staffing issues are now a state policy, law or regulation having the effect of law, which removes them from the dispute resolution regimen provided in the CBAs.

The arbitrator was well within his authority to define the term "new," as it pertains to schools, which was not defined by the collective bargaining agreement he was charged with interpreting (*see Salamino v Board of Educ. of the City School Dist. of the City of N.Y.*, 85 AD3d 617, 618 [1st Dept 2011] ["the arbitrator was required to give meaning to [a] term" not defined

by the CBA"]). It "cannot [be] conclude[d] that the arbitrator acted arbitrarily and capriciously in using" (*id.*) the generally recognized definition of the word "new." Nor was the arbitrator bound to conclude that the definition of a "new" school under the Education Law must be the same as the definition of a "new" school under the excessing provisions of the CBAs. DOE's arguments attacking the merits of the arbitrator's decision as violating public policy largely mirror its arguments made regarding arbitrability and are rejected for the same reasons.

The Unions' grievance does not challenge either the DOE's right to put forth a plan to close schools or the SED's right to approve such a plan. It seeks only a determination regarding the interpretation and implementation of staffing requirements under the CBAs. The Unions were not, therefore, relegated to raising their dispute in an Article 78 proceeding (*see Matter of Civil Serv. Empls. Assn., A.F.S.C.M.E, Local 1000, AFL-CIO v County of Nassau*, 249 AD2d 472 [2d Dept 1998]).

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

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10066 The People of the State of New York, Ind. 925/08
Respondent,

-against-

Herbert Williams,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered July 20, 2010, as amended August 2, 2010, convicting defendant, after a jury trial, of two counts of sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to consecutive terms of seven years and five years, respectively, unanimously modified, on the law, to the extent of vacating the sex offender certification and remanding for further certification proceedings, and otherwise 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 rejection of defendant's highly implausible defense of consent. The victim's psychiatric background, which was fully

explored before the jury, casts no doubt on whether the encounter was forcible.

The court properly exercised its discretion in denying defendant's requests for a mistrial, the reopening of testimony, or other relief, based on a portion of the prosecutor's summation. The prosecutor never made any argument that defendant's consent defense was refuted by the victim's supposed "chastity." Instead, the prosecutor merely made appropriate comments on matters in evidence, including the victim's demeanor and medical records introduced by defendant, and these remarks were responsive to defense arguments. Nothing in the remarks could be construed as opening the door to evidence of the victim's sexual history that would otherwise be barred by the Rape Shield Law (CPL 60.42).

The court erred in certifying defendant as a sex offender at a proceeding conducted several weeks after sentencing in the

absence of defendant and his counsel (*see People v Smith*, 60 AD3d 580, 581 [1st Dept 2009], *lv denied* 12 NY3d 921 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10068 In re Mercedez Alicia Dynasty F.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Alicia A., etc.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

_____

Elisa Barnes, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Jane Pearl, J.), entered on or about March 8, 2012, which, insofar as appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that it is in the child's best interests to terminate the

mother's parental rights and free the child for adoption (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The evidence at the dispositional hearing shows that the child is doing well in the home of her foster mother, her father's ex-wife, who she calls "Grandma," and who wishes to adopt her. Moreover, the mother, at the time of the dispositional hearing, had still not completed drug treatment, parenting skills, or any other aspect of her service plan (*see Matter of Tyjaia Simone-Kiesha Mc. [Crystal Mc.]*, 101 AD3d 635 [1st Dept 2012]; *Matter of Brandon R. [Chrystal R.]*, 95 AD3d 653 [1st Dept 2012], *lv denied* 20 NY3d 998 [2013]). There was no evidence that the mother was making rehabilitative progress that would warrant a suspended judgment (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698 [1st Dept 2012]; *Matter of Kharyn O. [Karen O.]*, 90 AD3d 541 [1st Dept 2011], *lv denied* 18 NY3d 810 [2012]).

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

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10069 110 Central Park South Corporation, Index 151251/12
Plaintiff-Appellant,

-against-

Board of Managers of 116 Central Park South Condominium,
Defendant-Respondent.

_____

Kane Kessler, P.C., New York (S. Reid Kahn and Gerard Schiano-Strain of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Jared E. Paioff and Steven D. Sladkus of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about October 19, 2012, which, insofar as appealed from as limited by the briefs, in this action seeking, inter alia, the removal of a chimney flue extension attached to plaintiff's building, denied plaintiff's motion for summary judgment, unanimously affirmed, with costs.

The court correctly held that, where a chimney extension altered pursuant to Administrative Code of City of NY § 27-860 was no longer in use, the test for whether it had to be removed was whether it constituted a hazard or nuisance (*see e.g. Lichter v 349 Amsterdam Ave. Corp.*, 22 AD3d 394 [1st Dept 2005], *lv denied* 6 NY3d 704 [2006]). As factual issues exist on those

questions, summary judgment was properly denied.

We have considered plaintiff's remaining contentions, including its challenges to the standards applied by the motion court, and find them unavailing.

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10072-
10072A In re Miguel Andrade,
Petitioner-Appellant,

-against-

New York City Police Department, et al.,
Respondents-Respondents.

Index 402860/10

Miguel Andrade, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered May 19, 2011, denying the petition seeking to annul respondents' determination, dated June 25, 2010, which denied petitioner's request under the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 23, 2011, which denied petitioner's motion to reargue, denominated as one for "reargument and reconsideration," unanimously dismissed, without costs, as taken from a nonappealable paper.

The court properly denied the petition and dismissed the proceeding under the doctrine of res judicata. Petitioner requested disclosure of documents he had sought in a prior FOIL

request, which were found to be exempt from disclosure in a prior article 78 proceeding between the same parties (*see Matter of Cobb v Lombardi*, 261 AD2d 172 [1st Dept 1999]; *see also Matter of Corbin v Ward*, 160 AD2d 596 [1st Dept 1990], *lv denied* 76 NY2d 706 [1990]).

The record further establishes that the petition was time-barred. The subject petition was brought in September 2010, more than four months after the November 2007 denial of petitioner's prior FOIL request (*see* CPLR 217[1]), and his second FOIL request "did not extend or toll his time to commence an article 78 proceeding" (*Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]).

The appeal from the December 2011 order is dismissed. Petitioner's motion, denominated as one for "reargument and reconsideration," did not offer new or additional facts that would change the prior determination (*see* CPLR 2221[e]), and thus, was essentially a motion to reargue, the denial of which is not appealable (*see Ramos v Napoli*, 95 AD3d 637 [1st Dept 2012]).

Furthermore, we exercise our discretion to disregard the inaccuracies in the notice of appeal and treat it as valid, particularly since respondent was not misled or otherwise

prejudiced by the inaccuracies (*see* CPLR 5520[c]; *Cirillo v Macy's Inc.*, 61 AD3d 538, 539 [1st Dept 2009]).

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10073 Luis De Oleo, Index 301267/07
Plaintiff-Respondent, 84253/09

-against-

Charis Christian Ministries, Inc., et al.,
Defendants-Appellants.

[And a Third-Party Action]

_____

Olukayode Babalola, Bronx, for appellants.

Jacob Oresky & Associates, PLLC, Bronx (Rhonda Katz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 20, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff laborer's lone witness account, given at his deposition, regarding how he fell from the roof of a church owned and/or occupied by defendants while painting a protective sealant on the roof, was consistent and sufficient to establish his prima facie entitlement to partial summary judgment on his § 240(1)

claim (*see Rodriguez v 3251 Third Ave. LLC*, 80 AD3d 434 [1st Dept 2011]; *Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]).

Defendants failed to raise an issue of fact as to plaintiff's version of events, or as to his credibility. Plaintiff's testimony that he was employed by the roof contractor as a "helper," and that he was paid $80 daily for his labor, was sufficient to qualify him for the protections of § 240(1) (*see generally Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431 [1st Dept 2012]). Defendants' counsel's unsubstantiated opinion that it would be "practically impossible" for one to fall from the roof, since parapets and/or walls (shown in two photographs) would have stopped the fall, is wholly lacking in probative value (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The two photographs were not authenticated, they depicted only small sections of the roof, there were portions of the roof's edge that lacked a protective barrier, and no testimony was elicited from plaintiff as to the location on the roof he had fallen from (*see Vasquez v The Rector*, 40 AD3d 265, 266-267 [1st Dept 2007]). Further, defendants' protective barrier argument is entirely speculative and depends on unsubstantiated factual assumptions.

Defendants have not shown that plaintiff was the sole proximate cause of his accident. Although plaintiff testified that he lost his balance at the roof's edge after painting himself into a corner, he also testified that he was not provided with any safety device to prevent his fall, and defendants have not refuted that testimony (*see Fernandez v BBD Developers, LLC*, 103 AD3d 554 [1st Dept 2013]; *Collado v City of New York*, 72 AD3d 458, 459 [1st Dept 2010]).

Nor have defendants shown that the church was akin to a one- to two-family dwelling exempting them from liability under § 240(1) (*see Lombardi v Stout*, 80 NY2d 290, 296-297 [1992]). Apart from defendants' pastor's contradictory affidavit attesting that the church appeared to be the height of a one-story residence, the balance of the evidence established that the building was only utilized as a church. Moreover, defendants failed to present evidence showing the "residential nature of the site and purpose of the [roof] work" (*Castro v Mamaes*, 51 AD3d 522, 523 [1st Dept 2008] [internal quotation marks omitted]; *see Bartoo v Buell*, 87 NY2d 362, 368 [1996]; *cf. Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102-103 [1st Dept 1997], *lv denied* 90 NY2d 804 [1997]).

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

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10074 Najif Choudhury, etc., et al., Index 350767/09
Plaintiffs-Appellants,

-against-

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

_____

H. Bruce Fischer, P.C., New York (H. Bruce Fischer of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Moon Choi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 19, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny that portion of the motion seeking dismissal of the negligent supervision claim and plaintiff father's derivative claim as against defendants Board of Education and Department of Education, and otherwise affirmed, without costs.

According to plaintiffs' notice of claim, the infant plaintiff was injured after a door in a bathroom attached to his classroom closed on his middle finger, severing it.

The court properly dismissed the action as against defendant City of New York, since it was an improper party to the action

(*see Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

The court properly granted the remaining defendants' motion for summary judgment dismissing the claim of negligent maintenance. The school's custodial engineer testified that there had been no repairs made or complaints received regarding the bathroom door prior to the accident. Accordingly, defendants made a prima facie showing that they did not create or have actual or constructive notice of the alleged hazard (*see Davila v City of New York*, 95 AD3d 560, 561 [1st Dept 2012]). In opposition, plaintiffs failed to raise an issue of fact (*see id.*).

However, the court should not have dismissed plaintiffs' claim that defendants negligently supervised the infant plaintiff. The testimony of the custodial engineer indicating what the infant plaintiff's teacher told her about the accident was hearsay, and therefore insufficient to support the motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In addition, issues of fact exist as to the adequacy of the supervision provided by the school and whether any lack of supervision proximately caused the infant plaintiff's

injury (*see e.g. Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d 719, 720 [3d Dept 2002], *appeal dismissed* 99 NY2d 610 [2003]).

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10076 The People of the State of New York, Ind. 2243/09
Respondent,

-against-

Antoine Lawrence,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Bruce Allen, J.), rendered on or about April 4, 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: MAY 16, 2013

CLERK

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

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10077 Jada Corprew, Index 101851/07
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

Chelmsford Contracting Corp.,
Defendant-Respondent.

_____

Mirman, Markovits & Landau, P.C., New York (David Bloom of counsel), for appellant.

Carlucci & Giardina, LLP, New York (Don D. Carlucci of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered October 24, 2012, which granted defendant Chelmsford Contracting Corp.'s motion for summary judgment dismissing the claims and any cross claims against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she was injured when she stepped into a hole in the street next to the sidewalk curb, which had been installed by defendant Chelmsford one to four months earlier. Chelmsford had been retained by the City to install new pedestrian ramps in various locations, and had obtained a street opening permit for each site. In support of its motion for

summary judgment, Chelmsford relied on the testimony of its project manager that the City had signed off on its work, and argued that it was therefore free of liability. However, in order to be entitled to summary judgment dismissing the complaint, Chelmsford was required to establish prima facie that it did not cause or create the hole that allegedly caused plaintiff's fall (*see Garcia v City of New York*, 99 AD3d 491 [1st Dept 2012]; *Shechter v City of New York*, 17 AD3d 124, 125 [1st Dept 2005]; *Field v City of New York*, 302 AD2d 223 [1st Dept 2003]). The City's acceptance of Chelmsford's work did not immunize it from liability, if it created the defect (*see Brown v Welsbach Corp.*, 301 NY 202 [1950]). Nor was it entitled to summary judgment because the work was completed a month to four months before the accident (*see Hayes v DeMicco Bros., Inc.*, 34 AD3d 641 [2d Dept 2006]).

Defendant's failure to make such an initial showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, the motion court should not have granted summary judgment in favor of defendant based on its determination that plaintiff's testimony concerning the nature of the defect in the street was not credible, particularly

in the absence of any evidence contradicting her testimony that there was a hole in the street (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10078- Index 15703/99
10079 Alida Rodriguez,
Plaintiff-Appellant,

-against-

Ford Motor Company, et al.,
Defendants-Respondents.

_____

The Rothenberg Law Firm LLP, New York (Louis A. Badolato of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Richard J. Montes of counsel), for Ford Motor Company, respondent.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Betty F. Gerendasy, respondent.

_____

Judgments, Supreme Court, Bronx County (Faviola A. Soto, J.), entered January 24, 2012 and February 9, 2012, after a trial, respectively dismissing the complaint against defendant Ford Motor Company and defendant Betty F. Gerendasy, as the administratrix of the Estate of Peter Nyiri, and individually, and bringing up for review an order, same court and Justice, entered September 16, 2011, which denied plaintiff's motion to renew her motion for spoliation sanctions against Ford, with costs to Ford, unanimously affirmed, without costs.

Plaintiff seeks damages for personal injuries she sustained when she was hit by a Ford vehicle owned by Betty F. Gerendasy

and driven by Peter Nyiri. On a prior appeal, this Court reversed a grant of summary judgment to Ford, on the ground that plaintiff, who based her products liability claim against Ford on circumstantial evidence, had presented evidence that Nyiri was neither intoxicated nor negligent. We found that "Nyiri's deposition testimony that he had only had one glass of wine in an hour and a half and was not intoxicated, that the car accelerated when he put it in reverse without stepping on the gas, and that the steering wheel froze and the brakes did not work" could lead a jury to conclude that the vehicle did not perform as intended and that all other causes of the accident not attributable to Ford had been excluded (62 AD3d 573, 574 [2009]). At trial, plaintiff presented additional evidence, including the results of a blood alcohol content (BAC) test and the testimony of a toxicologist that Nyiri's BAC at the time of the accident was .08-.09, which the expert opined would have rendered him impaired, and that his claim to have consumed one glass of wine would not account for his BAC level. Given the new evidence, the "law of the case" doctrine did not preclude a directed verdict in Ford's favor (*see Chappelear v Dollar Rent-A-Car Sys., Inc.*, 33 AD3d 513 [1st Dept 2006]; *Smith v Metropolitan Transp. Auth.*, 226 AD2d 168 [1st Dept 1996], *lv denied* 89 NY2d 803 [1996], *cert*

denied 520 US 1186 [1997]). Plaintiff's failure to exclude all other causes for the vehicle's failure not attributable to Ford compels the dismissal of the product liability claim (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). As her own expert opined that Nyiri's BAC level at the time of the accident would have impaired his driving ability, plaintiff failed to exclude Nyiri's negligence as a cause of the vehicle's failure not attributable to Ford.

Consistent with our decision in another prior appeal in this case (301 AD2d 372 [2003]), the trial court properly admitted evidence of Nyiri's arrest at the scene. It was inherently unfair, and therefore improper, to exclude the corresponding evidence that the charges against him were dismissed, but in light of plaintiff's failure to make her prima facie case the error was harmless.

The court properly excluded the results of a BAC test performed almost one year after the initial test and expert testimony as to the results, because no proper foundation was laid therefor (*see Amaro v City of New York*, 40 NY2d 30, 35 [1976]; *Westchester Med. Ctr. v State Farm Mut. Auto. Ins. Co.*, 44 AD3d 750, 753 [2d Dept 2007]).

The court properly precluded plaintiff's accident

reconstruction expert from testifying about tire marks at the scene because such testimony had not previously been disclosed (*see* CPLR 3101[d]).

The court properly excluded documents concerning, inter alia, Ford's investigation into claims of sudden acceleration, since they neither support nor add to plaintiff's theory of the case.

Plaintiff failed to oppose Nyiri and Gerendasy's motion for a directed verdict, thereby failing to preserve for appeal her objection to the court's grant of the motion.

Plaintiff's submission in support of her motion to renew her motion for spoliation sanctions against Ford neither offers new facts that would change the prior determination nor demonstrates that there has been a change in the law that would change the prior determination (*see* CPLR 2221[e][2]).

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

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10080-
10081 47 West 14th St. Corp., Index 651251/11
Plaintiff-Respondent,

-against-

New York Wigs & Plus, Inc.,
Defendant-Appellant.

_____

The Law Offices of John H. Lee, P.C., Flushing (Shawn M. Cestaro of counsel), for appellant.

Kera & Graubard, New York (Martin S. Kera of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered January 4, 2013, awarding plaintiff landlord the principal sum of $115,138.78 in rent and tax escalation charges in connection with defendant tenant's vacatur of the premises before the expiration of its lease, and bringing up for review an order, same court and Justice, entered November 15, 2012, which granted plaintiff's motion to amend the complaint and for summary judgment, unanimously affirmed, with costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties' lease required that any modification or discharge be in a writing signed by the party to be charged. The

parties' surrender agreement was not signed by the landlord and therefore had no binding effect. Further, the surrender agreement did not become binding upon the tenant's mailing it to the landlord, as the "mailbox rule" for formation of contracts by dispatch of acceptance (*see Buchbinder Tunick & Co. v Manhattan Natl. Life Ins. Co.*, 219 AD2d 463, 466 [1st Dept 1995]) was not implicated. The tenant's claim of promissory estoppel based on the surrender agreement and the discussions leading up to it lacked merit because it had vacated the premises before signing the agreement, so the required element of detrimental reliance was lacking, and its evidence of the discussions did not show a clear and unambiguous promise (*see generally MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011]).

The court properly exercised its discretion in allowing amendment of the complaint to correct the alleged date of the tenant's vacating the premises (*see* CPLR 3025[b]), given that the

corrected date conformed to an admission made by one of the tenant's principals.

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

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10082 The People of the State of New York, Ind. 2126/10
Respondent,

-against-

Lateef Thompson,
Defendant-Appellant.

_____

Flamhaft Levy Hirsch & Rendeiro LLP, Brooklyn (Jeffrey A. Rabin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered May 4, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or not fully explained by, the trial record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance

under the state and federal standards (*see People v Taylor*, 1 NY3d 174, 175-176 [2003]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant asserts that his trial counsel's failure to object to certain lines of questioning during the prosecutor's cross-examination of defense witnesses rendered his representation ineffective. However, counsel unsuccessfully objected to these lines of questioning when he opposed an in limine motion made by the People. Counsel may have reasonably believed that making the same arguments again during cross-examination would have been futile or counterproductive (*see People v Cortez*, 85 AD3d 409, 410 [1st Dept 2011], *lv denied* 19 NY3d 972 [2012]). In any event, we conclude that counsel's failure to object to portions of the prosecutor's cross-examination and summation, and to the court's charge, met an "objective standard of reasonableness" (*Strickland*, 466 US at 688), and that defendant has not shown that these omissions affected the outcome of the case or deprived him of a fair trial.

Furthermore, the court properly exercised its discretion when it permitted the People to elicit evidence of the gang and drug activity of defendant's deceased cousin, who had been a homicide victim. The People made a sufficient showing that this

evidence was relevant under the particular facts of the case, and that they had a good faith basis for this inquiry.

The portions of the prosecutor's summation to which defense counsel did object were responsive to defense arguments and drew appropriate inferences from the evidence (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). To the extent there were any improprieties, we conclude that they were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10083 In re Rebecca Alfaro, Index 108053/10
Petitioner-Appellant,

-against-

Martha K. Hirst, etc., et al.,
Respondents-Respondents.

_____

Michael H. Zhu, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about August 22, 2011, denying the petition seeking, among other things, reinstatement to petitioner's prior position of permanent Fraud Investigator, placement on the Department of Homeless Services' (DHS) eligible list for promotion to Associate Fraud Investigator, and monetary damages for wrongful denial of promotion and wrongful transfer under Civil Service Law § 80, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner acknowledges that having prevailed in her administrative appeal on the ground that the Department of Citywide Administrative Services (DCAS) had erroneously ruled her ineligible for promotion to the position of Associate Fraud

Inspector, she was not entitled to be appointed to that position, but only to be placed on a special eligible list and given due consideration (*see Matter of Andriola v Ortiz*, 82 NY2d 320, 324 [1993], *cert denied* 511 US 1031 [1994]).

Petitioner's contention that DCAS acted arbitrarily in failing to place her on an eligibility list for DHS — where she was working when the error regarding her eligibility was made, rather than the Human Resources Administration (HRA), where she was employed when she won her administrative appeal — is unavailing. The record indicates that petitioner turned down the opportunity to return to DHS, evidently believing at that point that her prospects were better at HRA.

While petitioner correctly asserts that she would not have been laid off as a DHS Fraud Inspector if not for DCAS's miscalculation of her seniority, she is not entitled to back pay for that reason, because she was transferred to a job at HRA with the same title and compensation. Nor is petitioner entitled to compensation in connection with the demotion from provisional Associate Fraud Inspector to her permanent title of Fraud Inspector, which preceded the transfer to HRA. Petitioner had no expectation of tenure in the provisional position, which could be

terminated without the requirement of charges, a statement of reasons, or a hearing (*Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.-Long Beach Unit*, 8 NY3d 465, 471 [2007]).

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10084 In re Owen Hopper, Index 100688/12
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

_____

O'Keke & Associates, P.C., Brooklyn (Patrick O'Keke of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated September 28, 2011, which terminated petitioner's employment as a New York City police officer, 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 [Donna M. Mills, J.], entered April 26, 2012), dismissed, without costs.

The determination that petitioner engaged in serious misconduct is supported by substantial evidence *(see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-181 [1978]). Petitioner admitted that he left a loaded firearm unsecured in his backpack on a desk in a college library and later made an unauthorized call to a witness in an

investigation against him. Moreover, the evidence shows that on another occasion, petitioner made vulgar statements and exposed his genitals to an arrestee while on duty in the precinct. There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed does not shock the conscience since respondent "is accountable to the public for the integrity of the Department" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001] [internal quotation marks omitted]).

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10085 Magdelena T. Jacobs, Index 110094/09
Plaintiff-Appellant,

-against-

Madison Plastic Surgery, P.C., et al.,
Defendants-Respondents.

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Law Offices of Daniel A. Thomas, P.C., New York (Daniel A. Thomas of counsel), for appellant.

James W. Tuffin, Islandia, for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 6, 2012, which denied plaintiff's posttrial motion to set aside the verdict, unanimously affirmed, without costs.

On December 11, 2007, defendant Dr. Tornambe performed bilateral breast revision surgery, including implant replacement, on plaintiff. Plaintiff brought suit, alleging that the left breast revision resulted in nipple asymmetry and breast deformity.

We perceive no basis to disturb the jury's crediting of the testimony of defendant Dr. Tornambe that he marked plaintiff's breasts intraoperatively while she was in a seated position, a

procedure the experts agreed was within the standard of care (*see Torricelli v Pisacano*, 9 AD3d 291 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

The trial court did not commit reversible error in allowing into evidence testimony concerning plaintiff's expert's prior medical malpractice actions against her. This evidence was at most harmless error, particularly since the same testimony was elicited from defendant's expert.

Since plaintiff's expert testified that nipple asymmetry and breast deformity can occur in the absence of negligence, the trial court appropriately declined plaintiff's request to charge the jury with res ipsa loquitur (*see generally States v Lourdes Hosp.*, 100 NY2d 208 [2003]).

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: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10086 Paul Britez, Index 112928/08
Plaintiff-Respondent, 590424/10
590495/10

-against-

Madison Park Owner, LLC, et al.,
Defendants-Respondents,

National Interiors Contracting, Inc.,
Defendant-Appellant,

Citywide Interiors Contractors, Inc.,
Defendant.

[And Third-Party Actions]

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Milber Makris Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for Paul Britez, respondent.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for Madison Park Owner, LLC, G Builders IV, LLC and Walter & Samuels, Inc., respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered September 10, 2012, which, insofar as appealed from as limited by the briefs, denied defendant National Interiors Contracting, Inc.'s (National) motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against it, and granted defendants Madison Park Owner, LLC, G Builders IV, LLC, and Walter & Samuels, Inc.'s cross motion for summary

judgment on their contractual indemnification claim against National, unanimously affirmed, without costs.

Plaintiff sustained injuries when he fell off a baker's scaffolding while working in a building owned by Madison Park and managed by Walter & Samuels. Walter & Samuels, as Madison Park's agent, retained G Builders as the construction manager on a project to convert certain floors of the office building to luxury condominium units. G Builders entered into a subcontract with National for the drywall and carpentry work. National subcontracted part of its work to Citywide Interiors Contractors, Inc., which in turn subcontracted the taping and spackling work to plaintiff's employer, Pecci Construction LLC.

The Purchase Order between G Builders and National delegated "all DRYWALL, CARPENTRY AND CEILING scope of work" to National, which thus "obtain[ed] the concomitant authority to supervise and control that work" and became G Builders' statutory agent under Labor Law §§ 240(1) and 241(6) (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Further demonstrating National's supervisory authority are the Purchase Order's requirement that National submit to G Builders "a listing of all proposed onsite supervision and associated management" and National's subcontracting of a portion of its work to another subcontractor

(*see Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625 [1st Dept 2012]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]; *Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010]).

The indemnification clause in the Master Agreement between G Builders and National requires National to indemnify G Builders, Madison Park and their agents against "claims . . . arising out of or resulting from the performance of the Work . . . provided such claim . . . is caused in whole or in part by any act or omission of [National], anyone directly or indirectly employed by [National], or anyone for whose acts any of them may be liable." The accident arose out of the performance of National's work and National's failure to provide an adequate safety device in conformance with the Labor Law (*see Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019 [2d Dept 2011]). It also arose out of the failure of Pecci, a party in National's employ, to provide an adequate safety device (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 504-505 [1st Dept 2012]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 802 [2d Dept 2010]).

National argues that G Builder's negligence precludes contractual indemnification. However, the motion court dismissed plaintiff's common-law negligence and Labor Law § 200 claims

against G Builders (*see Kittelstad v Losco Group, Inc.*, 92 AD3d 612, 613 [1st Dept 2012]), and in any event, nothing in the record shows that G Builders supervised or controlled the activity that gave rise to the injury so as to render it liable (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *see also Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Contrary to National's contention, managing agent Walters & Samuels qualifies as an indemnitee under the indemnification clause.

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

ENTERED: MAY 16, 2013

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10087N Beverly Cason, et al., Index 109377/09
Plaintiffs-Respondents,

-against-

Deutsche Bank Group, et al.,
Defendants-Appellants.

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Morgan, Lewis & Bockius LLP, New York (Kenneth J. Turnbull of counsel), for appellants.

Norman A. Olch, New York, for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 4, 2012, which, in this employment discrimination action, denied defendants' motion, pursuant to CPLR 603 and 1003, to sever plaintiffs' claims into separate trial units, unanimously affirmed, without costs.

Plaintiffs assert claims under State and City Human Rights Laws, alleging defendants' discrimination based on race and national origin. Plaintiffs cite defendants' ethnically disparaging remarks and preferential treatment of plaintiffs' white counterparts in terms of compensation and promotion. Two plaintiffs allege retaliatory termination based on their complaints of racial discrimination, while the third alleges that the conditions resulting from the discriminatory acts became so

difficult that he was forced to resign. Plaintiffs' supervisor testified as to her long familiarity with defendants' alleged acts of racial discrimination and her caution with discussing the subject because she had seen the negative impact on careers of those who complained.

The motion court providently exercised its discretion in denying defendants' application for severance (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]). Plaintiffs' claims share a "'common nucleus of facts'" sufficient to warrant a joint trial (*Vecciarelli v King Pharms., Inc.*, 71 AD3d 595, 596 [1st Dept 2010], *quoting Sichel v Community Synagogue*, 256 AD2d 276, 276 [1st Dept 1998]).

Defendants have not shown that a joint trial will result in prejudice to a substantial right (*see Vecciarelli*, 71 AD3d at 596). Indeed, the trial court will have discretion to address

any potential danger of "guilt by association" by appropriate curative instructions (*see Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 855, 856 [2d Dept 2009]).

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10088-
10089 The People of the State of New York,
Respondent,

-against-

Joey Lopez, etc.,
Defendant-Appellant.

Ind. 5485/08

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered November 24, 2009, as amended September 16, 2010, convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the second degree (two counts), attempted assault in the first and second degrees, and assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

We reject defendant's argument that his robbery and burglary convictions were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence

established that defendant stole the victim's cell phone, that he did so by force rather than as an afterthought following an assault, and that he unlawfully entered the victim's apartment building by threatening an occupant.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10090 Nidia Lopez, Index 303810/09
Plaintiff-Respondent,

-against-

Kelly Street Realty, Inc.,
Defendant-Appellant.

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White Fleischner & Fino, LLP, New York (Jason S. Steinberg of counsel), for appellant.

Krieger, Wilansky & Hupart, Bronx (Brett R. Hupart of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 11, 2012, which, insofar as appealed from as limited by the briefs and insofar as appealable, denied defendant's motion to renew, unanimously reversed, on the law, without costs, the motion to renew granted, and, upon renewal, defendant's motion to strike plaintiff's note of issue and for further discovery concerning plaintiff's subsequent injury granted.

This personal injury action arises from a slip-and-fall accident that occurred on defendant's premises in June 2008. Plaintiff's original bill of particulars alleged that she suffered injuries to her back, right leg, and right ankle. Shortly before plaintiff filed the note of issue, defendant

received information indicating that she had suffered a subsequent injury to her right ankle. Defendant's original motion to vacate the note of issue was based, in part, on its demand for discovery sought relating to that subsequent injury. At oral argument, plaintiff's counsel represented that the subsequent injury was to her left ankle, and thus, a different body part was at issue. Accepting this explanation, the court denied the original motion insofar as it sought to vacate the note of issue, and ordered plaintiff to provide the other outstanding discovery, and a personal affidavit attesting that in her subsequent accident she injured a different body part from that claimed in the subject accident.

Defendant later moved to renew its motion to strike the note of issue and obtain discovery pertaining to the subsequent accident, submitting plaintiff's supplemental bill of particulars, in which she alleged that she sustained a left-knee injury during the subject accident which has left her with long-lasting, likely permanent injuries, including a decreased ability to bear weight on her left leg and anticipated degenerative conditions. Defendant explained that it did not include the supplemental bill of particulars with its original motion because the motion was premised upon the need for further discovery

pertaining to what defendant thought was a subsequent right leg injury. Because defendant did not learn that the subsequent accident involved only plaintiff's left ankle, and not the right one, until the day of oral argument, defendant maintained that it had no reason to know that the left-leg injuries were even relevant at that moment, and did not realize that until it later reviewed its files, armed with the new information. Under the circumstances, this establishes reasonable justification for failing to include this evidence with the original motion (*see* CPLR 2221[e][3]; *Telep v Republic El. Corp.*, 267 AD2d 57, 58 [1st Dept 1999]).

Upon renewed consideration of the merits of defendant's motion to strike the note of issue, it should have been granted. The general policy of this State, is to encourage "open and far-reaching pretrial discovery" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998] [internal quotation marks omitted]). The showing of outstanding discovery, separate and apart from that pertaining to plaintiff's subsequent accident, was a sufficient ground upon which to grant the original motion and vacate the note of issue (*see Nielsen v New York State Dormitory Auth.*, 84 AD3d 519 [1st Dept 2011]). Moreover, given the potential connection between plaintiff's

subsequent fracture of the ankle in the same leg in which she has claimed, inter alia, to have an inability to bear her full weight, defendant had a good-faith basis to seek disclosure pertaining to the latter injury, and granting same would serve the disclosure rules' purpose "to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]).

We further note that no prejudice to plaintiff appears on this record.

We have considered and rejected the remaining arguments.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10091 Warshaw Burstein Cohen Schlesinger & Kuh, LLP, Plaintiffs-Respondent, Index 116683/09

-against-

Eric A. Longmire, Defendant-Appellant.

_____

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 19, 2012, which granted plaintiff Warshaw Burstein Cohen Schlesinger & Kuh, LLP's (Warshaw) motion to dismiss defendant's counterclaim for legal malpractice pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In this action seeking attorney's fees, defendant Eric A. Longmire filed a counterclaim for legal malpractice, alleging that plaintiff negligently failed to pursue a claim of race-based termination, in opposition to a summary judgment motion seeking dismissal of Longmire's federal employment discrimination lawsuit against his former employer.

The motion court properly dismissed the legal malpractice

claim, as defendant failed to "meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the [plaintiff] client would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Longmire failed to show that he would have established a prima facie case of race-based discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also McDonnell Douglas Corp. v Green*, 411 US 792, 802-804 [1973]).

First, Longmire failed to show that he was terminated, as he himself testified in the underlying suit that he voluntarily left his former employment. In addition, based on his own allegations in the complaint and his affidavit, if he was terminated at all, it was due to his refusal to testify on his employer's behalf in his employer's matrimonial proceedings, and it was not due to Longmire's race. Thus, Longmire would not have prevailed on such a claim had Warshaw pursued it in opposing summary judgment.

Warshaw's decision not to move for reconsideration of the decision dismissing the underlying federal lawsuit was a strategic choice, and does not amount to legal malpractice

because "[a]n attorney's 'selection of one among several reasonable courses of action does not constitute malpractice'" (*Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011], quoting *Rosner v Paley*, 65 NY2d 736, 738 [1985]).

The motion court correctly rejected Longmire's submission of an expert affidavit on the issue of whether Warshaw acted negligently (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 69 [1st Dept 2002]).

The court properly considered the documents submitted pursuant to CPLR 3211(a)(1) in concluding that they establish a defense to the malpractice counterclaim as a matter of law, as they show that Longmire would not have prevailed on any claim of race-based termination in the underlying federal suit (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Indus. v Anderson Kill & Olick*, 267 AD2d 10, 11 [1st Dept 1999]). Nor did the documents exceed the "scope" of documents that a court may review in ruling on a motion to dismiss, as "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may

constitute documentary evidence within the meaning of CPLR 3211(a)(1)" (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 80 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]; *see also Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1999], *affd on other grounds* 94 NY2d 659 [1999]).

Finally, although Longmire contends that the motion should have been denied pursuant to CPLR 3211(d) because, among other things, depositions had not yet been taken of Warshaw attorneys who handled the underlying suit, Longmire does not specify what facts warrant further discovery or how they are relevant to his opposition to the motion to dismiss his counterclaim.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10092 The People of the State of New York, Ind. 3796/11
Respondent,

-against-

Zachery Williams,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about October 12, 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: MAY 16, 2013

CLERK

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

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10093 David Tash, Index 25151/98
Plaintiff-Appellant,

-against-

Federated Department Stores, Inc., doing business as Macy's Department Store,
Defendant-Respondent.

_____

Slavin & Slavin, New York (Barton L. Slavin of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 7, 2012, after a jury trial, in favor of defendant and against plaintiff, and bringing up for review an order, same court and Justice, entered June 15, 2012, which denied plaintiff's posttrial motion to set aside the verdict, unanimously affirmed, without costs.

In 1996, plaintiff, then five years old, was injured when, sitting on an escalator, his leg got caught between the bottom of the step and the combplate. The escalator stopped when a customer pushed the stop button.

We find that the verdict was not against the weight of the evidence, and was based on a fair interpretation of the evidence.

Based on the evidence, including testimony by defendant's expert, the jury could fairly infer that, although plaintiff had alleged that worn treads and a raised combplate combined to catch his foot, it was impossible to discern which of the 2000 treads on the escalator caused the accident.

The trial court instructed the jury on substantial cause, and plaintiff failed to preserve his argument that the trial court should have given the jury a missing witness charge (*see* CPLR 4110-b). The trial court did not err in denying plaintiff's request to charge that violations of certain Administrative Code sections were some evidence of negligence, since the sections cited by plaintiff did not relate to worn treads (*see* Administrative Code of City of NY §§ 27-982, 27-987). Moreover, the reference standards cited by plaintiff involve devices that stop the power on an escalator (*see* NY City Building Code [Administrative Code of City of NY tit 27, ch 1, Appendix] Reference Standard RS 18, Rules 805.3f, 805.3n, 805.3q). However, such devices were not at issue here, since an eyewitness stopped the escalator (*see generally French v O'Donohue*, 239 AD2d 903 [4th Dept 1997], *lv denied* 91 NY2d 804 [1997]).

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: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10095 Estelita Malupa, Index 6965/07
Plaintiff-Appellant,

-against-

Anthony Oppong, et al.,
Defendants-Respondents,

Anthony Bortolomey, et al.,
Defendants.

_____

Dinkes & Schwitzer, P.C., New York (Andrea M. Arrigo of counsel), for appellant.

Law Offices of Moira Doherty, P.C., Bethpage (Alan M. McLaughlin of counsel), for Anthony Oppong, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for Claudio A. Contreras, respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered March 2, 2012, which granted defendants' motion and cross motion for summary judgment dismissing the complaint alleging serious injuries under the "permanent consequential" and "significant" limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima face absence of a serious injury in plaintiff's cervical spine, lumbar spine, and right knee by submitting the affirmed reports of their neurologist and orthopedist who, after examining plaintiff, found absence of

neurological deficits, full range of motion, and absence of permanency or residuals (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]; *DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009]). Defendants also established prima facie absence of causation by submitting their radiologist's MRI reports concluding that the MRI films taken shortly after the accident showed only preexisting degenerative conditions, and no evidence of acute or recent trauma (*Barry*, 94 AD3d at 499; *Colon v Vincent Plumbing & Mech. Co.*, 85 AD3d 541, 542 [1st Dept 2011]; *DeJesus*, 61 AD3d at 607). The failure of defendants' experts to review plaintiff's medical records in preparing their reports does not render the reports insufficient, as they detailed the specific objective tests they used in their personal examination of plaintiff, and the radiologist found no evidence of traumatic injury upon review of plaintiff's MRI films (*see Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]). They were not required to examine any other part, since plaintiff made no other complaints of continuing injuries or symptoms resulting from the subject accident.

Plaintiff failed to raise a triable issue of fact. The only objective medical evidence submitted was unaffirmed MRI reports and the unaffirmed operative report of her orthopedic surgeon, which were not relied on by defendants and, therefore, are

insufficient to raise an issue of fact (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435 [1st Dept 2011]). While the affirmation of plaintiff's treating physician recites the findings in the unaffirmed reports, the affirmation may not be used to "bootstrap[]" the unaffirmed reports (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 662 [1st Dept 2010]). Further, the recent range of motion restrictions found by plaintiff's treating physician are minor and insufficient to establish a significant or consequential limitation (*Waldman v Dong Kook Chang*, 175 AD2d 204 [2d Dept 1991]), and the treating physician offered no opinion as to causation, and did not address the degenerative conditions found by defendants' expert and noted in the MRI and operative reports of plaintiff's physicians (*see Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]). Plaintiff's claims of persisting pain and limitations in her left hand are unsupported by any objective evidence of injury.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10097 The People of the State of New York, Ind. 6737/01
Respondent,

-against-

Damon Robertson,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered March 15, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of post release supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621, 630 [2011]).

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10098-
10099 Dylawatie Bharat,
Plaintiff-Appellant,

-against-

The Bronx Lebanon Hospital Center,
Defendant-Respondent.

Index 303112/10

Scarola, Benincasa & Mouzakitis PLLC, Flushing (Michael Mouzakitis of counsel), for appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered April 24, 2012, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about March 12, 2012, granting defendant's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Because defendant demonstrated conclusively that it assumed exclusive control over the manner, details and ultimate result of plaintiff's work, the summary adjudication of plaintiff's special employment status and consequent dismissal of the action was

proper (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]; *Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636 [1st Dept 2012]).

Plaintiff testified that defendant's employees determined her assignment and provided her with "all instructions, everything." She participated in a one-week orientation program and passed a written examination administered by defendant before commencing work at defendant hospital. She wore a uniform that conformed to defendant's specifications and an identification badge issued by defendant's security office. Plaintiff stated that the role of the nursing agency that paid her salary was to obtain the contract for her, but all instructions regarding her job duties were provided by defendant's employees, not the agency, and she did not report to the agency's employees, who were not present at the hospital.

Plaintiff failed to raise a triable issue of fact because she was properly considered a special employee even though the agency paid her salary and had the power to hire and fire her

(*see Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458 [1st Dept 2012]). Moreover, her contract with the agency had expired, and, in any event, only addressed ancillary aspects of the employment.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10104 Margaret Nuzum, Index 603019/07
Plaintiff-Appellant,

-against-

Stephen R. Field,
Defendant-Respondent,

Stuart Macfarlane, etc.,
Defendant.

_____

Estrin, Benn & Lane, LLC, New York (Melvyn J. Estrin of counsel), for appellant.

Hitchcock & Cummings, LLP, New York (Christopher B. Hitchcock of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 17, 2012, which granted defendant attorney's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff established an issue of fact as to whether an attorney-client relationship existed between her and defendant Field, with her sworn testimony that defendant expressly undertook to prepare promissory notes for her, albeit with the fees paid by another (*see Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451 [1st Dept 1993], *lv denied* 82 NY2d 654 [1993]). However, plaintiff's failure to provide an expert affidavit as to

the standard of care and professional competence in this area, to rebut defendant's expert affidavit, is fatal to her claim (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283 [1st Dept 1999]). Moreover, the claim has to be dismissed in any event as time-barred. The allegedly defective documents were prepared in 1999, and thus, the statute of limitations ran no later than 2002 (*Shumsky v Eisenstein*, 96 NY2d 164, 166-167 [2001]). As this action was brought five years too late, in 2007, it must be dismissed. That defendant allegedly represented plaintiff in 2004 does not change this result. That representation, while related to the proceeds of the promissory notes drafted in 1999, was to draft documents to ensure the proceeds of the notes passed to plaintiff's children. Hence, the new representation was insufficiently related to the matter sued upon to bring it within the continuous representation doctrine (*id.* at 168).

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10105 In re Modiano Realty Inc., Index 111932/11
Petitioner,

-against-

Environmental Control Board
of the City of New York,
Respondent.

_____

David Jadidian, Jackson Heights, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Moon Choi of counsel), for respondent.

_____

Determination of respondent, Environmental Control Board of the City of New York, dated June 23, 2011, which, after a hearing, found that petitioner had violated the Administrative Code of the City of New York §§ 28-210.1, 28-202.1 and 27-369, and the New York City Building Code (Administrative Code of City of NY tit 28, ch 7) § BC 1020.2, and imposed civil fines totaling $48,600.00, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered May 21, 2012), granted.

Respondent failed to introduce substantial evidence to establish that petitioner's residence was altered for occupancy

by four or more families (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). It was bare surmise and conjecture to conclude, from photographs depicting the outside of two doors in the basement, and the presence of five mailboxes on the exterior of the premises, that petitioner had illegally converted its premises (*cf. Matter of Kurtin v City of New York*, 78 AD3d 473 [1st Dept 2010]), especially since the Department of Building's inspector who issued the notices of violation did not testify at the hearing.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10106 Board of Managers of 184 Thompson Street Condominium, Plaintiff-Appellant, 103991/11

-against-

184 Thompson Street Owner LLC, et al., Defendants-Respondents.

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Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Tannenbaum, Helpern, Syracuse & Hirschtritt LLP, New York (Kenneth M. Block of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 11, 2012, as amended by order, same court and Justice, entered April 26, 2012, which, to the extent appealed from as limited by the briefs, granted so much of defendants' motion as sought dismissal of the first, third and fourth causes of action against defendants 184 Thompson Acquisition LLC, 184 Thompson Street Partners, LLC, and Raymond Chalme (the Non-Sponsors), and dismissal of the third cause of action as against remaining defendant 184 Thompson Street Owner LLC (the Sponsor), denied so much of plaintiff's cross motion as sought partial summary judgment on subsections (a) and (b) of its first cause of action, and its third and fourth causes of action, and, upon

searching the record, granted the Sponsor summary judgment on subsection (b) of the first cause of action to the extent of declaring that, having elected to establish the reserve fund for the subject condominium pursuant to the Administrative Code of the City of New York § 26-703(b)(i), the Sponsor "was entitled to 'receive [a] credit against the mandatory initial contribution to the reserve fund'" under § 26-703(c), unanimously affirmed, without costs.

The Sponsor opted to fund the subject condominium's reserve fund pursuant to Administrative Code § 26-703(b)(i) (the Total Price Method). Under the plain language of the governing statutes, the "total price" referred to in § 26-703(b)(i) is not "the price in effect during the exclusive purchase period, *i.e.*, the so-called 'insider's price,'" but rather the "'last price . . . offered to tenants in occupancy prior to the effective date of the plan'" (*Turtle Bay Towers Corp. v Welco Assoc.*, 228 AD2d 189, 189-190 [1st Dept 1996], quoting Administrative Code § 702[b][1], *lv denied* 89 NY2d 804 [1996]). We agree with the motion court that the record contains no conclusive evidence that the tenant-offeree prices set forth in the offering plan were increased prior to the plan's effective date. We reject plaintiff's contention that the tenant-offeree prices set forth in the plan

were "illusory." Although 96 of the 140 units listed were vacant, disregarding the vacant apartments would only result in lowering the amount of the reserve fund, which would be illogical and run counter to the statutory Total Price Method's purpose of providing for an adequate building reserve fund.

We also reject plaintiff's argument that a sponsor may take a credit for capital replacement work only when it has opted to use the second reserve funding method (the Roll-Over Method) listed in Administrative Code § 26-703, which provides for ongoing contributions to the reserve fund of 3% of actual sales over the course of up to five years (*see* § 26-703[b][ii]). Plaintiff argues that the use of the term "initial" in § 26-703(c) indicates that further reserve fund contributions are required, which in turn would refer to the Roll-Over Method, and not the Total Price Method (*see* § 26-703[c] ["An offeror may claim and receive credit against the mandatory *initial* contribution to the reserve fund for the actual cost of capital replacements . . . "] [emphasis added]). Plaintiff's argument reads far too much into the statute's use of the term "initial." The statute's opening sentence refers to the "contributions required" pursuant to the section. The use of the plural indicates a legislative intent to encompass both of the reserve

funding methods provided for in § 26-703(b). In this regard, the use of the term "initial" would call for the credit to be applied solely against the "initial" contribution required under whichever of the two methods was being used. Similarly, § 26-703(c) ends by capping the amount of the capital replacement credit at the lesser of the actual cost of the capital replacement work or "one per cent of the total price" (*id.*). This reference to "total price" further supports our conclusion that the capital replacement credit is intended to apply to either reserve funding method, since "total price" is an element in the calculation of both methods (*see* § 26-703[b]). We add that construing § 26-703(c) as providing for a capital replacement credit only under the Roll-Over Funding Method would run counter to the statutory intent of encouraging sponsors to perform needed capital replacement work in conjunction with condominium conversions.

The motion court correctly determined that the Non-Sponsors may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification (*see Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]). The statements made by defendants in the

certification and the plan were mandated by the Martin Act (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 246 [2009]), and plaintiff does not posit any basis of liability outside of that statute, nor assert that the Non-Sponsors are liable under an alter-ego or other veil-piercing theory.

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: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10107 Bari Yunis Schorr, Index 305587/11
Plaintiff-Respondent,

-against-

David Evan Schorr,
Defendant-Appellant.

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David E. Schorr, New York, appellant pro se.

Newman & Denney P.C., New York (Louis I. Newman of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 4, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion to compel plaintiff to sell her interest in the marital residence to his parents, unanimously affirmed, without costs.

"It is well-settled that, prior to entry of a judgment altering the legal relationship between spouses by granting divorce, separation or annulment, courts may not direct the sale of marital property held by spouses as tenants by the entirety, unless the parties have consented to sell" (*Moran v Moran*, 77 AD3d 443, 444 [1st Dept 2010]). Here, plaintiff's statement in her affidavit, filed in connection with a prior motion in this action, did not constitute a stipulation or agreement between the

parties to immediately sell the marital residence, as it did not reflect a meeting of the minds and did not contain specific terms (*see* CPLR 2104; *see also Delvito v Delvito*, 6 AD3d 487 [2d Dept 2004]). Nor is this case akin to those in which the parties entered into an on-the-record stipulation of settlement that specifically set forth the terms of the agreement (*see Markson v Markson*, 139 AD2d 705 [2d Dept 1988]) or in which a party consented to the sale on-the-record in open court in response to the court's questions (*see Frisina v Frisina*, 178 AD2d 460, 460 [2d Dept 1991]).

Plaintiff is not prohibited from refusing to consent to the sale by the doctrine of judicial estoppel, given that she never previously took the position that she was amenable to an immediate sale of the residence to defendant's parents (*see generally Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000]). In fact, she rejected such a proposal.

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10108-
10109N Lisa Vasquez, et al.,
Plaintiffs-Appellants,

Index 304037/09

-against-

Leonardo Soriano, et al.,
Defendants-Respondents.

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Arnold I. Bernstein, White Plains, for appellants.

Koors & Jednak, Bronx (Paul W. Koors of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 12, 2011, which denied plaintiffs' motion to strike defendants' answer or, alternatively, for summary judgment on the issue of liability, and order, same court and Justice, entered on or about July 12, 2011, which denied plaintiffs' motion for a special preference, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiffs' motion to strike defendants' answer as a spoliation sanction. Although defendant Leonardo Soriano readily admitted that he disposed of the plastic covering that allegedly caused plaintiff Lisa Vasquez's fall, plaintiffs may prove their case with the photographs of the condition, which, according to Lisa Vasquez and plaintiffs' counsel, accurately depict the

condition at the time of her accident (*see Alleva v United Parcel Serv., Inc.*, 102 AD3d 573, 574 [1st Dept 2013]).

Supreme Court properly denied plaintiffs' motion for summary judgment on the issue of liability. Defendants' home was built in 1969, and the Building Code and Residential Code of the New York State Uniform Fire Prevention and Building Code Act (L 1981, ch 707, § 1) are not applicable to buildings constructed or under construction before January 1, 1984 (*see id.* § 19). In any event, a violation of the regulations promulgated by the State Fire Prevention and Building Code Council (Executive Law §§ 374, 377), would constitute mere evidence of negligence, and not negligence per se (*see Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 489 [2012]; *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 453 [2002]).

Although, in order to obtain a trial preference, Lisa Vasquez was not required to show that the accident at issue caused her alleged indigence (CPLR 3403[a][3]; *see Brenton v Tiripicchio*, 54 AD2d 571, 571-572 [2d Dept 1976]), the court properly denied plaintiffs' motion because they failed to address

plaintiff Ruben Vasquez's financial status.

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

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

ENTERED: MAY 16, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10110-
10111N In re Jack J. Grynberg, et al.,
Petitioners-Appellants,

-against-

BP Exploration Operating
Company Limited, et al.,
Respondents-Respondents.

Index 116840/04

Law Offices of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for Jack J. Grynberg, appellant

Frankfurt Kurnit Klein & Selz, P.C., New York (Ronald C. Minkoff of counsel), for Grynberg Production Corporation (Texas), Inc., Grynberg Production Corporation (Colorado), Inc., and Pricaspian Development Corporation (Texas), appellants.

Sullivan & Cromwell LLP, New York (John L. Hardiman of counsel), for BP Exploration Operating Company Limited, respondent.

Emmet, Marvin & Martin, LLP, New York (Kenneth M. Bialo of counsel), for Statoil ASA, respondent.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 14, 2012, denying petitioners' motion to disqualify the arbitrator from any further participation in two arbitrations on the grounds of partiality and bias, and to stay the arbitrations pending his replacement, and order, same court and Justice, entered December 3, 2012, which denied petitioners' motion to renew, unanimously affirmed, without costs.

Petitioners waived any claim for disqualification of the

arbitrator on the ground of bias by failing to identify in their prior notice of appeal Supreme Court's effective denial of the part of their cross motion that sought to discharge the arbitrator (92 AD3d 547 [2012]; *see Torres v City of New York*, 41 AD3d 312 [1st Dept 2007]). Petitioners contend that they did not waive the claim for disqualification because, although they indicated in their cross motion that they sought the discharge of the arbitrator, they advanced no arguments in support thereof, and the court did not expressly address the issue. To the contrary, by failing to make any arguments as to the arbitrator's alleged partiality during the confirmation proceeding, petitioners waived that challenge.

In view of the foregoing, we need not address petitioners' contention that the arbitrator exhibited either actual bias or the appearance of bias. In any event, we have considered this contention and find it without merit.

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

ENTERED: MAY 16, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

8985 Patrick Lynch, etc., et al., Index 650822/10
Plaintiffs/Petitioners-
Respondents-Appellants,

Alexander Hagan, etc.,
Plaintiff,

-against-

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

_____

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

Michael T. Murray, New York (Allison E. Maue of counsel), for Patrick Lynch and the Patrolmen's Benevolent Association of the City of New York, Inc., respondents-appellants.

Seelig Law Offices, LLC, New York (Philip H. Seelig of counsel), for Roy Richter, respondent-appellant.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered January 20, 2012, modified, on the law, to deny defendants' motion as to the fifth cause of action (conversion) as against the City, and grant plaintiffs' motion for summary judgment on the issue of the City's liability for conversion, and otherwise affirmed, without costs.

Opinion by Acosta J. All concur except Friedman, J.P. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

8985
Index 650822/10

_____x

Patrick Lynch, etc., et al.,
Plaintiffs/Petitioners-
Respondents-Appellants,

Alexander Hagan, etc.,
Plaintiff,

-against-

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

_____x

Defendants/respondents appeal from the order of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered January 20, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs/petitioners' motion for partial summary judgment declaring defendant-respondent City of New York to be in violation of Retirement and Social Security Law § 480(b)(I) and (ii) by failing to contribute required amounts to the pensions of members of the New York City Police Pension Fund and the New York City Fire Department Pension Fund who are in Tier III of the City's pension system, and granted defendants' motion to dismiss plaintiffs' second, third, and fifth causes of action.

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

Michael T. Murray, New York (Allison E. Maue and Nancy K. Picknally of counsel), for Patrick Lynch and the Patrolmen's Benevolent Association of the City of New York, Inc., respondents-appellants.

Seelig Law Offices, LLC, New York (Philip H. Seelig of counsel), for Roy Richter, respondent-appellant.

ACOSTA, J.

The primary issue before the Court is whether the City of New York's decision to not apply an increased-take-home-pay (ITHP) benefit to police officers and firefighters placed into Tier III of the retirement system after July 1, 2009, and to continue deducting 3% of their wages towards their retirement benefits, violates Retirement and Social Security Law (RSSL) § 440(b). We hold that it does. We also hold that plaintiffs sufficiently stated a cause of action for common-law conversion of the deducted wages.

All City and State Employees, including New York City police officers, hired before July 1, 1973, were placed into a retirement system referred to as "Tier I." As a general matter, public employees hired between July 1, 1973 and July 1, 1976 were placed into Tier II (*see generally* RSSL art 11, § 440-451). Most public employees hired between 1976 and 1983 were placed into Tier III (*see* RSSL art 14, §§ 500-520). Tier II retirement benefits have a pension component and an annuity component (*see* RSSL §§ 441[b][c]). Tier III has a pension benefit, but no annuity component (*see* RSSL §§ 504; 505).[1]

[1] Most public employees hired between 1983 and 2010 were placed into Tier IV (*see* RSSL art 15, §§ 600-617). Public employees hired between January 2010 and March 31, 2012, were placed into the short-lived Tier V (see L 2009, ch 504 § 1), with

While most public employees hired after 1976 were placed, successively, into Tiers III and IV, until July 1, 2009, the Legislature repeatedly extended Tier II for police officers. The City has placed police officers hired after July 1, 2009, into Tier III, rather than Tier II.

Tier II police officers make individual pension contributions ranging from 4.3% to 8.65% of their pay, depending on their age at the time they were hired. By contrast, police officers in Tier III make individual pension contributions at a fixed rate of 3% of their pay.

In 1963, as a result of contract negotiations with police unions, the City implemented "Pensions-for-increased-take-home-pay (ITHP) (*see* Administrative Code of City of NY § 13-226). ITHP increased officers' take-home pay by having the City contribute a portion of each officer's required pension contributions. From 1963 to 1966, the City contributed 2.5% towards all police officers' pensions. In 1967, the Legislature increased the City's ITHP contribution rate to 5%, where it remained until 1975 (*see* Administrative Code § 13-226[a][5][6]).

In 1974, the Legislature shifted the ITHP codification from the New York City Administrative Code to the Retirement and

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public employees hired since April 1, 2012, being placed into Tier VI (*see* L 2012, ch 18).

Social Security Law (*see* RSSL § 480[a]). During the fiscal crisis of 1976, the Legislature reduced the City's ITHP contribution rate from 5% to 2.5% (*see* RSSL § 480[b][i]). In June 2000, the City and the Municipal Labor Committee entered into an agreement entitled "Agreement on Jointly Supported Pension Enhancements" (MLC Agreement). The parties to the MLC Agreement agreed to support implementation of certain actuarial methods that would generate savings for the City. In exchange, the City agreed to support specifically identified pending legislation that would increase the ITHP contribution rate from 2.5% to 5%. The Legislature subsequently enacted RSSL § 480(b)(ii), increasing the City's ITHP contribution rate to 5%.

As noted, through repeated Legislative action, police officers continued to enjoy Tier II status decades after it expired for most other State and City workers. The last two-year extension expired on June 30, 2009 (L 2007, ch 63, § 1). In June 2009, the Legislature passed a bill that would have extended police officers' Tier II status for another two years, but the Governor vetoed it. In his message to the Senate, the Governor explained that, although the Tier II status had been "routinely" extended for police officers and firefighters since 1976, the State and localities were now "hemorrhaging revenue at an alarming rate due to the recession and financial crisis" and

that he was not willing to "simply re-enact the same provisions that have contributed to New York's financial straits, without accompanying reform."

By complaint dated July 6, 2010, plaintiff Patrick Lynch, as President of the Patrolman's Benevolent Association of the City of New York, Inc., commenced this action (1) seeking a declaration that the City's actions in declining to make an ITHP contribution for police officers hired after July 1, 2009 (i.e. Tier III members) violated RSSL § 480(b); (2) seeking a declaration that the City violated Administrative Code § 13-216(b) by taking the above actions without the required 7/12 vote of the Police Pension Fund's Board of Trustees; (3) alleging that the City breached the MLC Agreement; (4) alleging that the City violated Labor Law § 193, which proscribes certain unauthorized deductions from employee wages; and (5) alleging that the City converted the affected police officers' wages.

On or about December 3, 2010, plaintiff Roy Richter, as President of the Captain's Endowment Association of the City of New York, Inc., intervened and served a substantially identical complaint, asserting four identical causes of action. By so-ordered stipulation entered September 8, 2011, Alexander Hagan, as President of the Uniformed Fire Officers' Association, was permitted to intervene in the action and be added to the caption

of Richter's complaint as a party plaintiff.

The City moved to dismiss the complaints pursuant to CPLR 3211(a)(7), arguing that Tiers I and II were the only retirement plans that by their own terms called for ITHP contributions, and that RSSL § 480 merely continued what was intended to be a temporary ITHP benefit for Tier I and II members. The City argued that, since Tier III "does not contain any provisions regarding ITHP or its calculation and administration, it would be absurd to assume that the Legislature intended that Tier III Police Members would be entitled to ITHP." The City further argued that, since Tier III members contribute a fixed 3% of their wages towards their pension, application of the 5% ITHP contribution requirement to Tier III members would lead to the "absurd result" of "entirely eliminat[ing]" Tier III members' responsibility to contribute towards their pensions.
The City also contended that the MLC Agreement "merely sets forth an agreement between the City and the unions to support the legislative bill would modify RSSL § 480(b) . . . and does not include any provision whereby the parties agreed to extend ITHP contributions to Police Members and firefighters not covered by RSSL § 480(b), such as those placed in Tier III."

By notices dated April 1, 2011, Lynch and Richter moved for summary judgment. Supreme Court granted plaintiffs partial

summary judgment on their first cause of action (declaring that the City violated RSSL § 480(b), and granted the City's motion to the extent of dismissing the second, third and fifth causes of action. We modify to deny the City's motion as to the fifth cause of action for common-law conversion.

ITHP was first implemented in 1963, as part of the New York City Administrative Code. The Tier I pension plan then went into effect, and the Tier II pension plan went into effect from 1973 to 1976; both had pension and annuity benefits. Tier I and Tier II members paid between 4.3% and 8.65% of their wages towards their annuities. ITHP increased officers' take-home pay by having the City pay 2.5%, and then 5%, of the officers' contribution towards their annuities (*see* Administrative Code §§ 13-225; 13-226).

Thereafter, in 1974, ITHP was recodified as RSSL § 480. Unlike Administrative Code § 13-226, however, 480 makes no reference to any "annuity contribution" (Administrative Code § 13-226[a][1]). Instead, it provides, in pertinent part:

> "Any program under which an employer in a public retirement system funded by the state or one of its political subdivisions assumes all or part of the contribution which would otherwise be made by its employees toward retirement, which expires or terminates during nineteen hundred seventy-four, is

> hereby extended, notwithstanding the provisions of any other general, special or local law" (RSSL § 480[b][I]).

By its own language, § 480 is not restricted to Tier I or II, or to annuity contributions. Rather, it applies to "*[a]ny* program" under which a government employer makes a "contribution which would otherwise be made by its employees toward retirement" (emphasis added). Contrary to the dissent's position, the plain language indicates a legislative policy to apply ITHP to any government employee, regardless of pension tier (*see Eaton v New York City Conciliation & Appeals. Bd.*, 56 NY2d 340, 345 [1982] ["where the statutory language is clear and unambiguous, the court should construe the statute to give effect to the plain meaning of the words used"]; *see also Cromwell v Le Sannom Bldg. Corp.*, 177 AD2d 372 [1st Dept 1991] ["The precise and unambiguous language of the statute may not be expanded through consideration of legislative history"]), and we disagree with the dissent that it is irrelevant that the statute itself does not limit its reach to annuity contributions. Moreover, the conclusion that the § 480 recodification was intended to extend ITHP to any current pension tier is buttressed by the fact that, rather than being included in RSSL article 11, governing Tier II, the statute was enacted as the sole occupant of its own free standing article, article 13.

The City's argument that application of the 5% ITHP contribution rate to Tier III members, who pay a fixed 3% of their salaries towards their pensions, would place Tier III members "in a better position than members of Tiers One and Two and virtually every other member of a City retirement system" is unavailing. Such a situation is not unprecedented. As noted, ITHP contributions also result in some members of Tiers I and II having to pay nothing towards their retirement. Moreover, Tier III's provisions are generally less favorable for members than Tiers I and II. Hence, it is not unthinkable that the Legislature might wish to soften the blow for Tier III police officers by continuing to extend them the benefit of ITHP contributions.

In any event, § 480 "must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 548-49 [1983] [internal quotation marks omitted]). Again, the plain language of § 480 and its placement in its own free standing article are indicative of a legislative intent that ITHP contributions continue to apply to police officers, regardless of their tier.

Moreover, despite the grave financial situation facing the

City, the Legislature, in creating Tier III, modified many benefits available to public sector employees in that tier, but chose not to exclude or diminish ITHP. For example, the RSSL expressly mentions ITHP in § 508-a(a) death benefits. Contrary to the dissent's position, the fact that the Legislature expressly mentioned ITHP in Tier III but did not state that ITHP was inapplicable to that tier shows that it never intended to exclude ITHP from Tier III, that it purposefully omitted any exclusion of ITHP in Tier III (*see Brady v Village of Malverne*, 76 AD3d 691, 693 [2nd Dept 2010], *lv dismissed* 16 NY3d 806 [2011] [where the General Municipal Law was enacted before the Volunteer Firefighters' Benefit Law (VFBL), and the VFBL explicitly stated that it was an exclusive remedy, the Court refused to read into the VFBL an exception for remedies available under the General Municipal Law, because the Legislature was deemed to be aware of all previously enacted statutes, and would have included such a carve-out in the VFBL had it intended there to be one]).

Finally, plaintiffs' allegations stated a cause of action for common-law conversion. A conversion occurs when a party, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

"Two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.* at 49-50 [citation omitted]).

As a general matter, a cause of action for conversion may be dismissed as duplicative of a claim for breach of contract (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 25 AD3d 482, 483 [1st Dept 2006]. However, while plaintiffs' claim for breach of contract was correctly dismissed, plaintiffs' claim of a violation of RSSL § 480 based on the City's wrongful deduction of 3% of the officers' wages is meritorious. Generally, "when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324 [1983] [internal quotation marks omitted].

Accordingly, the order of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered January 20, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs/petitioners' motion for partial summary judgment declaring defendant/respondent City of New York to be in violation of Retirement and Social Security Law § 480(b)(i) and (ii) by failing to contribute required amounts to the pensions of

members of the New York City Police Pension Fund and the New York City Fire Department Pension Fund who are in Tier III of the City's pension system, and granted defendants' motion to dismiss plaintiffs' second, third, and fifth causes of action, should be modified, on the law, to deny defendants' motion as to the fifth cause of action (conversion) as against the City, and grant plaintiffs motion for summary judgment on the issue of the City's liability for conversion, and otherwise affirmed, without costs.

All concur except Friedman, J.P. who dissents in part in an Opinion.

FRIEDMAN, J.P. (dissenting in part)

I respectfully dissent to the extent the majority affirms the declaration in favor of plaintiffs and modifies to grant them summary judgment as to liability on their fifth cause of action, for conversion. In my view, a declaration should be issued in favor of defendants and all of plaintiffs' claims for damages should be dismissed. The majority, in reaching a contrary result, applies to police and firefighter members of the Tier III retirement system (i.e., those hired on or after July 1, 2009) an increased-take-home-pay (ITHP) benefit that, as enacted in the 1960s and 1970s by the relevant legislative bodies, applies only to members of Tiers I and II of the retirement system. In a nutshell, the operative language creating the ITHP benefit (a reduction of annuity contributions) cannot be applied to Tier III members, whose retirement plan lacks any annuity component. The majority essentially rewrites the law to fit the square peg of the Tier III system into the round hole of an ITHP program that was created for members of Tiers I and II. In so doing, the majority takes the 1974 law that extended the preexisting ITHP benefit to Tier I and II employees and applies it to police officers and firefighters hired in 2009 or later, who belong to the entirely dissimilar Tier III of the retirement system.

The question raised by this appeal is whether New York City

police officers and firefighters hired on or after July 1, 2009, who are (or will be) members of Tier III of the City's pension system (Retirement and Social Security Law [RSSL], art 14, § 500 *et seq*), are entitled to benefit from the ITHP program extended (but not created) by RSSL § 480(b), which was originally enacted in 1974.[1] Under the ITHP program, the employer assumes certain retirement contributions that would otherwise be made by the employee. RSSL § 480(b)(i) does not itself set forth the parameters of the ITHP program. Rather, § 480(b) refers to a "program" that already existed at the time of the statute's original enactment in 1974 and provides that this preexisting program shall continue to exist. Specifically, RSSL § 480(b)(i) provides, in pertinent part:

> "Any program under which an employer in a public retirement system . . . assumes all or part of the contribution which would otherwise be made by its employees toward retirement, which expires or

[1]Plaintiffs in this matter are two police unions and a firefighters union. Defendants are the City and its police and firefighters' pension funds. Although Tier III of the pension system was created in 1976, Tier II was extended by RSSL § 440(c) for new police officers and firefighters appointed through June 30, 2009. The Legislature failed to override the Governor's veto of a bill that would have further extended Tier II status for new police officers and firefighters appointed after June 30, 2009. The City has not appointed any new firefighters since June 30, 2009, but the interests of firefighters to be appointed in the future are represented by the firefighters union plaintiff in this proceeding.

terminates during [1974], is hereby extended . . . "[2]

From the foregoing, it emerges that whether the ITHP program applies to employees covered by Tier III cannot be determined from the language of RSSL § 480(b) itself. In this regard, it should be borne in mind that Tier III, which was not created until 1976, did not exist when RSSL § 480(b) was first enacted in 1974, and that there were no police or firefighter members of Tier III until 2009, after all of the extensions of the ITHP program had been enacted. Thus, contrary to the view of the majority and Supreme Court, the fact that RSSL § 480(b) does not contain language limiting its applicability to any particular tier of the pension system is not determinative. Rather, we must look to the preexisting provisions of law that created the ITHP program to determine whether that program has any applicability to police officers and firefighters covered by Tier III. When this approach is taken, it becomes clear that the ITHP program has no applicability to Tier III employees.

Before the enactment of RSSL § 480(b), authority for the ITHP program with respect to police officers existed under § 13-

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[2]As originally enacted in 1974, RSSL § 480(b) extended the referenced "program" until 1976. Over the ensuing three decades, the statute was repeatedly amended to provide for successive two-year extensions. The extension was made indefinite by the statute's most recent amendment (L 2009, ch 504, pt A, § 5).

226 of the Administrative Code of the City of New York. The operative provisions of § 13-226 state that "the contribution of each member *made pursuant to subdivision b or e of section 13-225 of this subchapter* . . . shall be reduced by [a specified percentage] of the compensation of such member" (emphasis added). Section 13-225 (entitled "Contributions of members and their use; annuity savings fund") provides for covered employees to contribute (in amounts determined by an actuary) only to the *annuity* portion of their retirement plan, *not* to the *pension* portion of the retirement plan (*see* Administrative Code § 13-255[1] [the retirement allowance of a member of Tier I and Tier II comprises, inter alia, "(a)n annuity based on his or her required annuity savings . . . and in addition, a pension"]).[3] It is undisputed, however, that the retirement allowance for members of Tier III — unlike the allowance for members of Tiers I and II — does not have any annuity component, and contributions are not determined by an actuary. Instead, a Tier III member

[3]Although the retirement program for firefighters is set forth in a different chapter of title 13 of the Administrative Code, the City represents, and plaintiff firefighters union does not dispute, that the basic scheme for the firefighters in 1974, when RSSL § 480(b) originally extended the ITHP program, was similar to that for the police — a retirement allowance having annuity and pension components, with the employee contributing to the annuity only, subject to reduction pursuant to the ITHP program.

simply contributes to the retirement system at a fixed rate of 3% of his or her annual compensation (RSSL § 517) and receives "a pension equal to fifty percent of [the] final average salary, less fifty percent of the primary social security benefit at age sixty-two" (RSSL § 505[a]). Hence, Tier III members make no annuity contributions to which the pre-1974 ITHP program extended by RSSL § 480(b) could apply. It is irrelevant that the statute itself does not state that the program being extended is restricted to reduction of annuity contributions because that restriction is plain upon examination of the preexisting ITHP program that the statute extended.[4]

The majority manages to reach its result by resolutely ignoring the fact that the nature of a "program" extended by RSSL § 480(b) cannot be determined from the text of § 480(b) itself. Again, § 480(b) simply refers, in pertinent part, to "[a]ny program under which an employer . . . assumes all or part of the contribution which would otherwise be made by its employees

[4]Moreover, because the operative language of § 13-226 (establishing the ITHP program for police officers) provides for the employer's assumption of the employee's "contribution . . . made pursuant to subdivision b or e of section 13-225 of this subchapter," it is not evident to me how the ITHP program can be applied to a Tier III police officer who, by definition, makes no contribution "pursuant to subdivision b or e of section 13-225." To reiterate, the contributions of Tier III employees are prescribed by article 14 of the RSSL, not by Administrative Code § 13-225.

toward retirement, which expires or terminates during [1974]."[5] To determine whether a preexisting "program" extended by § 480(b) applies to Tier III employees, one must know the nature of that program, and the nature of the program can be discovered only by turning to the body of the law that created the program before § 480(b) was enacted. In the case of the ITHP program, the relevant pre-1974 body of law (Administrative Code §§ 13-225 and 13-226) reveals that ITHP provides for the employer's assumption of all or part of the employee's contribution only to the *annuity* portion of his or her retirement.[6] Since Tier III does not include any annuity component, the ITHP program cannot be applied to Tier III employees. Simply put, in the case of a Tier III employee, there is no annuity contribution to which the ITHP program can be applied. It seems to me that this conclusion is unavoidable unless one rewrites the ITHP program to apply to non-

[5]Given that § 480(b) simply extends certain preexisting programs fitting a very general description, there is no basis for the majority's claim that "the Legislature shifted the ITHP codification from the New York City Administrative Code to the Retirement and Social Security Law." A person seeking to learn how ITHP functions would search RSSL § 480(b) in vain for such information.

[6]Thus, the majority errs in asserting that "ITHP increased officers' take-home pay by having the City contribute a portion of each officer's required *pension* contributions" (emphasis added). Again, Tier I and II officers contribute only to the annuity component of their retirement; the pension component is entirely funded by the employer.

annuity pension contributions, which is essentially what the majority chooses to do. I do not believe that we have authority to engage in judicial legislating of this kind. So far as I can tell, the majority offers no response to this objection.

I am not persuaded by plaintiffs' argument, adopted by the majority, that RSSL § 508-a(a), which applies to Tier III members generally, indicates that the ITHP program is applicable to Tier III police officers and firefighters. RSSL § 508-a(a) provides in pertinent part that "[a] death benefit plus the reserve-for-increased-take-home-pay, *if any*, shall be payable upon the death of a member of a retirement system" under specified circumstances (emphasis added). The statute's reference to a "reserve-for-increased-take-home-pay" is qualified by the phrase "if any," indicating that Tier III members will not necessarily be entitled to such a reserve. Given that RSSL § 508-a(a) does not itself create any ITHP program for Tier III members, the statute's placeholder reference to payment of a "reserve-for-increased-take-home pay, if any" does not change the fact that, to determine whether "any" ITHP reserve actually does apply to a particular Tier III member, one must examine the underlying ITHP provision. The majority utterly fails to undertake any such examination.

To be clear, it is my view that ITHP does not apply to Tier

III employees because the benefit provided by ITHP (reduction of the employee's annuity contributions) cannot be applied (absent judicial rewriting) to an employee who makes no annuity contributions. Thus, there is little force to the majority's objection to my position that ITHP applies "to any government employee, regardless of pension tier." The fact is that Tier III officers do not make annuity contributions to which ITHP would apply, and I decline to join the majority in rewriting ITHP from the bench to make it apply to pension contributions that the program, as written, simply does not cover.

Based on the foregoing, it is my view that Tier III police officers and firefighters are not entitled (or, for those to be appointed in the future, will not be entitled) to participate in the ITHP program. Accordingly, I would reverse the order appealed from, render a declaration in favor of defendants, and dismiss the petition and complaint. To the extent the majority does otherwise, I respectfully dissent.

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

ENTERED: MAY 16, 2013

CLERK