SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 13, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6876 Stuart Kreisler, et al., Index 161021/14
Plaintiffs-Respondents,

-against-

B-U Realty Corp., et al.,
Defendants-Appellants.

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Sidrane & Schwartz-Sidrane, LLP, Rockville Centre (Arun Perinbasekar of counsel), for appellants.

Ephron-Mandel & Howard, LLP, New York (Damon P. Howard of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 12, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment to declare that defendants engaged in a fraudulent scheme to remove plaintiff's apartment from rent regulation; directed the Special Referee to calculate the legal regulated rent by using the default formula set forth in 9 NYCRR § 2522.6; and denied defendants' cross motion to dismiss the complaint under CPLR 3211(a)(2), unanimously affirmed, with costs.

Supreme Court properly declined to dismiss on subject matter jurisdiction grounds. Where, as here, a landlord has engaged in

fraud in initially setting the rent or removing an apartment from rent regulation, the court may examine the rental history for an apartment (*see Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [1st Dept 2016], *lv denied* 29 NY3d 903 [2017]) and, moreover, may do so beyond the statutory period allowed by CPLR 213-a (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]). Moreover, defendants' arguments regarding the legality of the initial rent ring hollow in light of their repeated admissions, in the course of the proceedings below, that the initial rent was wrong.

The court also properly retained jurisdiction over the rent overcharge issues rather than referring these to DHCR, given that legal issues remain open, including the willfulness of defendants' rent overcharges (*Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648 [1st Dept 2012]).

The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which

violated *Roberts v Tishman Speyer Props. L.P.* (13 NY3d 270 [2009]), came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.

We reject defendants' asserted reliance on a "pre-*Roberts*" framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. Moreover, and notwithstanding defendants' arguments to the contrary, we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate (*see e.g. Pascaud v B-U Realty Corp.*, 2017 NY Slip Op 31482[U] [Sup Ct, NY County 2017]).

In turn, we find defendants have not shown that Supreme Court erred in directing the Special Referee to use the default formula of 9 NYCRR § 2522.6(b)(2) to determine plaintiffs' base

rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment.

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

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

ENTERED: SEPTEMBER 13, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5589 The People of the State of New York, Respondent, Ind. 3846/14

-against-

Thomas Holmes, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Anokhi A. Shah of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

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Appeal from a judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about March 16, 2016, convicting defendant of two counts of burglary in the second degree, and sentencing him to concurrent terms of 3½ years, with five years postrelease supervision, held in abeyance, and the case remanded for consideration of defendant's claim that the court erroneously believed that five years was the minimum term of postrelease supervision that it could impose.

In this case, the minimum period of postrelease supervision (PRS) that the sentencing court could have imposed was 2 ½ years. However, a review of the record raises the concern that the sentencing court was under the erroneous impression that it was required to impose a five-year term of PRS. Thus, it appears that the court was unaware that it could impose a lower term.

At the time of defendant's plea, the court, counsel, and the prosecution believed defendant was a predicate felony offender. The plea offer contained the mandatory five-year term of PRS for a second felony offender convicted of a first violent felony offense (see Penal Law §§ 70.00[6], 70.45[2][f]). At sentencing, however, when defense counsel stated that defendant was not, in fact, a predicate felon, the sentencing court asked whether defendant's status as a first felony offender "change[d] our circumstances." Defense counsel responded, "I think the minimum is still three and a half." The court later asked, "Is there any reason that I should not impose the sentence of three-and-one-half years plus five years of post-release supervision?" Defense counsel replied, "Even if it was not quote unquote agreed upon, that would have been the best Your Honor could have given." As indicated, the defense counsel's statement was correct as to the prison term, but not as to the period of PRS. Nevertheless, the court replied, "I believe so." Thus, it appears that the court and the parties incorrectly believed that the statutory minimum sentence for a second-felony offender was a 3 ½ year prison term and five years post-release supervision, when in fact the minimum sentence was 3 ½ years followed by PRS of 2 ½ years (*see* Penal Law § 70.45(2)).

Contrary to the dissent's assertions, the record indicates

possible harm flowing from the court's erroneous belief. Although the sentencing court did not expressly state that it wanted to impose the minimum sentence of PRS, this outcome was still a reasonable possibility in this case. Indeed, the original plea that presumed that defendant was a predicate did not give the court any discretion with regard to PRS, since it required a mandatory five-year term of PRS for a predicate felony offender. Yet, when the court questioned counsel about whether defendant's nonpredicate status would change the circumstances, the court's question did not express any unwillingness to consider a lesser period of PRS than the one originally agreed upon, if allowed under the law. Thus, it is unclear how long a term of PRS the court would have imposed if it had known that it had the discretion as to the PRS term (*cf. People v Rivera*, 154 AD2d 309 [1st Dept 1989], *lv denied* 75 NY2d 775 [1989]).

The dissent completely mischaracterizes the majority's position as being "based on the false premise that somehow defendant was to receive the statutory . . . minimum PRS for his plea of guilty." What the dissent glosses over is that the original plea offer was based on the erroneous belief that defendant was a predicate felon. Because of this erroneous assumption of defendant's predicate felony status, the guilty plea required a mandatory term of PRS of five years. Under these

circumstances, the lack of "any mention of defendant receiving the minimum PRS," could have been attributed to the shared misunderstanding, among the court and the attorneys, that the plea offer required a mandatory term of PRS of five years, despite the fact that defendant was not a predicate felon.

For the foregoing reasons, we find that defendant is entitled to a remand for the sole purpose of reconsideration of the length of the term of postrelease supervision (*id.*; see also People v R*eynolds*, 57 AD3d 336 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]; *People v Stanley*, 309 AD2d 1254 [4th Dept 2003]).

All concur except Tom, J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

I respectfully dissent from the majority's determination to reach defendant's unpreserved challenge to his term of postrelease supervision in the interest of justice, and to remand the matter for a hearing. There is no basis to reach the challenge in the interest of justice, and remanding the matter for reconsideration for no legal or apparent reason would be a waste of judicial resources in our current busy Criminal Court.

In 2014, defendant Thomas Holmes was charged with two counts of burglary in the second degree, four counts of criminal possession of stolen property in the fifth degree, and one count of menacing in the second degree, based upon allegations that he unlawfully entered two different hospitals, stole cell phones and wallets from patients and staff members, and tried to intimidate a security officer with a toy handgun.

At a hearing on February 24, 2016, defendant pleaded guilty to two counts of burglary in the second degree, in exchange for concurrent prison terms of 3 1/2 years, followed by five years of PRS, in full satisfaction of the indictment.

On appeal, defendant contends, and the majority agrees, that the sentencing proceedings were defective to the extent the parties and the court purportedly mistakenly believed and agreed that five years of PRS was the statutory minimum, and that the

sentencing court may not have realized it had discretion to impose a lesser term of PRS. There is nothing in the record to support this proposition. Further, defendant's five-year term of PRS was lawful (Penal Law § 70.45[2][f]), and he is not claiming that the court exceeded its sentencing authority.

The majority's position is based on the false premise that somehow defendant was to receive the statutory minimum prison sentence and the minimum PRS for his plea of guilty to two counts of burglary in the second degree, and that the court was confused as to the minimum PRS it could have imposed.

The record reflects that on February 24, 2016, the court asked the People whether they were ready and the prosecutor responded that "on the last date the People recommended three-and-a-half years with five years postrelease supervision, and said that we wouldn't recommend it again" and that within a day or so, counsel called and said defendant was interested in the plea offer. After defendant confirmed his acceptance of the plea, the court asked whether defendant was a predicate and was informed that he was. The court then formally allocuted defendant and adjourned the matter for sentencing on March 12, 2016.

At no time during the plea proceeding was there any discussion of defendant receiving the minimum PRS or a mandatory

term of PRS. The plea offer of 3 1/2 years, followed by five years of PRS, was made by the People without any reference to whether defendant was a predicate felon or not. The majority's assertion "that the original plea offer was based on the erroneous belief that defendant was a predicate felon" is pure speculation without any support in the record.

The majority's position that because there was confusion as to defendant's predicate status, the court misapprehended the minimum PRS it could have imposed on defendant has no support in the hearing minutes and is based on pure speculation. Nowhere does the record reflect that the court wished to impose the minimum PRS for defendant.

At the sentencing proceeding held on March 12, 2016, counsel informed the court that defendant was not a predicate felon and the following is the entire colloquy regarding these issues that took place.

> "The Court: People, Do you have a predicate statement?
>
> "Counsel: Turns out he is not a predicate, that is what Mr. Lynch told me earlier today.
>
> "The People: We agree, Judge, he is not a predicate.
>
> "The Court: Doesn't that change our circumstances?
>
> "Counsel: I was wondering about that, but I think the minimum is still three and a half.
>
> "The Court: This is a burglary two, right?

"Counsel: Yes.

"The People: A "C" violent [offense].

"The Court: So it is what it is.

"Counsel: Yes, it is what it is.

"The Court: Is there any reason that I should not impose the sentence of three and a half plus five years post release supervision?

"Counsel: Even if it was not quote-unquote agreed upon, that would have been the best Your Honor could have given.

"The Court: I believe so.

"Counsel: So there is no reason to delay this."

It is clear that the court's question concerning whether defendant's corrected predicate status would "change our circumstances" was to simply make sure the defendant's plea was still within and not outside the statutory range of defendant's sentence as a non-predicate felon. Counsel replied in the negative and stated that the statutory minimum was still 3 1/2 years, as agreed to at the plea hearing. In so informing the court, counsel was obviously referring to the prison sentence, and not the agreed upon five-year term of PRS. The court and counsel then agreed that "it is what it is," and the court inquired whether there was any reason why it should not impose a term of 3 1/2 years, followed by five years of PRS. Counsel replied that "that was the best [the court] could have given,"

and the court stated that it believed that to be true.

Read in context, this comment by counsel also referred to the statutory minimum 3 1/2 year prison sentence, and it is submitted that the court's cursory agreement with counsel on that point, standing alone, does not show that it clearly misapprehended its discretion with regard to PRS. Simply, once the court ascertained that the sentence comported with defendant's non-predicate status it sentenced defendant pursuant to the terms of the plea agreement. Indeed, particularly in light of the lack of a promise or an agreement of a minimum term or mandatory term of PRS at the plea proceedings, the majority's skewed reading of the sentencing minutes to raise a nonexisting issue is unavailing and without merit.

The majority also assumes that because a five year term of PRS is mandatory for a second felony offender convicted of a first violent offense the court incorrectly believed such term of PRS was the minimum it could give. In this regard, the majority notes that the original plea offer presumed that defendant was a predicate felon. Once again, nothing in the record supports this theory. The court never expressed that it was constrained with regard to PRS, and never mentioned either a mandatory or minimum PRS term. Simply, the People made a plea offer of concurrent prison terms of 3 1/2 years with five years PRS which was

accepted by defendant and the court finalized the plea agreement between the parties. As noted, had the issue of PRS been a serious concern, counsel could have raised it at sentencing. The fact that counsel did not do so speaks volumes and belies the majority's theory that the court was confused or unaware it could impose a lesser term of PRS.

Moreover, as the majority must concede, defendant's argument that the sentencing court failed to apprehend and exercise its discretion to impose a lesser term of postrelease supervision is unpreserved (*see People v Giacchi*, 154 AD3d 544, 545 [1st Dept 2017], *lv denied* 30 NY3d 1105 [2018]). Defendant failed to raise this claim before the sentencing court, and, contrary to his argument, his claim is subject to the preservation rule (*People v Giacchi*, 154 AD3d at 545 ["[d]efendant did not preserve his claim that the court failed to apprehend and exercise its discretion to depart from a promised sentence. . . . While defendant characterizes his claim as one of unlawful sentencing, he is essentially arguing that a substantively lawful sentence was imposed by way of a defective procedure, and such claims require preservation"]).

The majority would reach defendant's claim in the interest of justice. However, in order to exercise our interest of justice jurisdiction, there must exist "special circumstances

deserving of recognition" (*People v Chambers*, 123 AD2d 270, 270 [1st Dept 1986]). In other words, this Court will not exercise its interest of justice jurisdiction absent "extraordinary circumstances" (*People v Marshall*, 106 AD3d 1, 11 [1st Dept 2013][internal quotation marks omitted], *lv denied* 21 NY3d 1006 [2013]). Here, there are no extraordinary or special circumstances regarding defendant or regarding the fairness of the plea and sentencing proceedings that warrant our exercise of interest of justice jurisdiction.

Moreover, as we noted in *Giacchi*, "As a result of the lack of preservation, the court was never called upon to clarify its statement as to sentence, which is subject to several interpretations" (154 AD3d at 545). Here, too, the burden was on defendant to bring the issue to the court's attention and this Court should not review the claim in the interest of justice. In any event, the record does not demonstrate that the sentencing court misapprehended its discretion with regard to the term of PRS.

As in *Giacchi*, to the extent the court may be viewed as expressing an erroneous belief that it lacked sentencing discretion, "remand for resentencing is unwarranted because the record fails to indicate any possible harm flowing from the court's alleged error, such as an indication of reservation about

the fairness of the sentence to be imposed (*see Giacchi*, 154 AD3d at 545, citing *People v Farrar*, 52 NY2d 302, 305 [1981] [court expressed concern about appropriateness of sentence but failed to exercise discretion]). At no point did the sentencing court express any reservations about the term of PRS it was imposing. Nor is there any indication that the court was unaware it could have imposed a term of PRS as little as 2½ years.

Unlike this case, in *People v Rodriguez* (147 AD3d 648 [1st Dept 2017]), where we found a remand for consideration of the term of PRS warranted, the court, in offering the defendant a sentence of five years of incarceration and five years of post-release supervision, remarked that it was "constrained by the statutes" and "can't give you anything that's less than five years incarceration and five years post release supervision." The court emphasized, "As a matter of law, that is the very [] least that I can give you." It is only where such error regarding the court's discretion is clear from the record that a remand is called for. No such error is evident here.

Similarly, in *People v Reynolds* (57 AD3d 336 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]), relied upon by the majority, the court erroneously characterized the five-year period of PRS it imposed as "mandatory," and it may not have realized that it had the discretion to impose a postrelease

supervision term of as little as 2½ years. The same is true of *People v Stanley* (309 AD2d 1254 [4th Dept 2003]), also cited by the majority. There the court stated that "it was not [its]" place to address defendant's request for a period of postrelease supervision of less than five years, thereby indicating the court's misapprehension that it had no ability to exercise its discretion in determining whether to impose a shorter period of postrelease supervision" (309 AD2d at 1255 [internal quotation marks omitted]). However, no such clearly erroneous statements are present on this record.

Moreover, it is submitted that the circumstances of this case demonstrate defendant's need for a five year term of PRS. Indeed, PRS is intended, in part, to assist offenders' reintegration into society, assist with housing and employment, and foster rehabilitation and drug treatment. Defendant - who was 47 years old when convicted - concedes that he began using cocaine and heroin at age 19, and that throughout his life, his drug use led to "repeated involvement with the criminal justice system." In fact, defendant states that he stole items from the two hospitals in order to support a $200-per-day heroin addiction. In light of defendant's admitted inability to remain drug-free and obey the law, it was appropriate to impose a longer term of PRS to help defendant with drug rehabilitation and

reintegration into his community. There is no basis to reduce such term. In sum, defendant's procedural challenge to his lawful term of PRS is unpreserved, there is no basis to review it in the interest of justice, and, furthermore, defendant has not shown that a remand is warranted.

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

ENTERED: SEPTEMBER 13, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5733-
5734 Index 653382/14

Leon Pokoik, etc., et al.,
Plaintiffs-Appellants,

-against-

Norsel Realties, et al.,
Defendants-Respondents.

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The Law Firm of Gary N. Weintraub, LLP, Huntington (Leland S. Solon of counsel), for appellants.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 3, 2017, dismissing the amended complaint, unanimously modified, on the law, the dismissal of the amended complaint as against defendants Michael L. Steinberg and Jay Lieberman vacated, and defendants' motion to dismiss denied as to the first and second causes of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 13, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs allege that defendants purposely undervalued Norsel Realties's (Norsel) property to advance their "personal estate tax strategies," and that the effects of the resulting decrease in the rent on the property will be felt by all

partners. Moreover, any pecuniary loss plaintiffs suffered derives from harm to Norsel. Thus, plaintiffs' claims are derivative (*see Yudell v Gilbert*, 99 AD3d 108, 114-115 [1st Dept 2012]; *Ganzi v Ganzi*, 144 AD3d 510, 511 [1st Dept 2016]).

We perceive no conflict of interest that would prevent plaintiffs from fairly representing Norsel's interests. In a separate derivative action by plaintiff Leon Pokoik against other Pokoik family members, who are also defendants in this action, we found that Pokoik's relationship with defendants had not been shown to be "so acrimonious or emotional as to demonstrate that plaintiff cannot act as an adequate representative for the companies" (*Pokoik v Pokoik*, 146 AD3d 474, 475 [1st Dept 2017]). Nor is there in the present record any indication of an especially acrimonious relationship between the parties.

The factual issue whether plaintiffs' proposed appraisal is "extremely high" and will have a negative impact on Norsel's business cannot be resolved on this pre-answer motion to dismiss.

On the prior appeal, we found that plaintiffs rebutted the presumption of the business judgment rule as to Michael L. Steinberg, Jay Lieberman, and Norsel (except with respect to the ninth cause of action, which had not yet been asserted) and that the allegations against 575 Realties, Inc., 575 Associates, LLC, and Steinberg & Pokoik Management Corp. were insufficient (*Pokoik*

v Norsel Realties, 138 AD3d 493, 494-95 [1st Dept 2016]). Nothing in the amended complaint alters that conclusion. There is no allegation that the remaining partner defendants were aware of plaintiffs' competing property appraisal; therefore there is no allegation of misconduct on their part (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [elements of breach of fiduciary duty claim]).

The ninth cause of action fails to state a claim for breach of fiduciary duty based on the transfer of the property and the rights under the lease from Norsel to defendant Norsel Realties LLC, because it does not allege damages (*see id.*).

The Decision and Order of this Court entered herein on March 8, 2018 (159 AD3d 459 [1st Dept 2018]) is hereby recalled and vacated (*see* M-1711 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 13, 2018

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kahn, Kern, JJ.

6153-
6154 Financial Guaranty Insurance Company, Plaintiff-Respondent, Index 652914/14 652853/14

-against-

Morgan Stanley ABS Capital I Inc., et al., Defendants-Appellants.

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Financial Guaranty Insurance Company, Plaintiff-Respondent,

-against-

Morgan Stanley ABS Capital I Inc., et al., Defendants-Appellants.

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Davis Polk & Wardwell LLP, New York (Brian S. Weinstein of counsel), for appellants.

Patterson Belknap Webb & Tyler LLP, New York (Erik Haas of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 19, 2017, in index no. 652853/14, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss with prejudice the first, second and third causes of action (alleging breaches of warranties and of the insurance agreement), unanimously affirmed, without costs. Order, same court and Justice, entered January 23, 2017, in index no. 652914/14, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the cause of action for fraudulent inducement and the claim for damages for all

insurance claim payments, unanimously modified, on the law, to grant the motion as to the cause of action for fraudulent, inducement and otherwise affirmed, without costs.

Plaintiff, a monoline financial guaranty insurer, commenced two separate actions seeking to hold defendants liable for damages in connection with insurance payments it made on certain certificates that were issued in two separate transactions: 1) With regard to index no. 6528153/14, plaintiff issued a financial guaranty insurance policy guaranteeing payments on certain certificates that were issued in a securitization of securities (from previous securitization) supported by residential mortgage loans; and 2) with regard to index no. 652914/2014, plaintiff issued a financial guaranty insurance policy guaranteeing payments on certain certificates that were issued in a residential mortgage-backed securitization.

In index no. 652914/14, defendants failed to preserve their argument that plaintiff cannot recover for insurance payments that were not caused by their alleged breaches or misrepresentations. However, we will consider the argument because it does not involve any new facts and could not have been avoided by plaintiff if defendants had made it before the motion court (*see e.g. DiFigola v Horatio Arms*, 189 AD2d 724, 726 [1st Dept 1993]), and because it is essentially the same as the

argument defendants make in index no. 652853/14, that plaintiff cannot recover for insurance payments that were not caused by their alleged breaches of contract.

As to the breach of contract action, defendants are correct that plaintiff "is not entitled to damages amounting to all claims payments it made or will make under the policies, regardless of whether they arise from a breach or misrepresentation" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 88 [1st Dept 2017], *affd* __ NY3d __, 2018 NY Slip Op 04686 [June 27, 2018]). However, that does not entitle defendants to the dismissal they seek, since it cannot be determined as a matter of law, on this pre-answer motion to dismiss, that no part of plaintiff's losses was caused by a breach of misrepresentation by defendants rather than by the 2007 housing and credit crisis (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]). We note that, in index no. 652853/14, plaintiff concedes that its damages must result from defendants' breaches of contract and that, in index no. 652914/14, plaintiff says it will prove that all of its claims payments were caused by defendants' misrepresentations. Thus, plaintiff will abide by *Ambac.*

In index no. 652914/14 defendants contend, and we agree, that plaintiff's fraud claim should be dismissed as duplicative

of its contract claims. An action for fraud may be dismissed where the damages sought are duplicative of the damages sought for breach of contract (*see e.g. MBIA Ins. Corp. v. Credit Suisse Sec. [USA], LLC,* [decided herewith]*; Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). In *Manas,* an employee alleged both fraud and breach of contract and sought to recover salary and bonuses under the employer's short- and long-term compensation plans under the fraud claim; this Court dismissed the fraud cause of action because the damages were the same as those sought under the breach of contract claim (*id.*).

In this case, under the fraud claim, plaintiff essentially seeks compensatory damages, which are no different from rescissory damages, to which plaintiff is not entitled. "Payment of [compensatory] damages would place [plaintiff] in the same position it would be in if it had not insured any of the securities — the equivalent of rescissory damages" *(Ambac*, __ NY3d at __, NY Slip Op 04686, *3; *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412 [1st Dept 2013] [precluding financial guaranty insurer that had issued irrevocable policies from obtaining rescissory damages]). Since plaintiff can only recover insurance payments caused by the alleged misrepresentations and breaches, the only damages plaintiff could recover on its fraud claim are those resulting

from the non-conforming loans, which are precisely the damages plaintiff is entitled to recover on its breach of contract claims (*see MBIA Ins. Corp. v Credit Suisse Sec. [USA], LLC, et al, supra*).

The fact that plaintiff seeks different types of interest on its fraud and contract claims does not save the claims from being duplicative (*see generally Grobman v Chernoff*, 15 NY3d 525, 529 [2010] ["damages and prejudgment interest are not the same thing"]). Nor does plaintiff's request for punitive damages on its fraud claim distinguish that claim from its contract claim (*see e.g. Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014]).

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

ENTERED: SEPTEMBER 13, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6936-
6937-
6938 Index 190219/16

In re New York City Asbestos Litigation

- - - - -

Ann Marie Idell, etc.,
Plaintiff-Respondent,

-against-

Aerco International, Inc., et al.,
Defendants,

Crane Co., et al.,
Defendants-Respondents,

Jenkins Bros.,
Defendant-Appellant.

_____

Clyde & Co US LLP, New York (Peter J. Dinunzio of counsel), for appellant.

Simmons Hanly Conroy LLC, New York (James Kramer of counsel), for Ann Marie Idell, respondent.

K&L Gates, LLP, New York (Tara L. Pehush of counsel), for Crane Co., respondent.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Daniel W. Levin of counsel), for Warren Pumps LLC, respondent.

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Orders, Supreme Court, New York County (Martin Shulman, J.), entered August 15, 2017, which granted defendants Crane Co. and Warren Pumps LLC's respective motions to quash trial subpoenas issued to them, unanimously affirmed, without costs. Order, same court and Justice, entered December 15, 2017, which denied defendant Jenkins Bros.' (defendant) motion pursuant to CPLR 4404

to set aside the verdict, and granted plaintiff's motion pursuant to CPLR 4404 to set aside the verdict to the extent of directing a new trial unless defendant stipulated to an increase in the jury awards of $1.8 million and $1.5 million for past and future pain and suffering, respectively, to $4 million and $2.5 million, respectively, unanimously modified, on the law, the facts and as a matter of discetion, to vacate the additurs for past and future pain and suffering and to direct a new trial on past pain and suffering only, unless, within 30 days of service of a copy of this order with notice of entry, defendant stipulates to increase the award for past pain and suffering to $4 million, and to reinstate the jury's future pain and suffering award, and otherwise affirmed, without costs.

The Supreme Court properly precluded defendant from eliciting testimony from plaintiff's expert regarding exposure to asbestos in the alleged nonparty tortfeasors' products because the court properly found that defendant failed to establish specific causation against such alleged nonparty tortfeasors (*see Matter of New York City Asbestos Litig.*, 148 AD3d 233, 238-239 [1st Dept 2017]).

Moreover, contrary to defendant's contention that General Obligations Law § 15-108 requires that the settled defendants be included on the verdict sheet for apportionment purposes

regardless of whether any evidence of their liability was presented, failure to present a prima facie case of their liability "constitutes a waiver of the nonsettling tortfeasor's right to reduction of the verdict based on an apportionment of fault, but not based on the amount of the settlement" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 242 AD2d 919, 920 [4th Dept 1997], *mod on other grounds* 92 NY2d 288 [1998]).

The court properly precluded defendant from introducing evidence of plaintiff's alleged exposure to asbestos in Scotland before he emigrated to the United States because such evidence was speculative.

On the record and arguments before us, it was not error for Supreme Court to quash the subpoena issued to defendant Crane Co. as such subpoena was improperly served. Any error in quashing the subpoena issued to defendant Warren Pumps LLC based on a finding that such subpoena was improperly served was harmless.

Supreme Court properly charged the jury on the issue of recklessness. Based on the circumstances of this case, which include plaintiff's continued exposure to defendant's valves through 1986, there was sufficient evidence from which a jury could determine that defendant was aware that workers such as plaintiff were at risk from exposure to asbestos (*Matter of New York City Asbestos Litig.*, 89 NY2d 955, 956-957 [1997]).

Supreme Court properly directed a new trial on damages as to past pain and suffering unless defendant agrees to increase that award to $4 million. However, we find that the jury's award for future pain and suffering of $1.5 million should be reinstated as such award did not deviate materially from reasonable compensation.

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

ENTERED: SEPTEMBER 13, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6969 Flor Suarez, et al., Index 20377/15E
Plaintiffs-Respondents,

-against-

Emerald 115 Mosholu LLC, et al.,
Defendants-Appellants.

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Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about June 5, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff slipped and fell on a sidewalk when his right foot "went into a little ditch," causing him to lean forward, at which point his left foot "went into another crack," causing him to fall on his right side. Additionally, plaintiff testified that there was snow surrounding the sidewalk as well as ice "[a]ll around" the sidewalk. Prior to his fall, plaintiff had "moved to [his] right" to allow another pedestrian walking with two dogs to pass. It was once he started walking again down the center of the sidewalk that his accident took place.

Defendants, the building owner and property manager, moved

for summary judgment, arguing that the alleged defective condition was a trivial defect and, therefore, not actionable. In support of their motion, defendants submitted, inter alia, an affidavit of a professional engineer who opined that the sidewalk was in excellent condition "without cracking or other defects" and that the separation of the sidewalk flags, otherwise known as expansion joints, "contains no hazard, not even a trivial or *de minimis* hazard and violates no code, statute or regulation." Defendants' expert further stated that based on his measurements, the "largest differential in vertical displacement" of the sidewalk flag was "5/8-inch, which does not constitute a walking hazard to an able-bodied pedestrian."

In opposition, plaintiff submitted an affidavit from an expert engineer who also found that the sidewalk flags had a vertical height differential of over one half inch. However, plaintiff's expert opined that this differential and the dimension of the opening at the expansion joint created a "trap-like hazardous condition and [was] a known cause of trip and fall accidents." The expert further opined that the condition of the sidewalk had been in a noticeable state of disrepair for at least one year prior to plaintiff's fall, and therefore, defendants should have been aware of the unsafe condition.

The motion court properly rejected defendants' argument that

the sidewalk defect was trivial as a matter of law and denied defendants' motion for summary judgment, finding issues of fact. The Court of Appeals has held "that 'there is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable' . . . and therefore [] granting summary judgment to a defendant 'based exclusively on the dimensions[s] of the . . . defect is unacceptable'" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015], quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Thus, a finding of triviality, as a matter of law, must "be based on all the specific facts and circumstances of the case, not size alone" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 77). For this reason, the Court of Appeals has noted that "whether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury" (*Trincere*, 90 NY2d at 977 [internal quotation marks omitted]).

Here, the crux of defendants' triviality argument is that the defect was physically insignificant. However, as already noted, case law prohibits us from basing a finding of triviality on size alone. Indeed, before the burden can shift to the plaintiff, defendants "must make a prima facie showing that the defect is, under the circumstances, physically insignificant *and*

that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 79 [emphasis added]). Even if this Court were to determine that defendants met their burden here, plaintiff's expert raised an issue of fact when he opined that the defect created a "trap-like hazardous condition" and one that was known to cause trip and fall accidents, thus precluding a grant of summary judgment in defendants' favor.

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

ENTERED: SEPTEMBER 13, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Ellen Gesmer
Jeffrey K. Oing, JJ.

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Malou Mananghaya, as Administratrix of the Estate of Tristan Michael Mananghaya, et al.,
Plaintiffs-Appellants,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Respondent,

Napoli Transportation, Inc., doing business as C&L Towing Services, Inc.,
Defendant.

- - - - -

Napoli Transportation, Inc., doing business as C&L Towing Services, Inc.,
Third-Party Plaintiff,

-against-

Aggreko, LLC,
Third-Party Defendant-Respondent.

- - - - -

The Bronx-Lebanon Hospital Center,
Second Third-Party Plaintiff,

-against-

Aggreko, LLC,
Second Third-Party Defendant-Respondent.
_____x

Plaintiffs appeal from an order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about May 10, 2017, which, to the extent appealed from as limited by the briefs, denied their motion for partial summary judgment on their Labor Law § 240(1) cause of action as against defendant Bronx-Lebanon Hospital Center and granted the motions for summary judgment of defendants and third-party and second third-party defendant Aggreko, LLC dismissing that cause of action.

Block O'Toole & Murphy, New York (David L. Scher and Christina Mercado of counsel), for appellants.

Ahmuty, Demers & McManus, New York (Glenn A. Kaminska and Nicholas M. Cardascia of counsel), for Bronx-Lebanon Hospital Center, respondent.

O'Connor Redd, LLP, Port Chester (Steven M. O'Connor of counsel), for Aggreko, LLC, respondent.

GESMER, J.

Plaintiffs are the wife and children of decedent Tristan Michael Mananghaya, who was killed while performing work at Bronx Lebanon Hospital Center (the hospital). They seek to recover damages under the Labor Law for his death. The only issue on this appeal is whether the work he was performing constitutes an "alteration" within the meaning of Labor Law § 240(1). We hold that the work he was performing affected the functioning of a crucial building-wide system at the hospital by "changing the way the [hospital buildings] react to . . . the elements" (*Belding v Verizon N.Y., Inc.*, 14 NY3d 751, 753 [2010]), and thus constitutes a "*significant* physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]), bringing plaintiffs' claim within the protection of Labor Law § 240(1).

Facts

The essential facts established by deposition testimony for the purposes of these summary judgment motions are not in dispute. We consider, inter alia, the deposition testimony of the hospital's senior director of engineering and lead engineer, the technician for third-party defendant Aggreko, LLC, the boom truck operator employed by defendant Napoli Transportation, Inc. d/b/a C&L Towing Services, Inc. (C&L), who was present on the day

of the accident, and decedent's coworker present on the day of the accident.

The hospital is required by the agencies that regulate it to maintain certain temperatures. For example, operating rooms must be kept at 62 degrees.

The portion of the hospital at issue consists of three buildings located at 1650 Grand Concourse between 173rd Street and Mount Eden Parkway. The buildings are connected internally and encompass approximately 475,000 square feet. In the warm months, the hospital is cooled by an integrated air conditioning system in which air handling units located in seven mechanical rooms on different floors bring cool air through vents to the entire hospital complex. The fan that blows air through the vents contains a coil through which chilled water flows, which removes humidity and lowers the temperature of air flowing through the system. The water recycles continuously through the system, replenished as needed by the hospital's water supply. As it passes through the coil and cools the air around it, the water gets warmer. It then passes through a chiller, which lowers the temperature of the water before it reenters the coil.

In 2009, the hospital decided to install a "back-up" or "stand by" system because one of its two chillers had failed in the past, and the hospital was concerned that one chiller would

not be sufficient in the warmer months to maintain the required temperatures. The hospital considered placing a third chiller on a hospital roof top, but decided instead to place a rented chiller and generator on the street outside the hospital, because it was less costly to do so.

To accomplish this, in 2009, the hospital leased from Aggreko a 28,000 pound chiller that was to be incorporated into the hospital's air conditioning system. Aggreko worked with subcontractors, including C&L, to deliver the rented chiller and integrate it into the hospital's air conditioning system at the beginning of the summer, and to disconnect and return it in the fall.

The rented chiller sat atop a trailer parked on 173rd Street. In order to incorporate the rented chiller into the hospital's system, permanent T-valves were installed on the chilled water supply and return risers located in the hospital's second floor mechanical room. Two approximately 125 feet long stiff rubber hoses with metal flanges were screwed and bolted into the T-valves. The hoses passed through an open door in the second floor mechanical room, across the roof, through scaffolding erected on the 173rd Street side of the hospital as a bridge to keep the hoses off of the sidewalk, to the rented chiller, where they were attached. Because of their weight and

stiffness, the hoses were lifted up to the roof with a type of crane known as a boom. The generator was parked around the corner on Grand Concourse. The chiller weighed between 27,450 pounds when empty and 28,450 pounds when full of coolant, and the trailer weighed 12,000 pounds. Because of the dangers posed by the coolant, the generator and the hoses, workers erected a fence around the unit as a safety measure to prevent access by the public.

Once installation was complete, water in the hospital's cooling system that had been warmed by passing through the coils moved through the hoses to the rented chiller. There it was cooled to the appropriate temperature, and then passed back through the hoses, and into the coil in the fan. The rented chiller was operated and inspected by a hospital engineer specially assigned to do so. The rented chiller was an integral part of the hospital's vital and extensive cooling system. The chiller was turned on and remained in use until fall. In fall 2009, the unit was disconnected and the rented components returned to the contractor.

In May 2012, after the hospital had experienced further air conditioning system failures, it again rented a chiller and a generator from Aggreko. The rented chiller was incorporated into the hospital's air conditioning system in the same way it had

been in 2009. The chiller sat on top of a trailer flatbed approximately 41 feet long and 8 feet wide, parked on 173rd Street outside the hospital, near the corner of Grand Concourse. Because 173rd Street slopes between Selwyn Avenue and Grand Concourse, and the chiller will not function if not level, the trailer was "chocked up" with 6 feet by 6 feet blocks of wood stacked under it in a criss-cross pattern to make it level. After installation and connection were complete, the contractor's employee showed the hospital's lead engineer the completed work, and demonstrated how the standby chiller and generator worked. The hospital's lead engineer observed that the chiller appeared to be placed on the trailer in a different way than it had been in 2009, and it "looked a whole lot different being chocked up," but did not complain to the contractor about the installation.

Once installed, the rented chiller was connected to the hospital, used the hospital's water supply and operated as a cooling system to provide chilled air throughout the entire hospital. It pushed massive amounts of cool air throughout the hospital, and thus altered the hospital's environment in a substantial and necessary way.

Disconnection and removal of the rented chiller began on or about December 3, 2012. First, the hospital shut off the valves on its chilled water supply and return in the mechanical room, to

prevent water from continuing to flow into the rented chiller. Two employees of nonparty subcontractor Miller Mechanical then unbolted and unscrewed the hoses from the T-valves, drained the water from the hoses and the chiller, and stored the hoses on the roof of the second floor mechanical room near the corner of 173rd Street and Grand Concourse.

On December 4, 2012, Miller employees arrived at the hospital to take down the scaffolding. In addition, two Aggreko employees, including the decedent, who was classified as a technician, arrived at the hospital, as did C&L's boom truck operator. The boom truck operator testified that he understood that he would be booming the hoses down from the roof. However, when he arrived, he learned for the first time that he would also be lifting the trailer and chiller so that the wood blocks leveling it could be removed from underneath it. He testified that, although he asked, no one present could tell him how much the trailer and chiller weighed. He assumed that the chiller weighed approximately 16,000 pounds, based on prior experience with Aggreko chillers. Although 23,000 pounds would be "pretty much pushing the limit" of the boom truck's capacity, he determined that the equipment he had with him that day would be sufficient to lift the chiller and trailer. In actuality, they weighed in total approximately 40,000 pounds. The C&L boom truck

operator ran a chain around the chiller and trailer, and attached the chain to the boom with the use of nylon slings and a shackle. The chain was intended to be used to tie materials down, not lift them up, and the boom truck operator testified that he had never used it in this manner before.

The workers had to close 173rd Street, since the chiller took up one lane, and the truck with the boom required to bring the hoses down from the roof and lift the trailer and chiller to remove the wood chocking took up the other lane. Decedent was at the corner of 173rd Street and Grand Concourse, acting as a "flag man" to direct pedestrians away from the work area. When his coworker began removing the wood from under the trailer, a piece of wood became stuck. Decedent's co-worker testified that decedent saw him struggling with it, and came to help. While both men were working by the trailer, the chain snapped, the trailer dropped, and the chiller slid off the trailer and crushed decedent, killing him.

On or about January 16, 2013, plaintiffs commenced this action against the hospital and C&L, seeking damages, as relevant to this appeal, for violation of section 240(1) of the Labor Law. The hospital and C&L, as third-party plaintiffs, sued Aggreko, LLC, as third-party defendant, for contribution and common-law indemnification.

In November 2016, plaintiffs moved, inter alia, for partial summary judgment on their Labor Law § 240(1) claim against the hospital. The hospital, C&L, and Aggreko each moved, inter alia, for dismissal of plaintiffs' Labor Law § 240(1) claim, each arguing that Labor Law § 240(1) does not apply because decedent was not engaged in work covered by the statute.

By decision and order entered May 10, 2017, the motion court, inter alia, denied plaintiffs' motion and granted the motions for dismissal of plaintiffs' Labor Law § 240(1) claim. We now reverse, for the reasons discussed below.

Analysis

Labor Law section 240(1) imposes a nondelegable duty on owners and contractors to protect workers from the risks associated with "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" by placing the ultimate responsibility on them to provide "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (*see Panek v County of Albany*, 99 NY2d 452, 457 [2003]). A failure to do so resulting in injury to a worker engaged in the type of work covered by the statute "establishes an owner or contractor's liability as a matter of

law" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]). An owner is liable under the statute even where it exercises no control over work being performed by a contractor (*Haimes v New York Tel. Co.*, 46 NY2d 132, 136 [1978]). Labor Law § 240(1) is to be construed as liberally as possible in order to accomplish its purpose of protecting workers (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]).

No one disputes that the occurrence in this case, an object falling "while being hoisted or secured, because of the absence or inadequacy of a safety device," which causes the injury or death of a worker, constitutes the type of hazard contemplated by Labor Law § 240(1) (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *see also Zimmer*, 65 NY2d at 524 ["If proximate cause is established, the responsible parties have failed, as a matter of law, to 'give proper protection'"]). The only issue on this appeal, as limited by the briefs, is whether the project at issue falls under a category of work qualifying for the statute's protection.

The analysis of this question is not limited to the moment of injury, since "'it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work'" (*Saint*, 25 NY3d at 124, quoting *Prats v Port Auth. Of N.Y. & N.J.*, 100 NY2d 878, 882

[2003]). Thus, even where the worker is engaged in a task that is "ancillary" to work falling under one of the enumerated categories of covered work, he or she will be covered by the statute's protections where his work is "an integral part" of the larger project (*Saint*, 25 NY3d at 126; *see also Prats* at 882; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415 [1st Dept 2009], *affd* 14 NY3d 751 [2010], *supra*).[1]

Plaintiffs assert that the project at issue in this case constituted an "alteration." For work to qualify as "altering" within the meaning of Labor Law § 240(1), it must not be "simple, routine" (*Joblon*, 91 NY2d at 465), cosmetic, or decorative (*Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]), and it must effect "a *significant* physical change to the configuration or composition of the building or structure" (*Joblon*, 91 NY2d at 465), including significantly changing the way an important component of the building functions (*Belding*, 14 NY3d at 753). The change need not be permanent to qualify as an alteration (*Saint*, 25 NY3d at

[1]For this reason, we reject Aggreko's argument that decedent's acting as a "flag man" to direct pedestrians away from the work area excludes him from the protections of Labor Law § 240(1). Moreover, it is undisputed that he was assisting in removing wood blocks from under the chiller in order to prepare it to be removed from the site when it fell (*see Joblon*, 91 NY2d at 465 ["It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of injury"]).

127-128).

Here, the motion court determined that, because the work did not alter the hospital buildings' "structural integrity," it was not covered by Labor Law § 240(1). However, while we have used this language to describe what could qualify as an alteration for Labor Law purposes (*Kretzschmar v New York State Urban Dev. Corp.*, 13 AD3d 270, 270-271 [1st Dept 2004], *lv denied* 5 NY3d 703 [2005]),[2] a change in structural integrity is not necessarily required to obtain Labor Law § 240(1) coverage. The small hole chiseled into the wall to run wires between rooms to install an electric wall clock in *Joblon* is unlikely to have affected the building's "structural integrity." Nevertheless, it was

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[2]In *Kretzschmar*, cited by the motion court, we affirmed dismissal of a Labor Law § 240(1) claim where an electrician was injured while removing a sign from a temporary exhibit at the Javits Center. To the extent that our noting that the work did not affect the building's "structural integrity" constituted a requirement that a building's structural integrity be affected in order for work to constitute an alteration, that rule is not good law after *Belding v Verizon N.Y., Inc.* (14 NY3d 751 [2010], *supra*), discussed below. Moreover, *Kretzschmar*, and the cases to which it cites, are also distinguishable from this one in that they all concerned work that effected only a cosmetic or decorative change (*see Tanzer v Terzi Prods.*, 244 AD2d 224 [1st Dept 1997] [attaching objects to decorate a building for a television film shoot]; *Perchinsky v State of New York*, 232 AD2d 34 [3d Dept 1997], *lv dismissed in part, denied in part* 91 NY2d 812 [1999] [stringing wires to hang kites as decorations]). *Maes v 408 W. 39 LLC* (24 AD3d 298 [1st Dept 2005]), also relied on by defendants, is similarly inapposite, as it only concerned work which was "decorative" (*id.* at 300).

"significant enough" to constitute an alteration (*Joblon*, 91 NY2d at 465).

In cases decided by this Court and the Court of Appeals since *Joblon*, work being performed that affects a crucial building system has been found to constitute a significant physical change to the configuration or composition of the building. While such work may involve making holes in the building's walls or ceiling (*Weininger v Hagedorn & Co.*, 91 NY2d 958 [1998] [running computer and telephone cable through holes punched into the ceiling in order to build a telecommunications center in newly leased space]), this is not a necessary requirement for Labor Law § 240(1) coverage where the system or component altered is important and the change is sufficiently significant. In *Belding v Verizon N.Y., Inc.*, the Court of Appeals found that applying "bomb blast" film to lobby windows was sufficiently significant "in and of itself" to constitute an alteration because it "significantly altered the configuration or composition of the structure by changing the way the lobby windows react to explosions, impacts and the elements" (14 NY3d at 752, 753). The Court so held even though the work applying the film was a relatively brief process that required only simple tools.

In *Panek v County of Albany*, a worker was injured in a fall

while removing two air handlers for salvage from an air traffic control tower slated for demolition. The work involved dismantling the cooling system by cutting pipes and plumbing and removing electrical distribution lines, as well as loosening the bolts affixing the air handlers to an I-beam in the ceiling (*id.* at 456). There is no indication that Mr. Panek's work required making any change to the air tower's "structural integrity," in the sense of making holes in the walls, floor, or ceiling, or removing structural supports, but it is clear that he was dismantling a significant building system, and the Court of Appeals accordingly found that the work he was performing constituted an alteration under Labor Law § 240(1).

Conversely, we have found work that only affected the provision of a service to a finite area within the building, or that only involved the removal of an object attached to the building with bolts but that, unlike the air handlers in *Panek*, was not part of an important building-wide system, did not constitute an alteration within the meaning of Labor Law § 240(1). In *Pantovic v YL Realty, Inc.* (117 AD3d 538, 539 [1st Dept 2014]), we found that a worker injured in a fall while feeding a portable air conditioner exhaust tube into a preexisting duct hole to "furnish the need for a personal air conditioning unit" was not conducting an alteration. Similarly,

in *Rhodes-Evans v 111 Chelsea LLC* (44 AD3d 430 [1st Dept 2007]), we found that a Verizon technician injured in a fall while splicing fiber optic cable into an existing cable to bring telephone service to a single new tenant in the building was not conducting an alteration. In *Widawski v 217 Elizabeth St. Corp.* (40 AD3d 483 [1st Dept 2007]), we found that a worker injured in a fall while retrieving an eight foot tall commercial mixer from a bakery that had gone out of business by unbolting it from the floor and disconnecting it from an electrical box above it was not performing an alteration.

Here, the work being performed was a significant change to the hospital's air conditioning system, which the hospital must operate in warm weather in order to meet its regulatory requirements. Like the application of "bomb blast" film to the lobby windows in *Belding*, the deinstallation and removal of the rented chiller "altered the configuration or composition of the structure by changing the way the [hospital buildings] react to . . . the elements" (*Belding*, 14 NY3d at 753). Moreover, like the dismantling and removal of the air handlers in *Panek*, disconnecting and removing the rented chiller and generator was a significant undertaking, was not simple, routine, or cosmetic, and fundamentally altered the function of a significant building system, the hospital's air conditioning system. As in *Panek*, the

project took more than a day to complete. The qualifying work in both *Belding* and *Panek* appears to have been performed by one person. In contrast, here, the work was complex enough that it required the labor of employees of the hospital, the contractor and the multiple subcontractors. It required shutting off the valves on the hospital's chilled water supply and return in the mechanical room, unbolting and unscrewing approximately 125 feet of heavy, nonbending hose from the chilled water supply and riser; draining the water from the hoses and standby chiller; dismantling the scaffolding that served as a bridge carrying the hoses from the mechanical room over the sidewalk to the chiller; dismantling the fencing around the chiller and generator; closing the street outside the hospital; using lifting equipment to lower the hoses from the roof; and using a boom, chains, shackles, slings, and hooks to raise the trailer and chiller so that the decedent and his coworker could remove the wood blocks that leveled the trailer and chiller, in order to allow for the trailer to be removed. Under these circumstances, we find that the work decedent was engaged in constituted an alteration under Labor Law § 240.

Accordingly, the order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about May 10, 2017, which, to the extent appealed from as limited by the briefs, denied

plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) cause of action as against the hospital and granted the motions for summary judgment of the hospital, C&L, and Aggreko dismissing that cause of action, should be reversed, on the law, without costs, plaintiffs' motion granted, the motions for summary judgment dismissing plaintiffs' Labor Law § 240(1) cause of action denied, and the matter remanded to the motion court to decide those branches of the parties' motions that were not previously reached or were denied as moot due to dismissal of plaintiffs' Labor Law § 240(1) claim.

All concur.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about May 10, 2017, reversed, on the law, without costs, plaintiffs' motion granted, the motions for summary judgment dismissing plaintiffs' Labor Law § 240(1) cause of action denied, and the matter remanded to the motion court to decide those branches of the parties' motions that were not previously reached or were denied as moot due to dismissal of plaintiffs' Labor Law § 240(1) claim.

Opinion by Gesmer, J. All concur.

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

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

ENTERED: SEPTEMBER 13, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Richard T. Andrias
Cynthia S. Kern
Jeffrey K. Oing, JJ.

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_____x

MBIA Insurance Corp.,
Plaintiff-Appellant-Respondent,

-against-

Credit Suisse Securities (USA) LLC, et al.,
Defendants-Respondents-Appellants,

Select Portfolio Servicing, Inc.,
Defendant.
_____x

Cross appeals from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 31, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the fraudulent inducement claim, denied so much of plaintiff's motion for summary judgment as sought a ruling that an insurer does not have to prove loss causation in connection with a fraudulent inducement claim, granted so much of plaintiff's motion as sought a ruling on the meaning of the "No Monetary Default" representation and the "Mortgage Loan Schedule" representation in the Pooling and

Service Agreement for the subject residential mortgage-backed securitization transaction, and denied plaintiff's motion to supplement the record in opposition to defendants' motion.

Patterson Belknap Webb & Tyler LLP, New York (Erik Haas and Catherine A. Williams of counsel), and Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz and Kenneth R. David of counsel), for appellant-respondent.

Orrick, Herrington & Sutcliffe LLP, New York (Barry S. Levin, John Ansbro, Richard A. Jacobsen and Paul F. Rugani of counsel), for respondents-appellants.

MANZANET-DANIELS, J.

This appeal concerns the propriety of the motion court's dismissal of plaintiff's (MBIA) fraudulent inducement claim and concomitant ruling that MBIA is required to prove loss causation as an element of its fraud claim.

In 2007, defendant DLJ Mortgage Capital Inc. (DLJ), as sponsor, amassed a loan "pool" comprised of over 15,000 second-lien residential mortgage loans with an aggregate outstanding principal balance of approximately $900 million, which was then transferred to a trust, known as the Home Equity Mortgage Trust 2007-2 (HEMT 2007-2), formed by defendant Credit Suisse Securities (USA) LLC. Credit Suisse then served as the underwriter of the mortgage loan pool, and marketed residential mortgage-backed securities to investors. Credit Suisse solicited MBIA, a monoline insurance company, to issue an irrevocable financial guaranty insurance policy guaranteeing payments of interest and principal to purchasers of the securities in the event that the pool of loans in the trust did not generate sufficient income to cover the payments.

After having an opportunity to perform due diligence and evaluate the transaction's risks,[1] MBIA issued a $767 million

[1]MBIA did not conduct its own loan-level review. Indeed, MBIA admits that it made a business decision to forgo reviewing

unconditional and irrevocable insurance policy on HEMT 2007-2. The deal documents contained a number of representations and warranties (R&W). The representations at issue here are the "No Monetary Default" representation (No Monetary Default Rep) and the "Mortgage Loan Schedule" representation (MLS Rep). The former provided that

> "[t]here is no material monetary default existing under any Mortgage or the related Mortgage Note and there is no material event that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note...."

The latter provided that "[t]he information set forth in the Mortgage Loan Schedule . . . is complete, true and correct in all material respects as of the Cut-off Date." The attached schedule contained information about the transaction loans, including debt-to-income ratio, the borrowers' credit scores, and the original principal balances.

The insurance agreement limited MBIA's remedy for breach of the Pooling and Service Agreement's (PSA) warranties to the "repurchase protocol" set forth in section 2.03(e) of the PSA, which makes repurchase the sole remedy as to any non-conforming loan where the loan breach materially and adversely affects the

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the loans, a practice it had previously employed.

interests of the certificateholders or MBIA.

As a result of the 2008 financial crisis, loans representing 51% of the original loan balance defaulted, requiring MBIA to make over $296 million in claim payments. MBIA demanded that Credit Suisse repurchase those loans. Credit Suisse declined to repurchase them.

On December 24, 2009, MBIA initiated this action, alleging that it was fraudulently induced to participate in the transaction by defendants' false representations concerning: (1) the attributes of the securitized loans; (2) defendants' adherence to certain strict underwriting guidelines used to select the loans underlying the transaction; and (3) the due diligence conducted by defendants on the securitized loans to ensure compliance with the guidelines. MBIA also alleged that defendants induced it to participate in the transaction by making numerous false R&Ws in the insurance agreement and in other transaction documents. The complaint asserted various causes of action, including fraudulent inducement, breach of R&Ws, breach of the repurchase obligation, breach of the implied duty of good faith and fair dealing, and material breach of the insurance agreement.

On January 30, 2013, MBIA filed an amended complaint asserting, inter alia, fraudulent inducement, breach of the

insurance agreement, and breach of the PSA's repurchase protocol, and seeking compensatory, consequential, rescissory, and punitive damages.

MBIA moved for summary judgment on the meaning of the MLS Rep and the No Monetary Default Rep, and on the standard applicable to its fraudulent inducement claim. MBIA argued that Insurance Law §§ 3105 and 3106 eliminated the common-law elements of loss causation and justifiable reliance.

Credit Suisse and DLJ (defendants) moved for summary judgment dismissing the fraudulent inducement claim, arguing that MBIA was unable to establish the element of justifiable reliance and that the fraud claim should be dismissed because the damages sought were duplicative of the damages available on the contractual "put-back" claims. They also sought a ruling that the MLS Rep and the No Monetary Default Rep should not be interpreted as tantamount to a "no-fraud representation."

The motion court granted in part and denied in part the motions for summary judgment. The court granted MBIA partial summary judgment with respect to the meaning of the MLS and No Monetary Default warranties. The court agreed with MBIA that the MLS warranty served to guarantee the accuracy of the information in the MLS, not merely that the information had been accurately transcribed from the loan file. The court rejected Credit

Suisse's argument that so construing the warranty would in effect be tantamount to imposing a "no fraud rep," which Credit Suisse had declined to give.

With respect to the No Monetary Default Rep, the court rejected Credit Suisse's argument that the representation merely provided assurance that borrowers were not materially delinquent on the financial obligations under the mortgages and applied only to curable defaults, finding that such an interpretation would render the "'no material event' language to be surplusage."

The court rejected MBIA's argument that sections 3105 and 3106 of the Insurance Law altered or eliminated any of the elements or standards that would otherwise be applicable to MBIA's claim that it had been fraudulently induced to issue the financial guaranty insurance for the transaction. The motion court reasoned that

> "[s]ince § 3105 is silent on the issue of loss causation and it is clear from § 3106 that insurance companies cannot avoid liability due to false warranties if such losses are not related to the subject matter of the warranty, harmonizing §§ 3105 and 3106 requires MBIA to prove loss causation when its claim is based on false warranties."

The motion court accordingly held that MBIA was foreclosed from recovering losses attributable to conforming loans, explaining that those losses "do not arise from a breach," and

represent "the very risk [the insurer] assumed" (internal quotation marks omitted). The court noted that recovery for such conforming loans was "simply a species of rescissory damages," which under precedent were not recoverable.

The motion court dismissed the remainder of the fraudulent inducement claim on the basis that the available fraud damages were "entirely duplicative of what [MBIA] would recover on its contractual put-back claims." The court found that the possibility of punitive damages was not a basis for maintaining an otherwise duplicative fraud claim. Having dismissed the fraud claim on these bases, the motion court did not reach the issue of justifiable reliance.

We now modify to deny plaintiff's motion for summary judgment as to the meaning of the No Monetary Default Rep and the MLS Rep, and otherwise affirm.

MBIA seeks "Claims Payment Damages" and "Repurchase Damages." The "Claims Payment Damages" consist of "all claims payments that MBIA has made . . . [or] will likely incur," and are designed to put MBIA in the same position it would have been in had the policy never been issued. As such, they constitute rescissory damages and are not recoverable by plaintiff monoline insurer seeking redress under an irrevocable policy. We have made clear that an insurer is "not entitled to damages amounting

to all claims payments it made or will make under the policies," inasmuch as such damages are "rescissory damages to which the insurer is not entitled" (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.* (151 AD3d 83, 88 [1st Dept 2017], *affd* ___ NY3d ___, 2018 NY Slip Op 04686 [June 27, 2018]).

"Repurchase Damages" represent the difference between the claims payments MBIA made or is projected to incur, and those MBIA would have made had Credit Suisse repurchased nonconforming lines, i.e., those that breached the representations and warranties.

While such repurchase damages are in theory recoverable, the fraud claim was nonetheless correctly dismissed. It has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract (*see e.g. Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). As we noted in *Manas*, fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract. Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed; fraud damages are meant to indemnify losses suffered as a result of the fraudulent inducement (*see id.*). Where all of the damages are remedied through the contract claim, the fraud claim is

duplicative and must be dismissed (*see id.*; *see also Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014] [dismissing fraud claim seeking duplicative damages even where, as here, the plaintiff sufficiently alleged breach of an independent duty owed them independent of the contract]; *Triad Intl Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 531-532 [1st Dept 2014] [affirming dismissal of fraud claim where the damages sought on the fraud claim were duplicative, explaining that "plaintiff seeks the same compensatory damages for both claims . . . . Its purported fraud damages are actually contract damages"]; *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014] [fraud claim duplicative of a breach of contract claim where the fraud claim sought the same damages, namely return of the deposit paid by the plaintiff under the contract]).

MBIA's claim that a different measure of interest might apply to a judgment related to a fraud, as opposed to a contract claim, is irrelevant, as interest is not an element of compensatory damages either in contract or in fraud. Nor does MBIA's request for punitive damages change the result. A party cannot bootstrap a fraud claim seeking duplicative relief merely by alleging a potential for punitive damages (*see Mosaic Caribe*, 117 AD3d at 422).

In connection with the foregoing, the court correctly determined that the fraudulent inducement claim is subject to the common-law fraud element of loss causation (*see Ambac*, 151 AD3d at 86-87). To the extent ever in doubt, the Court of Appeals has now conclusively ruled that the provisions of the Insurance Law cited by MBIA did not displace the common-law elements of justifiable reliance and loss causation in a cause of action for fraudulent inducement (2018 NY Slip Op 04686). The Court found that "[s]ection 3105 does not provide an affirmative, freestanding, fraud-based case of action" and does not "'inform' a court's assessment of the longstanding common law elements of fraudulent inducement" (*id.* at *3).

Given the grounds for the dismissal of the fraud claim, i.e., duplicative damages, the court properly denied plaintiff's motion to supplement the record in opposition to defendant's motion with evidence that would bolster the factual allegations of fraud.

The court erred in granting MBIA's motion for summary judgment as to the meaning of the No Monetary Default Rep and the MLS Rep. In *Ambac*, this Court examined a materially identical No Monetary Default Rep. We held that the motion court erred in interpreting it, as a matter of law, to include borrower misrepresentation, explaining that "the better course is to hold

a trial to inquire into and develop the facts to clarify the relevant legal principles and their application to the [] representations and warranties" (151 AD3d at 89 [internal quotation marks omitted]). That holding squarely applies to the No Monetary Default Rep, which is materially identical to the one at issue in *Ambac*. Credit Suisse offers a compelling argument that the motion court's broad interpretation of the representation was not correct.[2]

Similar reasoning requires denial of summary judgment as to the meaning of the MLS Rep (*see Bear Stearns Mtge. Funding Trust 2007-AR2 v EMC Mtge. LLC* (2014 Del Ch LEXIS 300, *5 [Del Ch 2014] [holding that a trial was required to determine whether a materially identical MLS Rep guaranteed "underlying truthfulness," as opposed to "accurate transcription"]).

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 31, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the fraudulent

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[2]Credit Suisse asserts that "borrower fraud" does not fit within the plain meaning of the second clause of the representation since such misrepresentation (unlike a missed payment or unpaid tax) does not require the "passage of time" to ripen into a default but constitutes a default from the moment it is made (*see Bear Stearns Mtge. Funding Trust 2007-AR2 v EMC Mtge. LLC* (2014 Del Ch LEXIS 300, *7 [Del Ch 2014] ["fraud generally has no grace period and cannot be cured"]).

inducement claim, denied so much of plaintiff's motion for summary judgment as sought a ruling that an insurer does not have to prove loss causation in connection with a fraudulent inducement claim, granted so much of plaintiff's motion as sought a ruling on the meaning of the "No Monetary Default" representation and the "Mortgage Loan Schedule" representation in the Pooling and Service Agreement for the subject residential mortgage-backed securitization transaction, and denied plaintiff's motion to supplement the record in opposition to defendants' motion, should be modified, on the law, to deny plaintiff's motion as to the meaning of the representations, and otherwise affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 31, 2017, modified, on the law, to deny plaintiff's motion as to the meaning of the representations, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

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

ENTERED: SEPTEMBER 13, 2018

CLERK