SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 15, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4264 Kevin Pludeman, et al., Index 101059/04
Plaintiffs-Respondents,

-against-

Northern Leasing Systems, Inc.,
Defendant-Appellant,

Jay Cohen, et al.,
Defendants.

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Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), for appellant.

Chittur & Associates, P.C., New York (Krishnan Chittur of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered March 29, 2010, which granted plaintiffs' motion for summary judgment as to liability on their cause of action for breach of contract, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiffs are small business owners who, as lessees, entered into form leases for certain business equipment with defendant Northern Leasing Systems, Inc. (NLS), as lessor. Each plaintiff signed the form lease on page 1. Paragraph 9 ("Insurance") of the form lease, on page 3 thereof, provides in

pertinent part: "If Lessee does not provide evidence of insurance [on the leased equipment], Lessee is deemed to have chosen to buy [a] Loss and Destruction waiver [from NLS] at the price in effect, price which Lessor reserves the right to change from time-to-time." Plaintiffs' cause of action for breach of contract is based on NLS's charging them the aforementioned "Loss and Destruction waiver" (LDW) fee for the privilege of not purchasing insurance. Plaintiffs allege that, when they signed the form leases on page 1, they were unaware of the last three pages of the form. On that basis, plaintiffs contend that they are not bound by the LDW fee provision of paragraph 9 (again, on page 3) and that NLS's charging of the LDW fee (in the amount of $4.95) therefore constituted an overcharge and a breach of contract.

In the order appealed from, Supreme Court granted plaintiffs' motion for summary judgment as to liability on their cause of action for breach of contract. We reverse and deny the motion. On this record, questions of fact exist that preclude granting plaintiffs summary judgment on the breach of contract claim. Specifically, a factfinder must determine (1) whether plaintiffs received only the first page of the form lease or all four pages, and (2) whether, if plaintiffs received all four pages, they could reasonably have believed that all terms were

contained on page 1. The latter question cannot be answered as a matter of law in plaintiffs' favor, given that page 1 of the form lease, which each plaintiff signed, states that it is "Page 1 of 4" and contains a reference, above the lessee's signature, to paragraph 11, which appears on page 3 of the form. Moreover, the record contains evidence that the form lease each plaintiff signed was printed on one sheet of paper, 11 inches wide by 17 inches long, folded in half to create a four-page booklet. We note that there is no legal requirement that a party's signature appear at the end of a written agreement (*see* Uniform Commercial Code § 1-201, Official Comment 39 [signature or other authentication of a written agreement "may be on any part of the document"]; *cf. Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [2008], *affd* 13 NY3d 398 [2009] ["there is no legal requirement that contractual provisions fixing the term of a contract must appear at the end of . . . the document"]). Finally, that the form lease did not specify the amount of the LDW fee did not render the lease or its provision for the LDW fee void (*see* Uniform Commercial Code § 2A-204[3] {"Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy"]). Thus, if the LDW fee provision

is found to be part of the agreement, NLS is entitled to set the fee, provided the fee is reasonable.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5302 In re Council of School Supervisors and Administrators, Local 1, etc., Petitioner-Respondent, Index 112483/09

-against-

New York City Department of Education, et al., Respondents-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Bruce K. Bryant, Brooklyn, for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered August 4, 2010, which, to the extent appealed from, granted the petition seeking to confirm an arbitration award that required the City to restore on-street parking permits to petitioner's members, and denied the City's cross petition to vacate the arbitration award and to dismiss the petition, unanimously reversed, on the law, without costs, the petition denied, and the cross petition granted.

Petitioner, Council of School Supervisors and Administrators (CSA), Local 1, American Federation of School Administrators, AFL-CIO, by its President Ernest Logan, is a labor organization certified pursuant to article 14 of the Civil Service Law as the

bargaining representative for school principals, assistant principals, and other supervisors and administrators in the City's school system. Respondents include the City by the Mayor (City), and the New York City Department of Education (DOE), which is a municipal agency that administers the City's public education system, and is the employer of the CSA-represented employees.

In early 2008, the City enacted a city-wide plan applicable to all agencies to reduce the number of parking permits issued to municipal workers for parking on city streets, and to ensure the proper regulation of such permits by the Department of Transportation (DOT). The reason for the plan was to reduce congestion and pollution on the city streets, and to encourage the use of public transportation. Prior to that time, parking permits were distributed by each City entity based on demand rather than corresponding to parking spaces actually available.

For the 2007-2008 school year, DOE issued more than 63,000 permits for just 25,000 spaces available to DOE employees. The permits could be used in any of the 10,000 parking spaces designated by DOT for DOE use on the city streets, or in the 15,000 spaces on DOE premises. The permits made no distinction between on-street parking or parking on DOE premises. Nor were the permits site-specific. Any CSA-represented employee who

requested a parking permit for use in spaces reserved for DOE employees was granted one, although having the permit did not guarantee a parking space.

Upon application of the city-wide plan, the DOE (as well as other agencies) was restricted to 10,000 permits for the corresponding number of available on-street spaces, and was no longer authorized to issue the on-street permits on demand (as distinguished from the permits it may still issue for parking spaces on DOE property). Instead, the permits issued by DOT for on-street parking are site specific, and therefore issued to personnel working at a particular site.[1] The number of DOE parking permits was thereby substantially reduced, and DOE denied permits to many CSA-represented employees who had previously held them.

In August 2008, CSA filed a grievance against the DOE, arguing that any reduction in the parking permits issued to CSA members violated a provision of the collective bargaining agreement between DOE and CSA that dealt with conditions of employment. The CSA contended that DOE could not make such a change without appropriate prior negotiation with CSA.

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[1]However, the DOT issued an additional 650 permits to the DOE for teachers and staff whose work required them to visit multiple sites during their workdays

The grievance went to arbitration, and following a hearing, an arbitration award was entered against the DOE and the City. The arbitrator found that the permits policy change was a proper subject of bargaining as it "constituted a significant and adverse alteration of the bargaining unit members' working conditions." It directed DOE to "return[] all parking permits previously held by CSA bargaining unit members" in the 2007-2009 school year until negotiations could be conducted with CSA over the proposed reductions.

In September 2009, the CSA commenced this proceeding pursuant to CPLR article 75 to confirm the arbitration award. The City respondents cross-petitioned for an order to vacate arguing that: (1) it violated strong public policy; (2) the arbitrator vastly exceeded his authority; and (3) the arbitration award was irrational.

By order and judgment entered August 4, 2010, the court granted the petition, confirmed the award in CSA's favor, and denied the City's cross petition to vacate the award. This was error.

As a threshold matter, we reiterate well-settled law that an arbitration award will be vacated only where "it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power"

(*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [2004] [internal quotation marks and citation omitted]). Here, however, we agree with respondents that the award should be vacated on all of the above-mentioned grounds.

It is undisputed that the power to issue parking permits rests in the exclusive control of the City. Respondent City by Mayor Bloomberg, and non-party DOT have the power under the NY Constitution, article IX, § 2(a),(c), state law (*see* NY Vehicle and Traffic Law §§ 1641; 1642) and local laws (*see* Municipal Home Rule Law § 10[1][ii][a][6] and Administrative Code of City of NY §§ 24-801 *et seq*.) to regulate traffic in the City streets, as well as parking. DOT is the preeminent City agency responsible for regulating traffic, including parking, within the City (*see Santiago v Riccio*, 170 AD2d 340 [1991], *appeal dismissed* 77 NY2d 989 [1991]).

In this case, the award directs DOE to issue permits in such manner and by such method that it directly overrides the authority of DOT. Indeed, it directs DOE to exercise a legal authority it does not possess. This not only means the arbitrator exceeded his authority, but did so in an entirely irrational way. Moreover, Supreme Court erred in attempting to soften or justify this irrational overreach.

Specifically, the court found that the award had no direct

bearing on DOT's authority to regulate on-street parking because the number of parking permits that DOT allocated to DOE exceeded the number of CSA members affected in this proceeding. In other words, the arbitrator had decided only "the issue of entitlement" as to the 10,000 on-street parking permits assigned to DOE. Further, the court noted that the arbitrator had heard testimony that DOE's practice of issuing parking permits was a condition of employment. Thus, the court denied the City's cross petition because it found that the City had failed to show how the award was inconsistent with the terms of the collective bargaining agreement which required negotiation of changes in the conditions of employment.

The foregoing findings miss the point. First, it is irrelevant that the award is consistent with the collective bargaining agreement. The agreement was forged between CSA and DOE. DOT was not a party to the collective bargaining agreement, and cannot be bound by it. DOT did not agree to issue parking permits to any CSA member who demanded a permit. Nor did DOT expressly agree to the arrangement in place prior to the installation of the city-wide plan, namely issuing more permits than available corresponding spaces. Nor was DOT a party to the arbitration. Yet, the issuance of on-street parking permits lies in the exclusive control of DOT not DOE. Thus, either DOE has

been directed to negotiate a "perk" it cannot legally deliver, or we would have to accept the clearly unsupportable position that the arbitration award de facto transferred the authority to regulate traffic and parking in the City of New York to DOE, certain City employees and their collective bargaining representatives.

Moreover, we reject the court's attempt to justify the arbitrator's overreaching by holding that the award did not infringe on the City's and DOT's authority to regulate traffic and parking because DOT issued 10,000 on-street permits to DOE, and DOE is simply allocating them when it reinstates them for certain CSA members. This reasoning simply further underscores the irrationality of the award.

At the heart of the city-wide plan, and its objective to reduce congestion and pollution, are 10,000 *site specific* permits. That is, current permits issued by DOT, unlike the permits issued in prior years to DOE, are regulated by issuing them to personnel at a specific physical location (either a school or a DOE facility) adjacent to or near the on-street parking spaces allocated to DOE.

According to the affidavit of DOE's director of special projects, this means that parking permits can be issued only to personnel working in schools or DOE facilities that have on-

street parking spaces assigned to the facility by DOT. According to DOE, approximately 300 schools in the city do not have any on-street or off-street parking spaces available. Thus, while a number of CSA members previously received permits even though they worked at such schools, the DOE further affirms that it is no longer "possible or practical for DOE to give all DOT issued permits to CSA union members, especially to those who are not assigned to schools with on-street parking."

This is entirely consistent with DOT's determination that regulation is necessary to reduce congestion and pollution. The objectives of reducing congestion, pollution and the City's carbon footprint, and promoting the use of public transportation are all city initiatives encompassed in the City Charter and the Administrative Code. To the extent that the award essentially annulled the judgment of the City as to those objectives of the city-wide plan, we find that it also violated public policy.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5314 The People of the State of New York, Respondent, Ind. 4579/00

-against-

Richard Keating, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about April 27, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motion.

Defendant is eligible for consideration for resentencing even though he had been released from custody on his drug

conviction but reincarcerated for a parole violation (*see People v Paulin*, __NY3d__, 2011 NY Slip Op 05544 [2011]).

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4075 In re Stephon L.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (George J. Silver, J.), entered on or about November 20, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second and third degrees, criminal possession of a weapon in the fourth degree, and menacing in the second and third degrees, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence supports inferences that appellant, either

personally or as an accessory under Penal Law § 20.00, committed each of the offenses at issue. Furthermore, although there was evidence relating to two victims, the attempted assault and menacing counts were not duplicitous, either facially or under the facts presented (*see People v Wells*, 7 NY3d 51, 56-57 [2006]).

Regardless of whether the court should have drawn a missing witness inference with regard to one of the victims, there was no prejudice to appellant, because the court specifically noted that, even if it had drawn an adverse inference, its finding would have been the same.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4487-
4487A Victor K. Kiam III et al., Plaintiffs-Appellants, Index 601424/07

-against-

Park & 66th Corporation, et al., Defendants-Respondents.

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Tofel & Partners, LLP, New York (Lawrence E. Tofel of counsel), for appellants.

Marin Goodman, LLP, Harrison (Richard P. Marin of counsel), for respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered October 18, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered October 5, 2010, which granted defendants' motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs, who are shareholders in defendant cooperative corporation (the co-op), assert various claims in this action against the co-op and a member of its board in connection with conduct relating to plaintiffs' interests in a sunroom appurtenant to their penthouse apartment. Before the instant motion for summary judgment was made, a bifurcated nonjury trial was held concerning plaintiffs' entitlement to a declaratory

judgment that they have the right to maintain and sell the sunroom as part of their penthouse apartment. The trial court found that, although plaintiffs were unable to produce any written consent by the co-op to the construction of the sunroom, the co-op's board had approved the initial construction of the sunroom in 1968 and plaintiffs were entitled to its use. The trial court further found that the co-op had waived any right it had to seek the sunroom's removal. On a prior appeal, we upheld these findings of the trial court (66 AD3d 415 [2009]).

At issue on this appeal are plaintiffs' causes of action for tortious interference with prospective economic advantage, breach of fiduciary duty, and negligence. These claims relate to a deal plaintiffs negotiated to sell their apartment, from which the prospective purchasers withdrew when the dispute concerning the sunroom came to light. The motion court granted defendants summary judgment dismissing these claims. On plaintiffs' appeal, we affirm.

Given the lack of a written consent by the co-op to the construction of the sunroom (which took place many years before the instant dispute arose), the co-op's position that the sunroom was not part of plaintiffs' demise cannot, as a matter of law, be said to have been a misrepresentation made in bad faith or with reckless disregard for the truth. Accordingly, the record

establishes that the co-op's conduct did not constitute the independent tort either of slander of title (*see Vollbrecht v Jacobson*, 40 AD3d 1243, 1247 [2007]) or of breach of fiduciary duty (*cf. Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [2010]), and therefore the "wrongful means" element of a claim for tortious interference with a prospective economic advantage was not satisfied (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). Plaintiffs' claims of bad faith and recklessness are further negated by the e-mail written by one plaintiff about the co-op's efforts to raise the apartment's share allocation and maintenance, in which he stated: "I have spoken to my attorney and we may be able to fight this but I am inclined not to . . . it is not clear we are going to win." Moreover, the record contains no competent evidence to support plaintiffs' allegation that the co-op demanded a payment from the prospective purchasers as the price of maintaining the sunroom as part of the demise. Finally, plaintiffs' cause of action for negligence was properly dismissed in the absence of a duty independent of the contract

governing the parties' relationship (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]).

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4592 Steve Pappas, et al., Index 601115/09
Plaintiffs-Appellants,

-against-

Steve Tzolis,
Defendant-Respondent,

Vrahos LLC,
Defendant.

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Carl E. Person, New York, for appellants.

Weinstein Smith LLP, New York, (Eric Weinstein of counsel), for respondent.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about March 4, 2010, which, insofar as appealed from as limited by the briefs, granted defendant Steve Tzolis's motion to dismiss the first, second, third, fourth, fifth, ninth, tenth, and eleventh causes of action pursuant to CPLR 3211(a)(1) and (7), modified, on the law, to deny the motion as to the first, fourth, fifth, and tenth causes of action, and otherwise affirmed, without costs.

Plaintiffs and defendant Steve Tzolis formed defendant Vrahos LLC for the specific purpose of entering into a long-term lease on a building in Manhattan. Vrahos was created as a Delaware limited liability company, although the operating agreement expressly provided that the agreement was governed by

New York law. The lease, which commenced in January 2006, required the payment of a security deposit of $1,192,500 and personal guarantees from Tzolis and plaintiff Steve Pappas. The operating agreement specified that Tzolis would advance the security deposit. It further provided that, as consideration for his furnishing of the security deposit, Tzolis would have the right to enter into a sublease of the property with Vrahos. This was conditioned on his paying additional monies to Vrahos above the rental payments that Vrahos was required to pay directly to the landlord.

As concerns this appeal, the operating agreement also contained the following relevant provision:

"Any Member may engage in business ventures and investments of any nature whatsoever, whether or not in competition with the LLC, without obligation of any kind to the LLC or to the other Members."

Tzolis exercised his right to sublease the building. However, he failed to make the additional payments to Vrahos that were required by the operating agreement. In September 2006, a few months after the subtenancy began, Tzolis suggested to plaintiffs that they assign their interests in Vrahos to him. He claimed that he did not want to make the additional rent payments and would rather take over the prime lease. Plaintiffs agreed,

and negotiated buyouts of $1,000,000 for Pappas and $500,000 for plaintiff Constantine Ifantopoulos. The assignment agreements between plaintiffs and Tzolis provided that the assignment would become effective on the later of the date on which the landlord released Pappas from his personal guarantee and the date on which Pappas received the assignment fee. If either of those events had not taken place by February 5, 2007, the assignment would be rendered null and void. At the same time as they executed their assignment agreement, plaintiffs and Tzolis signed a handwritten "certificate," which provided, in pertinent part, that "each of the undersigned Sellers, in connection with their respective assignments to Steve Tzolis of their membership interests in Vrahos LLC, has performed their own due diligence in connection with such assignments. Each of the undersigned Sellers has engaged its own legal counsel, and is not relying on any representation by Steve Tzolis or any of his agents or representatives, except as set forth in the assignments & other documents delivered to the undersigned Sellers today. Further, each of the undersigned Sellers agrees that Steve Tzolis has no fiduciary duty to the undersigned Sellers in connection with such assignments."

The assignments to Tzolis became effective shortly after February 20, 2007, the date on which Pappas was released from his

personal guarantee. Six months later, Vrahos, now wholly owned by Tzolis, assigned its lease to nonparty Charlton Soho LLC for $17.5 million. Pappas claims that he later discovered that, unbeknownst to plaintiffs at the time, Tzolis had begun negotiating the assignment of the lease to nonparty Extell Development Company, Charlton's owner, months before plaintiffs assigned their interests in Vrahos to Tzolis.

The complaint asserts nine causes of action against Tzolis. The first is that, in failing to disclose to them that he and Extell were negotiating a lucrative sale of Vrahos's leasehold interest, and then engineering the buyout of their interests, Tzolis breached a fiduciary duty that he owed to plaintiffs. The second claim is for misappropriation of a business opportunity of Vrahos. The third is for breach of contract and of the implied covenant of good faith and fair dealing, although it does not identify the contract that Tzolis is alleged to have breached. The fourth cause of action is for conversion, the fifth for unjust enrichment, and the sixth for rescission and a declaratory judgment that not only was plaintiffs' assignment of their interests in Vrahos to Tzolis rendered null and void by Trolis's actions, but that, in addition, Tzolis forfeited his own interest in the entity. Plaintiffs' seventh and eighth causes of action seek, respectively, an equitable accounting and the imposition of

a constructive trust. The ninth cause of action asserts that Tzolis tortiously caused Vrahos to interfere with plaintiffs' interests. The tenth cause of action sounds in fraud and misrepresentation and is based on Tzolis's failure to advise plaintiffs, before Tzolis purchased their interests in Vrahos, of the ongoing negotiations with Extell. Finally, the eleventh cause of action was brought derivatively on behalf of Vrahos and asserts that Tzolis breached his fiduciary duty to the entity.

Tzolis moved to dismiss the complaint in its entirety, pursuant to CPLR 3211(a)(1) and (a)(7). He argued that he and plaintiffs never intended to enter into a fiduciary relationship and that he thus had no duty to disclose his negotiations with Extell. He further asserted that Delaware law governed Vrahos's internal affairs, and that it permitted the elimination of fiduciary duties among members, which he contended was achieved by paragraph 11 of the operating agreement. Based on this theory, Tzolis argued that all of his dealings with Extell were immune from claims for breach of fiduciary duty. He further argued that because plaintiffs executed the certificate and willingly entered into the assignment agreement, none of the causes of action stated a claim against him. Plaintiffs countered that paragraph 11 could not be construed in such a way as to permit Tzolis's actions, and that their assignment of their

interests in Vrahos could not be considered willing because Tzolis had concealed material information from them such as his negotiations with Extell.

The motion court granted the motion. It found that under both Delaware law and New York law, plaintiffs had no cause of action. The court found that paragraph 11 of the operating agreement "eliminates the fiduciary relationship that would, otherwise, be owed by the members to each other and to the LLC." The court noted that, contrary to plaintiffs' contention, paragraph 11 could not be reasonably construed as limiting the types of business opportunities a member of Vrahos could enter into for his exclusive benefit to those that did not exploit the assets of Vrahos itself. The court also stated that, to the extent paragraph 11 of the operating agreement eliminated certain fiduciary duties amongst the members, it was not unlawful or against public policy. The court relied on this reasoning, and the fact that plaintiffs failed to identify any contractual provision that Tzolis violated, in finding that plaintiffs' claims for breach of fiduciary duty, misappropriation and breach of contract failed to state a cause of action.

As to their claims for conversion and unjust enrichment, the court noted plaintiffs' willing sale of their interests in Vrahos. As to the fraud cause of action, the court stated that

plaintiffs could prevail only if, under the "special facts" doctrine, they established that Tzolis had such superior knowledge of the relevant facts that it was inherently unfair for him not to disclose them. The court found that plaintiffs failed to sufficiently allege that, through the use of ordinary diligence, they could not have discovered that Tzolis had been negotiating to achieve a significant profit through the assignment of the lease to Extell. Further, the court determined that since the fraud allegations were based on information and belief, they were inadequate to support a fraud claim. Finally, the court found that plaintiffs did not have standing to assert a derivative claim on behalf of Vrahos, since, at the time they brought the complaint, they no longer had an interest in the entity.

As the movant on this pre-answer motion to dismiss, Tzolis had the burden of "clearly" establishing that paragraph 11 of the operating agreement eliminated the particular fiduciary duty that plaintiffs contend he breached (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Further, in considering whether Tzolis demonstrated that plaintiffs have not stated the various causes of action they assert in their complaint, we are required to accept the facts as alleged as true, "accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Paragraph 11 of the operating agreement may have permitted Tzolis to pursue a business opportunity unrelated to Vrahos, for his exclusive benefit, without having to disclose it to plaintiffs or otherwise present it first to Vrahos. However, we find that the provision does not "clearly" permit Tzolis to engage in behavior such as that alleged here, which was to surreptitiously engineer the lucrative sale of *the sole asset owned by Vrahos,* without informing his fellow owners of that entity. Thus, guided by the principles, enunciated above, that apply on a CPLR 3211 motion to dismiss, we find that Tzolis failed to meet his burden of establishing that the provision extended that far.

Even under Delaware law, which permits parties to a limited liability company agreement such as this one to eliminate traditional fiduciary duties (Del Code Ann tit 6 § 18-1101[c]), Tzolis has not established that the parties eliminated all fiduciary duties that they owed to each other. That is because, under Delaware law, "unless the LLC agreement in a manager-managed LLC *explicitly* . . . restricts or eliminates traditional fiduciary duties, managers owe those duties to . . . [the LLC's]

members" (*Kelly v Blum*, 2010 WL 629850, *10, 2010 Del LEXIS 31, *44 [Del Ch 2010] [emphasis added]). Accordingly, plaintiffs have adequately alleged that Tzolis breached a fiduciary duty to keep them informed of any and all opportunities he was pursuing on behalf of Vrahos.

We turn now to the effect of the certificate signed by plaintiffs, in which they acknowledged that the assignments of their interests in Vrahos were not based on any representations by Tzolis and that Tzolis owed them no fiduciary duties whatsoever. This Court addressed that very issue in *Blue Chip Emerald v Allied Partners* (299 AD2d 278 [2002]), a case with very similar facts. In *Blue Chip*, the parties were joint venturers who formed an entity for the sole purpose of owning a commercial building. The plaintiffs sold their interests in the entity to the defendants based on a valuation of the building that was a small fraction of the price that the defendants received when they sold the building two weeks later. The plaintiffs commenced an action, sounding in breach of fiduciary duty and fraud, to recover what they claimed they should have been paid based on the actual sale price of the building. The motion court granted the defendants' motion to dismiss, because the plaintiffs had executed a buyout agreement in which they acknowledged that they were not relying on any warranties or representations and that

they had been afforded an opportunity to conduct due diligence, and in which they disclaimed any claim for breach of fiduciary duty or fraud in connection with the sale.

This Court reversed, stating as follows:

"The key fact overlooked by the IAS court is that the . . . defendants, as coventurers and, in particular, as managing coventurers, were fiduciaries of [the entity] in matters relating to the Venture until the moment the buy-out transaction closed, and therefore owe[d] [the entity] a duty of undivided and undiluted loyalty. Consistent with this stringent standard of conduct, which the courts have enforced with [u]ncompromising rigidity, it is well established that, when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make full disclosure of all material facts. Stated otherwise, the fiduciary is obligated in negotiating such a transaction to disclose any information that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer. Absent such full disclosure, the transaction is voidable" (299 AD2d at 279-280 [internal quotation marks and citations omitted]).

We found that, pursuant to these principles, the defendants in *Blue Chip* had an obligation, in negotiating the buyout

agreement, to divulge to the plaintiffs "material facts concerning their efforts to sell or lease the Venture's Property, such as, for example, the prices prospective purchasers were offering to pay" (*id.* at 280). This obligation attached even though the plaintiffs were commercially sophisticated (*id.*).

There is no discernible difference in the facts of this case, and we are compelled to act with the same uncompromising rigidity here as in *Blue Chip*. Thus, notwithstanding the certificate in which plaintiffs acknowledged performing their own due diligence and stated that "Tzolis has no fiduciary duty to the undersigned Sellers in connection with such assignments," we find that Tzolis had an overriding duty to disclose his dealings with Extell to plaintiffs before they assigned their interests in Vrahos to him. Indeed, as this Court stated in *Blue Chip*, "[A] fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract" (299 AD2d at 280).

Although the case is not relied on by Tzolis, the dissent cites *Centro Empresarial Cempresa S.A. v America Móvil, S.A.B. de C.V.* (17 NY3d 269 [2011], *affg* 76 AD3d 310 [2010]) as support for its position that the certificate effectively released Tzolis from the claims now at issue. However, *Centro* is

distinguishable. In that case, the plaintiffs alleged that the defendants, their co-fiduciaries, induced them to sell their interest in a telecommunications company by misrepresenting the value of the enterprise. The Court of Appeals, in affirming the dismissal of the plaintiffs' fraud claim, noted that the "plaintiffs knew that defendants had not supplied them with the financial information necessary to properly value [their interest], and that they were entitled to that information . . . In short, this is an instance where plaintiffs 'have been so lax in protecting themselves that they cannot fairly ask for the law's protection'" (2011 Slip Op at *7, quoting *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). The Court further noted that the plaintiff "ha[d] actual knowledge that its fiduciary [was] not being entirely forthright" (*id.*). In contrast, defendants here have made no showing that plaintiffs had any reason to suspect Tzolis of deceit or that they had the independent ability to discover facts that would have deterred them from selling their interests in Vrahos to him.

Moreover, *Centro* involved an exceedingly broad release that extinguished defendants' liability "in all manner of actions. . . whatsoever. . . whether past, present or future. . . resulting from the ownership of membership interests in [the entity] or having taken or failed to take any action in any capacity on

behalf of [the entity] or in connection wit the business of [the entity]" (*id.* at *3). No such document was signed by plaintiffs here.

To the extent that, as the dissent notes, the Court of Appeals criticized *Blue Chip* in *Centro Empresarial,* it is irrelevant here. The criticism was that *Blue Chip* may suggest that this Court disagreed with the proposition that "[a] sophisticated principal is able to release its fiduciary from claims - *at least where . . . the fiduciary relationship is no longer one of unquestioning trust* - so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into" (2011 NY Slip Op 04720 at *6 [emphasis supplied]). Here, the dissent points to no evidence that plaintiffs and Tzolis were not still in a relationship of unquestioning trust at the time of the transaction at issue, other than employing the circular logic that they must not have had such a relationship given that plaintiffs were willing to execute the certificate.

We further acknowledge this Court's decision in *Arfa v Zamir* (76 AD3d 56 [2010],*affd* 17 NY3d 737, 2011 NY Slip Op 04719 [2011]), also not cited by Tzolis, which was similar to *Centro* insofar as, notwithstanding the fiduciary relationship between the parties, it dismissed a fraud claim based on allegations that

the defendants induced the plaintiffs to invest in a building with them by misrepresenting certain material facts. However, *Arfa*, like *Centro*, is distinguishable from this case insofar as there was a broad release, the parties' relationship by the time of the alleged fraud had deteriorated to a high level of distrust, and the plaintiffs had received "hints of . . . falsity" from the defendants (76 AD3d at 62 [internal quotation marks and citation omitted]). It is notable that this Court in *Arfa* distinguished *Blue Chip* based on those same facts.

Accordingly, we conclude that the motion court erred in dismissing plaintiffs' claims for breach of fiduciary duty and fraud. With respect to the latter cause of action, we note that while the complaint's allegations, insofar as they were made upon information and belief, may have been insufficient, plaintiffs cured any defect by making particular allegations of fraud in Pappas's affidavit in opposition to the motion (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). The dissent contends that the fraud and misrepresentation claim should be dismissed because "Pappas and Ifantopoulos did not ask Tzolis why he was offering them 20 times more than what they had invested in Vrahos one year earlier." However, the dissent is ignoring the basic precepts that must be followed on a motion to dismiss and applying a standard that is more suitable to summary judgment. Accepting

the facts as alleged as true and according plaintiffs the benefit of every possible favorable inference, we find that plaintiffs have alleged enough to permit them to develop a full record on the issue whether they acted reasonably.

As for plaintiffs' causes of action for conversion and unjust enrichment, we reinstate them based on our finding that, because of Tzolis's surreptitious behavior, plaintiffs did not sell their interests in Vrahos willingly or at arm's length. Plaintiffs are entitled to litigate their claims that Tzolis's wrongful behavior constituted a conversion of a portion of their interests in Vrahos and that equity dictates that Tzolis return the corresponding value to them.

The remaining claims, however, were correctly dismissed. Plaintiffs allege in their second cause of action that Tzolis misappropriated a business opportunity by assigning the lease to Extell. However, it was Vrahos, not Tzolis, that assigned the lease. The court also correctly dismissed the breach of contract cause of action because of plaintiffs' failure to allege specifically what the violation was (*see Gordon v Curtis*, 68 AD3d 549, 550 [2009], *lv denied* 14 NY3d 713 [2010]). The related claim for breach of the implied covenant of good faith and fair dealing was also correctly dismissed because such a claim cannot be used to create independent contractual rights (*see National*

Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp., 25 AD3d 309, 310 [2006], *lv dismissed* 7 NY3d 886 [2006]).

Because the claim for breach of contract has been dismissed, plaintiffs cannot state a cause of action for tortious interference with contract (*see e.g. NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]). On appeal, plaintiffs seek to recast this claim as one for tortious interference with prospective business opportunities. Even if we were to consider this belated change, we would find that this claim fails to state a cause of action (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]).

Because plaintiffs' assignments of their interests in Vrahos may be voidable, they have standing to assert a derivative claim on Vrahos's behalf. However, on the merits, the eleventh cause of action was correctly dismissed, since it was contradicted both by other allegations in the complaint and by the documentary evidence, which shows that Vrahos received $17,500,000 from the assignment of its lease.

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

FREEDMAN, J. (dissenting)

I would affirm the dismissal of the complaint in its entirety, because contractual disclaimers by plaintiffs preclude the causes of action that the majority has reinstated.

The complaint alleges as follows: In January 2006, plaintiffs Steve Pappas and Constantine Ifantopoulos and defendant Steve Tzolis formed a Delaware limited liability company, Vrahos LLC, as a vehicle for entering into a 49-year lease of a commercial building in Manhattan, and operating and developing the property. Pursuant to Vrahos's operating agreement, also executed in January 2006, Pappas, Ifantopoulos, and Tzolis were named as the company's sole members and managers, with Pappas and Tzolis each holding a 40% interest and making a $50 thousand capital contribution and Ifantopoulos holding a 20% interest and making a $25 thousand contribution.

According to the complaint, Tzolis assumed Vrahos's control and management, and, with plaintiffs' consent, Vrahos subleased the Manhattan property to Tzolis in June 2006 for $20 thousand per month. In late 2006, Tzolis approached Pappas and Ifantopoulos about buying out their interests in Vrahos. According to the complaint, Tzolis's given reason for the buyout was that "he [did] not want to pay rent" and that "he owns his own buildings." But by this time, plaintiffs allege, Tzolis knew

of but did not disclose a profitable opportunity for Vrahos to assign its lease interest to nonparty Charlton Soho LLC, a real estate developer.

On January 18, 2007, the parties executed closing documents pursuant to which, after the fulfillment of certain conditions, Pappas and Ifantapoulos would assign their interests in Vrahos to Tzolis, in exchange for which Tzolis would pay Pappas $1 million and Ifantopoulos $500,000, or 20 times what they had invested one year earlier. At the closing, the complaint acknowledges, Pappas, Infantopoulos, and Tzolis executed a certificate stating that each of the plaintiffs "has performed [his] own due diligence in connection with [his] assignment[ ]," and that each of them "has engaged its own legal counsel, and is not relying on any representation by Steve Tzolis or any of his agents or representatives, except as set forth in the assignments & other documents delivered to [Pappas and Ifantopoulos] today." The certificate further stated that "Steve Tzolis has no fiduciary duty to [Pappas and Ifantopoulos] in connection with [the] assignments."

The transaction was consummated and the assignments completed on February 20, 2007. About six months later, in late August 2007, Tzolis, now Vrahos's sole member, assigned the Vrahos lease to Charlton Soho for $17.5 million, thus realizing a

very large profit on his investment in the LLC. Plaintiffs' central allegation against Tzolis is that he cheated Pappas and Ifantapoulos out of a share of the profit from the Charlton Soho deal by buying out their interests in Vrahos without disclosing to them that a potential deal was in the offing.

I agree with the majority that, for the reasons stated, Supreme Court correctly dismissed plaintiffs' claims for breach of the operating agreement, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and misappropriation of business opportunities. I also agree that the cause of action asserting a derivative claim was correctly dismissed on the merits.

The remaining causes of action for breach of fiduciary duty (first cause of action), conversion (fourth), unjust enrichment (fifth), and fraud and misrepresentation (tenth) also should have been dismissed. Pappas and Ifantopoulos allege that Tzolis breached his fiduciary duty to them by buying their LLC interests without telling them about what they contend were ongoing negotiations with Charlton Soho. The terms of the closing certificate, however, preclude that claim. In the certificate, Pappas and Ifantapoulos explicitly agreed that Tzolis had no fiduciary duty to them in connection with the assignment, stated that they were not relying on Tzolis' external representations,

and represented that they had protected their interests by performing due diligence and engaging separate counsel. Although Tzolis had a fiduciary relationship with Pappas and Ifantapoulos before the closing, the certificate specifically discharged that fiduciary relationship and released Tzolis from any liability arising from his fiduciary duty.

Moreover, a provision in the original operating agreement for the LLC anticipated competing interests among the LLC members. The agreement provides that "[a]ny [m]ember may engage in business ventures and investments *of any nature whatsoever*, whether or not in competition with the LLC, *without obligation of any kind* . . . to the other [m]embers" (emphasis supplied). Under Delaware law, which, as the majority points out, governs the breach of fiduciary duty claim, an LLC member's fiduciary duty to another member "may be expanded or restricted or eliminated by provisions in the limited liability company agreement" (Del Code Ann tit 18 § 1101[c]). While the operating agreement provision alone did not eliminate all of Tzolis's fiduciary duties to Pappas and Ifantapoulos, it afforded Tzolis latitude to pursue his individual business interests for his own gain regardless of his co-members' interests.

The Court of Appeals recently held that "[a] sophisticated principal is able to release its fiduciary from claims -- at

least where . . . the fiduciary relationship is no longer one of unquestioning trust -- so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, *2011 Slip Op 04720, *6* [2011], *affg* 76 AD3d 310 [2010]). In *Centro Empresarial*, the plaintiffs, who were minority shareholders in a closely held corporation, claimed that the defendant majority shareholder and its affiliates fraudulently induced them both to sell their shares (by misrepresenting their value) and to execute a broad release from claims. The defendant was the plaintiffs' fiduciary and therefore was required to "disclose any information that could reasonably bear on plaintiffs' consideration of [its purchase] offer" (*id.*, quoting *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341 [2001]). Despite that fiduciary obligation, the Court of Appeals held that the plaintiffs' claims, which included breach of fiduciary duty, fraud, and unjust enrichment, were barred by the release they granted defendants as a condition of the sale (*see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [2006], *lv denied* 8 NY3d 804 [2007]).

In this case, plaintiffs were business partners of Tzolis who affirmed at the closing and in connection with the assignments that they were represented by counsel and had

performed their own due diligence in connection with the transaction. Their acknowledgment in the closing certificate that Tzolis was not acting as their fiduciary and that they were not relying on any representations by him beyond those contained in the closing documents, constituted fair notice that plaintiffs were engaging in an arm's-length business transaction with Tzolis, that they should not place their "unquestioning trust" in him, and that in exchange for their immediate and certain twentyfold return on their investment, they were forgoing the possibility of future greater profit.

The majority's reliance on *Blue Chip Emerald v Allied Partners* (299 AD2d 278 [2002]) as support for its holding that, despite plaintiffs' disclaimers, Tzolis had an "overriding [fiduciary] duty to disclose" is misplaced. In *Centro Empresarial*, the Court of Appeals made clear that one party could release another from claims arising from a fiduciary duty that existed before the release, and called our holding in *Blue Chip Emerald* into question by stating that "[t]o the extent that Appellate Division decisions such as . . . [*Blue Chip Emerald*] . . . suggest otherwise, they misapprehend our case law" (2011 Slip Op 04720, *6).

The majority's attempt to distinguish *Centro Empresarial* from this case is unpersuasive. It is immaterial that instead of

signing a general release plaintiffs executed a certificate disclaiming Tzolis's fiduciary duty and his earlier representations. The disclaimer was tantamount to a release from all claims against Tzolis in connection with the assignment that were premised on his fiduciary duty to plaintiffs.

The majority also contends that Tzolis made no showing that plaintiffs lacked "unquestioning trust" in him. The face of the closing certificate, however, indicates otherwise. In consideration of Tzolis's purchase, plaintiffs were presented with, and with the advice of counsel signed, an explicit acknowledgment that Tzolis was not their fiduciary and that they should not rely on his earlier representations. Even if plaintiffs had the right to place their trust in Tzolis before they signed the certificate, that right necessarily ended when they executed it. Accordingly, the breach of fiduciary duty claim is barred.

The fraud and misrepresentation claim also fails. The gist of plaintiffs' allegations is that Tzolis failed to disclose that he was negotiating the lease assignment, not that he actually made any misrepresentations about it. New York law, which governs the operating agreement, adopts the "special facts" doctrine that, in the absence of a fiduciary relationship between parties to a transaction, a duty to disclose only arises where

one party's superior knowledge of relevant facts is such that non-disclosure would render the transaction unfair (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [2005]). However, that doctrine only applies if the party lacking the relevant facts could not have acquired them by using ordinary intelligence (*id.* at 278). Tzolis's substantial offer to plaintiffs should have alerted them to the fact that some deal was in the offing. Pappas and Ifantapoulos did not ask Tzolis why he was offering them 20 times more than what they had invested in Vrahos one year earlier; their lack of due diligence is unreasonable as a matter of law and fatal to plaintiffs' claim.

Finally, since Pappas and Ifantapoulos received their bargained-for consideration in exchange for their LLC interests, and the transaction was unaffected by a fiduciary relationship, the conversion and unjust enrichment claims fail.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5094N Wendy Hakim Jaffe, Index 309111/08
Plaintiff-Appellant,

-against-

Robert Jaffe,
Defendant-Respondent.

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Cohen Lans, LLP, New York (Robert S. Cohen of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 27, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for a protective order quashing 32 nonparty subpoenas, or an evidentiary hearing, unanimously modified, on the law and the facts, to quash the nonparty subpoena issued to SC Management and to quash the subpoena issued to Bank of New York Mellon to the extent it seeks records related to El-Kam Realty, Aval Company, Old Salem Farm Acquisition Corporation and Affiliates, Enterprise Products Partners, LP Nantucket Campfire, LLC, and Bedford Entities, the matter remanded for a determination whether the other subpoenas at issue were reasonably tailored to lead to relevant discovery, and otherwise affirmed, without costs.

In this divorce action, defendant served 37 nonparty

subpoenas on the business office maintained by plaintiff's father. Each subpoena was addressed to a different entity closely held by, or affiliated with, plaintiff's family, which has many real estate holdings. Plaintiff acknowledges that, before the marriage, she had minority interests in many of the entities and that during the marriage she transferred the interests in those companies to a single holding company in exchange for a 25% interest in the holding company. Unlike two of her siblings, plaintiff was given no current or future managerial authority in the holding company. Defendant also addressed subpoenas to SC Management, the company that manages the real estate holdings of the various LLC's. Plaintiff claims to have no interest in SC Management or six other entities that received subpoenas. In addition to the entities affiliated with plaintiff's family, defendant served a subpoena on Bank of New York Mellon, seeking documents related to accounts maintained there by all of the entities in which plaintiff held an interest, as well as SC Management and the six other entities in which plaintiff denies having any interest.

The subpoenas addressed to the entities in which plaintiff had transferred her interest to the holding company differed from each other in some respects, but they uniformally sought financial statements; tax returns; detailed fixed asset registers

and depreciation schedules for all assets held; building permits filed between 1996 and 2000; rent rolls identifying all tenants, their apartment numbers, their leases, the square footage of their apartment, and a calculation of their rent per square foot; documents reflecting "in kind" payments or barter transactions with any entity owned by the Hakim Organization, or with any employee, partner or shareholder of such entity; board meeting or other entity meeting minutes; business plans and projections; 1099's with copies of cancelled checks; ownership, operating, management, or subscription agreements; agreements of understanding signed by plaintiff; ownership schedules and stock transfer ledgers, including copies of front and back of all shares issued; copies of credit applications made to a bank or to other creditors; and outside accountants' working paper files and business evaluations or real estate appraisals conducted during the marriage.

Plaintiff moved to quash the subpoenas. She argued that the subpoenas were duplicative of discovery demands defendant had served on her directly (to which she also objected), and that they were intended solely to harass her parents. Indeed, plaintiff asserted, the subpoenas were served on the eve of Rosh Hashanah and immediately after defendant threatened to establish that plaintiff's parents were tax evaders. She further contended

that, to the extent she had interests in the entities to which the subpoenas were addressed, it was separate property and had no bearing on the distribution of the parties' marital assets. She claimed to have no active role in the companies that would have caused any appreciation in their value to become marital property.

In opposition to the motion, defendant argued that the documents and information sought by the subpoenas were necessary to determine whether a portion of plaintiff's family assets is marital property and because the documents bear on maintenance and child support. Pointing to documents he had already discovered during the litigation, defendant submitted that "[m]onies flow[ed] freely" among the subpoenaed entities and that plaintiff was active in the management and development of her family's real estate holdings. Defendant further asserted that the subpoenaed entities regularly made loans to various management companies controlled by the family, particularly SC Management, and used the management companies to pay for family members' personal expenses. Defendant stated that the discovery he sought was relevant to the issue whether plaintiff's actions caused appreciation to the separate property which should then be included in the marital estate. He also argued that, even if plaintiff's interests in the entities were non-marital, they were

still relevant under Domestic Relations Law § 236(5)(d)(9), which requires the court, in determining equitable distribution, to consider "the probable future financial circumstances of each party."

The court granted the motion in part and denied it in part. It held that nonparty discovery was appropriate as to those entities in which plaintiff conceded having interest. However, it quashed the subpoenas for all companies in which plaintiff claimed to have no ownership interest, except for SC Management. The court found that there was evidence, such as checks payable to plaintiff, that "raise[d] the possibility" that plaintiff received compensation for work she performed for that company. The court did not expressly address the subpoena served on Bank of New York.

In a divorce action, "[b]road pretrial disclosure which enables both spouses to obtain necessary information regarding the value and nature of the marital assets is critical if the trial court is to properly distribute the marital assets" (*Kaye v Kaye*, 102 AD2d 682, 686 [1984]). Indeed, in *Kaye*, the court denied the husband's motion for a protective order preventing discovery into four closely held family corporations in which he held minority interests, observing, "[I]t has been held that both parties in a matrimonial action governed by the Equitable

Distribution Law are now entitled to: a searching exploration of each other's assets and dealings at the time of and during the marriage, so as to delineate the extent of marital property, distinguish it from separate property, uncover hidden assets of marital property, discover possible waste of marital property, and in general gain any information which may bear on the issue of equitable distribution, as well as maintenance and child support. The entire financial history of the marriage must be open for inspection by both parties" (*id.* [internal quotation maraks and citations omitted]).

Pursuant to this rule of liberal discovery in matrimonial litigation, defendant is entitled to records of the entities in which plaintiff has an interest, so that he may determine whether her interests have a bearing on the distribution of the marital estate as well as support obligations. However, we find that defendant has failed to establish that plaintiff has any interest in SC Management, so the subpoena served on that entity should have been quashed. Further, to the extent the subpoena served on Bank of New York Mellon seeks records related to El-Kam Realty, Aval Company, Old Salem Farm Acquisition Corporation and Affiliates, Enterprise Products Partners, LP Nantucket Campfire, LLC, and Bedford Entities, the bank need not comply. Defendant has also failed to demonstrate any affiliation between plaintiff

and those entities. The bank is required, however, to divulge information related to the companies in which plaintiff has conceded having an interest.

While the entities are thus not immune from discovery in this action, we agree with plaintiff that the subpoenas are overbroad in many respects. For example, the subpoenas include a demand to provide the names and addresses of all commercial and residential tenants, with copies of every lease, and all building permits filed for any building, including construction and renovations for every building plaintiff's family owned, over a 15-year period of time. This information appears to be of dubious relevance. Accordingly, the motion court must reconsider plaintiff's motion to determine whether the particular demands annexed to the subpoenas are sufficiently tailored to the financial issues in the action, and whether it would be unduly burdensome for the entities to respond.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5182 John Cordeiro, et al., Index 118308/06
Plaintiffs-Respondents-Appellants,

-against-

TS Midtown Holdings, LLC, et al.,
Defendants-Appellants-Respondents.

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TS Midtown Holdings, LLC, Index 590121/08
Third-Party Plaintiff-Appellant-Respondent,

-against-

Schindler Elevator Corporation,
Third-Party Defendant-Respondent.

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondents-appellants.

Sonageri & Fallon, LLC, Garden City (James C. De Norscia of counsel), for respondent.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 16, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment as to liability on their Labor Law § 240(1) claim and granted their motion to strike defendants' answer to the extent of ordering that an adverse inference charge be given at trial, granted defendants' cross motion for summary judgment

dismissing the complaint and all counterclaims against them to the extent of dismissing plaintiffs' Labor Law § 241(6) claim, and granted third-party defendant Schindler Elevator Corporation's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant plaintiffs' motion for partial summary judgment as to liability on their Labor Law § 240(1) claim and to deny defendants' cross motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) to the extent it is based on a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1), and otherwise affirmed, without costs.

Plaintiff John Cordeiro, an employee of third-party defendant Schindler, was injured while preparing to remove elevator equipment from a building owned and managed by defendants by hoisting it through hatchway doors connecting a motor room with the floor below it. As plaintiff was sliding open the latch to the doors, they unexpectedly opened, causing him to fall to the floor below.

Plaintiffs met their prima facie burden of establishing entitlement to partial summary judgment on their Labor Law § 240(1) claim. Although the doors through which plaintiff fell were a permanent fixture of the building, they were not a "normal appurtenance," but rather, an access opening specifically built

for the purpose of allowing workers to perform their work on the building elevators by hoisting materials to the building's motor rooms (*Brennan v RCP Assoc.*, 257 AD2d 389, 391 [1999], *lv dismissed* 93 NY2d 889 [1999]). Accordingly, we find that the hatch in this case was a "device" within the meaning of § 240(1) (*see id.*; *Crimi v Neves Assoc.*, 306 AD2d 152, 153 [2003]). Further, plaintiff did not step onto hatchway doors that opened accidentally (*compare Bonura v KWK Assoc.*, 2 AD3d 207 [2003], *and Rodgers v 72nd St. Assoc.*, 269 AD2d 258 [2000]). Rather, plaintiff was required to open the doors in order to hoist up the governor from the 19th floor hallway below. This exposed plaintiff to a gravity-related risk of falling into the hallway from the motor room (*see Godoy v Baisley Lbr. Corp.*, 40 AD3d 920 [2007]).

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]; *see also Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [2008]). Defendants did not submit any admissible evidence that plaintiff knew he should have used his safety harness under these circumstances, or that he knew his partner had a suitable 50-foot lifeline to which the harness could have

been attached. While defendants argue that plaintiff could have tied his six-foot lanyard to a nearby beam or staircase, no evidence, expert or lay, was submitted that either of these options were appropriate anchorage sites (*see Miglionico*, 47 AD3d at 564-565). Accordingly, plaintiffs were entitled to partial summary judgment as to liability on their Labor Law § 240(1) claim.

Supreme Court improperly dismissed plaintiff's Labor Law § 241(6) claim to the extent it is based on an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1). Plaintiffs first alleged this particular Code provision concerning hazardous openings in a third supplemental bill of particulars served, without leave of court, after plaintiffs moved for summary judgment. However, plaintiffs' original bill of particulars claimed that defendants failed to adequately maintain the hatchway, causing plaintiff to fall when it suddenly opened. Accordingly, plaintiffs' belated identification of 12 NYCRR 23-1.7(b)(1) "entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant[s]" (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [2000]; *see Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [2010]). Further, the provision is sufficiently specific to support a Labor Law § 241(6) claim (*see*

Luckern v Lyonsdale Energy Ltd. Partnership, 281 AD2d 884, 886 [2001]), and issues of fact exist as to whether it was violated.

Supreme Court properly dismissed plaintiff's Labor Law § 241(6) claim to the extent it is based on 12 NYCRR 23-1.16, since plaintiffs never alleged in their original bill of particulars that plaintiff was given defective safety equipment (*see Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 59-50 [2004]). Plaintiffs' § 241(6) claim based on an alleged violation of 12 NYCRR 23-1.5 was also properly dismissed, since that section is insufficiently specific to support such a claim (*see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [2006], *lv denied* 8 NY3d 814 [2007]).

Supreme Court properly denied defendants' cross motion for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims. Proof of defendants' supervision and control over plaintiff's work is not required to impose liability under the statute and the common law where, as here, the accident results from a dangerous work site condition (*see Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 808 [2010]). The building superintendent testified that he had seen an unusual configuration in the hatchway doors prior to the accident. Thus, issues of fact exist as to whether defendants had notice of the dangerous or defective doors (*id.* at 808-809).

Supreme Court providently exercised its discretion in declining to impose the drastic sanction of striking defendants' answer due to their loss of the accident report, and instead, ordering that an adverse inference charge be given at trial (*see Hall v Elrac, Inc.*, 79 AD3d 427 [2010]).

Supreme Court properly dismissed the third-party action, since the contract between Schindler and defendant/third-party plaintiff TS Midtown Holdings, LLC does not contain a clear and unambiguous indemnity provision running in favor of TS Midtown. When a party is under no legal duty to indemnify, a contract assuming that obligation "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Tonking v Port Auth. of N.Y. & N.J.*, 2 AD3d 213, 214 [2003], *affd* 3 NY3d 486 [2004] [internal quotation marks and citation omitted]).

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5192 Luis Medina, Index 24058/06
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

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Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for appellant.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 1, 2010, upon a directed verdict, dismissing the complaint, unanimously modified, on the law, to reinstate plaintiff's Labor Law § 241(6) claim, the matter remanded for a new trial on said claim, and otherwise affirmed, without costs.

Plaintiff, an inspector for the New York City Transit Authority (TA), was injured on September 17, 2005 while inspecting a subway rail. Plaintiff was standing on the track bed when a 12-foot section of the rail, unsecured and weakened by saw cuts, suddenly sprang upward and then fell, striking his leg. Plaintiff brought this action asserting claims pursuant to, inter alia, Labor Law § 240(1) and § 241(6).

During the liability portion of the bifurcated trial,

plaintiff testified that he was installing new track. He stated that this was part of a subway system modification project and not a repair project to replace worn rails. At the time of his accident, plaintiff and his crew were attempting to "strip" and remove a rail.

The operating superintendent for the track department of TA testified at trial that during three attempts to cut the rail, the saw blade jammed, indicating that the rail was expanding. He explained that the welded rails could expand significantly due to temperature variations, placing the rails under significant compression tension. The superintendent testified that typically spike anchors were installed every 10 feet to keep the rails from expanding and moving vertically or laterally. However, his post-accident investigation revealed that there were no anchors in place along a 600-foot section of rail that included the section where plaintiff was injured. The superintendent testified that he did not know how long the anchors had been missing, but the fact that there were no anchors should have been discovered during twice-weekly track inspections.

The superintendent characterized plaintiff's work as "routine maintenance." However, he later conceded that the upgrade to the D subway line was part of a five-year signal improvement contract, which entailed replacement of 400 to 500

obsolete signal rails that were incompatible with updated braking and signaling systems.

At the close of plaintiff's case, the parties moved for directed verdicts. Defendant contended that plaintiff was engaged in routine maintenance and that his work did not pose an elevation-related risk as contemplated by § 240(1). Defendant further contended that with regard to the § 241(6) claim, plaintiff was not engaged in "demolition" within the meaning of Industrial Code (12 NYCRR) § 23-3.3. Plaintiff argued that the work was "alteration" pursuant to § 240(1) and/or "demolition," which is covered by both sections of the Labor Law.

On March 1, 2010, a judgment on the verdict was entered in favor of defendant on the grounds that plaintiff's work was "routine maintenance" and therefore not within the scope of the Labor Law. For the reasons set forth below, we find that plaintiff's § 240(1) claim was properly dismissed, but that the court erred in dismissing plaintiff's § 241(6) claim.

A directed verdict may be rendered where the court finds that, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Sorrentino v Fireman*, 13 AD3d 122, 123 [2004], quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The facts established at trial must be considered in the light most

favorable to plaintiff, and the court must afford plaintiff every favorable inference which may properly be drawn from those facts (*Sorrentino* at 123; *Villoch v Lindgren*, 269 AD2d 271 [2000]). Applying this standard, defendant's motion for a directed verdict on plaintiff's Labor Law § 241(6) claim should have been denied.

In order to recover under § 241(6), a plaintiff must demonstrate that there was a violation of a specific regulatory provision of the Industrial Code which resulted in his injury (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). 12 NYCRR 23-3.3(c), the section relied upon by plaintiff, requires "continuing inspections" during "hand demolition operations" to protect against hazards "resulting from weakened or deteriorated floors or walls or from loosened material." "Demolition" is defined in the Industrial Code as "work incidental to or associated with the total or partial dismantling or razing of a ... structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4[b][16]).

Under this definition, the removal and dismantling of the rail constituted demolition of a structure. The record supports the view that the repeated saw cuts loosened the rail, rendering it unstable. We find that on this record, the stressed rail was the kind of hazard contemplated by section 23-3.3(c) (*see e.g. Wade v Atlantic Cooling Tower Servs., Inc.*, 56 AD3d 547 [2008]).

We further find questions of fact on the existing trial record as to whether defendant conducted the "continuing inspections" required by section 23-3.3(c) (*see e.g. Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622-623 [2003]).

Furthermore, uncontradicted testimony establishes that the rails at issue were being removed for the purpose of upgrading the subway signal system, and not because they were worn, and that the "general context of the work" was a five-year capital improvement contract. These factors raise triable issues that militate against a finding, as a matter of law, that plaintiff was engaged in routine maintenance (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-82 [2003]; *Joblon v Solow*, 91 NY2d 457, 466 [1998]; *cf. Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Thus, the court should not have directed a verdict for defendant dismissing plaintiff's § 241(6) claim (*see Koren-DiResta Constr. Co. v New York City School Constr. Auth.*, 2 AD3d 114 [2003]; *see e.g. Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478 [2010]).

We find, however, that plaintiff's Labor Law § 240(1) claim was properly dismissed, albeit on different grounds. In order to recover under § 240(1), the hazard to which plaintiff was exposed must have been one "directly flowing from the application of the force of gravity to an object or person" (*Prekulaj v Terano*

Realty, 235 AD2d 201, 202 [1997], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Here, the rail was propelled by the kinetic energy of the sudden release of tensile stress in the steel rail. Thus, plaintiff's injuries were not the result of the effects of gravity (*see Daley v City of New York Metro. Transp. Auth.*, 277 AD2d 88 [2000]).

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Mazzarelli, J.P., Catterson, Manzanet-Daniels, Román, JJ.

5221 Structure Tone, Inc., Index 106810/06
Plaintiff-Respondent,

-against-

Universal Services Group, Ltd.,
Defendant-Appellant.

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Universal Services Group, Ltd., Index 590800/06
Third-Party Plaintiff-Appellant,

-against-

Pace Plumbing Corp., et al.,
Third-Party Defendants-Respondents.

– – – – –

Universal Services Group, Ltd., Index 590580/08
Second Third-Party Plaintiff-Appellant,

-against-

Prep-Crete, Inc.,
Second Third-Party Defendant-Respondent.

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Ahmuty, Demers & McManus, New York (Deborah A. Del Sordo of counsel), for appellant.

Barry, McTiernan & Moore, New York (Mark A. Collesano of counsel), for Structure Tone, Inc., respondent.

Bonner Kiernan Trebach & Crociata, LLP, New York (Mindy L. Jayne of counsel), for SBLM Architects, P.C., respondent.

Rivkin Radler, LLP, Uniondale (Merril S. Biscone of counsel), for Pace Plumbing Corp., respondent.

Herzfeld & Rubin, P.C., New York (Michael B. Sena of counsel), for Tremco Incorporated, respondent.

Goldberg Segalla, LLP, White Plains (Matthew J. McDermott of counsel), for Prep-Crete, Inc., respondent.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered June 3, 2010, which, to the extent appealed from as limited by the briefs, granted the motions of third-party defendants Pace Plumbing Corp., SBLM Architects, P.C., and Tremco Inc., for summary judgment dismissing the third-party complaint, and denied defendant Universal Service Group's (USG) motion for summary judgment dismissing all claims for damages associated with redesigns and upgrades and for summary judgment on USG's affirmative defenses, unanimously affirmed, with costs.

This action arises out of the construction of a Whole Foods market on the concourse of the AOL/Time Warner Center at Columbus Circ1e in Manhattan. Plaintiff Structure Tone, Inc. (STI), the general contractor for the work, retained USG to waterproof the market. The agreement provided that USG would be liable to STI for any damages incurred as a consequence of the failure by USG to comply with its obligations under the agreement. In the event that USG failed to promptly correct defective work, STI, at its option, could correct the work and deduct the cost from any money due to USG; if the cost of

finishing the work exceeded the unpaid balance of the contract, USG was to pay the difference.

STI commenced this action in May 2006. STI's complaint alleges that on 15 occasions from February 19, 2004 through February 24, 2005, the waterproofing failed causing water to leak from the Whole Foods market into various tenant spaces below. STI stated that the leaks caused damage to an Equinox gym as well as to the Time Warner security center and a physical therapy center. As a result, STI undertook to remedy the problem, and allegedly sustained damages of $1.2 million. For each of the leaks, the complaint alleges both a cause of action for negligence and for breach of contract. STI specified its damages as the costs of remediation, future construction, loss of profit, recovery of the amounts paid to USG, and contract balances not paid by Whole Foods.

In its answer, USG interposed a number of affirmative defenses. These included: 1) STI's failure to mitigate damages; 2) interference; 3) frustration of performance; 4) waiver; and 5) breach of the covenant of good faith and fair dealing. It subsequently abandoned its claims of failure to mitigate damages and interference.

In August 2006, USG commenced a third-party action against, inter alia, Pace, the plumbing subcontractor, SBLM, the

architect, and Tremco, which supplied the waterproofing material. USG stated causes of action for contribution and indemnification. In addition, USG alleged separate causes of action for negligence against SBLM, and for negligence, strict products liability, and breach of warranty against Tremco.

In February 2010, Pace, Tremco, and SBLM moved for summary judgment dismissing the third-party complaint. The third-party defendants asserted, inter alia, that USG's claims for contribution were barred because STI sought to recover only damages for "economic loss." Further, they asserted that the claims for common-law indemnification were improper since, in the underlying action, USG was alleged to have been actively at fault.

In the same month, USG moved for partial summary judgment. USG sought dismissal of plaintiff's claims for damages resulting from four of the alleged leak occurrences. It also sought dismissal of all claims associated with redesigns and upgrades, and summary judgment on its affirmative defenses.

The motion court properly granted third-party defendants summary judgment as to USG's claims for contribution because despite USG's attempts at casting its claims in tort, the claims are based on alleged breaches of an express contract. Claims for contribution are governed by CPLR 1401 and apply to damages for

personal injury, injury to property or wrongful death. Here, there was no personal injury, and a purely economic loss resulting from a breach of contract does not constitute an "injury to property" within the meaning of CPLR 1401 (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]; *see also Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [2003], *lv denied* 1 NY3d 504 [2003]).

USG's reliance on *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.* (109 AD2d 449 [1985]), *Sommer v Federal Signal Corp.* (79 NY2d 540 [1992]), and *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (58 AD3d 178 [2008]) is misplaced. Those cases involved an unduly dangerous product or circumstance which threatened the public for which a party may be liable in tort independent of the party's contractual duties. In this case, although counsel at oral argument attempted to assert danger to the public from the leaks, there is no evidence of record of any such danger.

Further, it is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries (*see Hawthorne v South Bronx Community Corp.*, 78 NY2d 433 [1991]; *Richards Plumbing & Heating Co., Inc. v Washington Group*

Intl., Inc., 59 AD3d 311 [2009]; *see also Kye Yong Kim v 40th Assoc.*, 306 AD2d 220 [2003])). In this case, STI seeks recovery from USG solely because of USG's alleged wrongdoing. Thus, the motion court properly dismissed USG's third-party claims for common-law indemnification.

Moreover, the motion court correctly barred the third-party claims of negligence as against SBLM, and negligence, product liability and breach of warranty claims as against Tremco. There was no contractual relationship between USG and the third-party defendants, or indeed any other relationship that would impose a duty running to USG. Additionally, Tremco's liability was limited by its enforceable warranty (*see* UCC 2-719), which it fulfilled by providing replacement waterproofing material.

As to USG's motion for partial summary judgment, the court properly denied that branch of the motion seeking dismissal of plaintiff's claimed damages due to upgrades as opposed to repair work. There was conflicting testimony regarding whether any of the costs included in the damages constituted upgrades as opposed to repair costs, and thus a triable issue of fact was raised precluding summary judgment (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

The court also properly denied dismissal of plaintiff's contractual causes of action based on USG's affirmative defenses.

First, the doctrine of frustration of performance is inapplicable here since the doctrine offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract (*see Pettinelli Elec. Co. v Board of Educ. of City of N.Y.*, 56 AD2d 520 [1977], *affd* 43 NY2d 760 [1977]; *see also Warner v Kaplan*, 71 AD3d 1 [2009], *lv denied* 14 NY3d 706 [2010]). Nor was USG entitled to summary judgment based on the defenses of waiver and breach of the covenant of good faith and fair dealing. USG argues on appeal that it asserts these defenses because plaintiff instructed USG to proceed with the waterproofing despite USG's complaints and concerns as to STI's alleged deviations from specifications. The motion court properly found that there is evidence in the record that USG's application of the waterproofing membrane was defective in multiple respects. Hence, there is no evidence of record that the waterproofing would have been successfully installed but for

the failure of plaintiff to address USG's concerns and complaints.

We have considered appellant's remaining claims and find them unavailing.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5228 In re Bausch & Lomb Contact Lens Solution Product Liability Litigation — Index 766000/07

— — — — —

Plaintiffs in the New York Coordinated Proceeding,
Plaintiff-Appellants,

-against-

Bausch & Lomb,
Defendant-Respondent.

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Parker Waichman Alonso LLP, New York (Arnold E. DiJoseph of counsel), for appellants.

Shook Hardy & Bacon, LLP, Kansas City, MO (Marie S. Woodbury of the bar of the State of Missouri, admitted pro hac vice, of counsel), and Heidel Pitton Murphy & Bach LLP, New York (Daniel S. Rattner of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 15, 2009, which, following a *Frye* hearing, granted defendant's pretrial motion to exclude the general-causation opinions of plaintiffs' experts regarding non-Fusarium corneal infections, unanimously affirmed, without costs.

Plaintiffs failed to meet their burden of showing at the *Frye* hearing (*Frye v United States*, 293 F 1013 [1923]) that their experts' opinions that defendant's soft contact lens solution ReNu with MoistureLoc (Renu ML) was causally related to a rise in

non-Fusarium corneal infections were generally accepted by the relevant medical or scientific community (*see Pauling v Orentreich Med. Group.*, 14 AD3d 357 [2005], *lv denied* 4 NY3d 710 [2005]; *Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [2003]; *see also Marso v Novak*, 42 AD3d 377 [2007], *lv denied* 12 NY3d 704 [2009]). They submitted no "controlled studies, clinical data, medical literature, peer review or supporting proof" of their theory (*Saulpaugh v Krafte*, 5 AD3d 934, 936 [2004], *lv denied* 3 NY3d 610 [2004]; *Lara*, 305 AD2d at 106).

Plaintiffs' experts contended that testing showed a reduced biocidal efficacy of ReNu ML under certain conditions. The experts then extrapolated from those results the conclusion that ReNu ML increased the risk of non-Fusarium infections. However, one of the experts stated in a published article that "contamination is not consistently correlated with a higher rate of microbial keratitis" (Levey and Cohen, *Methods of Disinfecting Contact Lenses to Avoid Corneal Disorders*, Survey of Ophthalmology, Vol. 41, No. 3, at 296 [1996]). In addition, from a certain study in which a film was found to protect Fusarium, plaintiffs' experts concluded that the film similarly would protect other microorganisms. However, plaintiffs'

microbiologist conceded that different types of microorganisms have different needs and respond differently to different conditions.

Moreover, despite four studies conducted on keratitis infections during the relevant period, plaintiffs introduced no epidemiological evidence of a rise in non-Fusarium infections. The court properly excluded plaintiffs' epidemiologist from explaining this lack of an epidemiological signal, because the testimony had not been previously disclosed by plaintiffs and would have surprised defendant. Additionally, plaintiffs failed to demonstrate good cause for their failure to disclose the testimony (*see* CPLR 3101[d]; *LaFurge v Cohen*, 61 AD3d 426 [2009], *lv denied* 13 NY3d 701 [2009]; *Peguero v 601 Realty Corp.*, 58 AD3d 556, 564 [2009]).

The court properly quashed plaintiffs' subpoena of defendant's expert and former chief medical officer, because the expert had been deposed on three occasions, and plaintiffs failed to articulate any legitimate need for his live testimony (*see Pena v New York City Tr. Auth.*, 48 AD3d 309 [2008]).

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

M-1761 - Bausch & Lomb Contact Lens Solution Product Liability Litigation

Motion for court to take judicial notice of new scientific study denied.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5371 The People of the State of New York, Ind. 7979/99
Respondent,

-against-

George Colon,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about March 23, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and remanded to Supreme Court for further proceedings consistent herewith.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Paulin*, __NY3d__, 2011 NY

Slip Op 05544 [2011]). Accordingly, we remand the matter to Supreme Court for further consideration of his application.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5407 The People of the State of New York, Respondent, Ind. 4126/02

-against-

Ronald McFadden, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Order, Supreme Court, New York County (Eduardo Padró, J.), entered on or about August 6, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and remanded to Supreme Court for further proceedings consistent herewith.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56) even though he was released on parole from custody on his drug convictions, but reincarcerated for a parole violation (*see People v Paulin*, __ NY3d __, 2011 NY

Slip Op 05544 [June 28, 2011]). Accordingly, we remand the matter to Supreme Court for further consideration of his application.

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

ENTERED: SEPTEMBER 15, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4698-	Patricia Nonnon, etc., et al.,	Index 8576/91
4699-	Plaintiffs-Respondents,	12648/91
4700-		16388/92
4701-	-against-	15687/92
4701A-		20800/92
4701B-	The City of New York,	15474/92
4701C-	Defendant-Appellant.	233354/92
4701D-		14920/92
4701E	[And Other Actions]	22410/92

Michael A. Cardozo, Corporation Counsel, New York (Scot C. Gleason of counsel), for appellant.

Mauro Lilling Naparty, LLP, Great Neck (Richard J. Montes of counsel), for respondents.

Orders, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about April 26, 2010 (*Nessen v The City of New York*, Bronx County Index No. 22410/92) and April 27, 2010 (*Walsh v The City of New York,* Bronx County Index No. 20800/92), reversed, on the law, without costs, the motions for summary judgment granted and the complaints dismissed. The Clerk is directed to enter judgment accordingly. Orders, same court and Justice, entered on or about June 18, 2009 (*Nonnan v The City of New York,* Bronx County Index No. 8576/91), April 26, 2010 (*Simpson v The City of New York,* Bronx County Index No. 12648/91; *Ariso v The City of New York*, Bronx County Index No. 15474/92; and *Phillips v The City of New York*, Bronx County Index No. 14920/92), April 27, 2010 (*Irizarry v The City of New York*, Bronx County Index No. 16388/92; and *Corollo v The City of New York*, Bronx County Index No. 15687/92), and April 29, 2010 (*Parmigiano v The City of New York,* Bronx County Index No. 23354/92), affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

4698-
4699-
4700-
4701-
4701A-
4701B-
4701C-
4701D-
4701E
Index 8576/91
12648/91
16388/92
15687/92
20800/92
15474/92
233354/92
14920/92
22410/92

_____x

Patricia Nonnon, etc., et al.,
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant.

[And Other Actions]

_____x

Defendant appeals from orders of Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 18, 2009, April 26, 2010, April 27, 2010, and April 29, 2010 which

denied its motions for summary judgment dismissing the complaints.

Mauro Lilling Naparty, LLP, Great Neck (Richard J. Montes, Barbara D. Goldberg, and Mitchel Ashley of counsel), for respondents.

Michael A. Cardozo, Corporation Counsel, New York (Scot C. Gleason, Elizabeth S. Natrella, Leonard Koerner, Christopher G. King, and Carrie Noteboom of counsel), for appellant.

MANZANET-DANIELS, J.

These consolidated actions are for personal injuries and wrongful deaths allegedly arising from plaintiffs' exposure to hazardous substances emanating from the Pelham Bay landfill in the Bronx. On a previous appeal, affirming the denial of defendants' motions to dismiss, inter alia, for failure to state a cause of action, we determined that plaintiffs' expert evidence did not require that a hearing be held in accordance with *Frye v United States* (293 F 1013 [DC Cir 1923]) (32 AD3d 91, 103-108 [2006], *affd* 9 NY3d 825 [2007] ["*Nonnon I*"]), ruling that "neither the deductions of the expert epidemiologists and toxicologists, nor the methodologies employed by them, in reaching their conclusions are premised on the type of 'novel science' implicating the concerns articulated in *Frye*" (*Nonnon I*, 32 AD3d at 103). Defendants now move for summary judgment in all nine actions, asserting that the evidence fails to show an increased cancer incidence caused by hazardous chemicals emanating from the landfill. We disagree, and affirm the order appealed from.

The now inactive 81-acre Pelham Bay landfill is owned by the City and was operated by the Department of Sanitation (DOS) beginning in 1963 for the disposal of 2,600 tons of municipal solid waste per day. Over the years, surrounding residents

complained about odors and the improper and illegal dumping of hazardous materials and industrial waste from corporations in the area. The landfill was ordered to close on December 31, 1978.

In March of 1985, the City commenced an action under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 USC, Ch. 103, § 9601 *et seq*.) against 15 corporate defendants. The City claimed that the corporations had illegally disposed of industrial and chemical waste containing hazardous substances at the landfill, contaminating the groundwater and threatening drinking water supplies. As a result of the suit, the City was awarded millions of dollars for the costs incurred in remediating the site and for natural resource damages (*see City v Exxon Corp.*, 766 F Supp 177, 197, 200 [SD NY 1991]). In 1983, the landfill was classified as an "inactive hazardous waste site," which means that a significant threat to the public health or environment exists, and that action is required (*Nonnon I*, 32 AD3d at 93).

In 1985, the DOS signed a consent decree with the State Department of Environmental Conservation (DEC), in which it admitted that it had allowed hazardous waste to be illegally disposed at the landfill while it was in operation, and that it had allowed leachate to enter the surface and ground waters in violation of state and federal standards (*Nonnon I*, 32 AD3d at

94; *see New York Coastal Fishermen's Assn. v New York City Dept. of Sanitation*, 772 F Supp 162, 163 [SD NY 1991]). DOS did not comply with the 1985 decree, as a result of which, in April 1990, DOS and DEC entered into a second consent decree, requiring completion of a remedial plan for cleanup of the landfill by 1995 (*Nonnon I*, 32 AD3d at 94).

Between 1991 and 1993, nine separate actions were brought against the City by residents of the neighborhoods closest to the landfill (*Nonnon I*, 32 AD3d at 94). In these actions, plaintiffs, children and adults and their families or executors, allege that extended exposure to hazardous substances emanating from the landfill caused the development of either acute lymphoid leukemia (ALL) or Hodgkin's disease (*id.*)[1]

On September 29, 2000, the City moved to dismiss the nine actions for failure state a cause of action, asserting, inter alia, that plaintiffs had failed to allege or establish a viable causal connection between the landfill and their injuries (*Nonnon I*, 32 AD3d at 95-96).

The motion court rejected the City's argument that the claims should be dismissed for failure to state a cause of action. The court found that the City's citation of reports

[1] This Court consolidated the nine actions for purposes of filing a single appellate brief and record.

pertaining to the Fresh Kills landfill, located on Staten Island, had no applicability to the case at bar, and that the City had offered no other evidence in support of its assertion that plaintiffs had failed to assert a causal connection between the landfill and their injuries. The court thus denied the City's motion (*Nonnon I*, 1 Misc 3d 897, 898-900 [2003]).

This Court affirmed, rejecting the City's argument that the scientific methodologies employed by plaintiffs' experts were insufficient to establish that plaintiffs' cancers were caused by exposure to substances emanating from the landfill (*Nonnon I*, 32 AD3d at 103-08).

After this Court granted leave to appeal, the Court of Appeals affirmed on the ground that the City's motion had never been converted to one for summary judgment and plaintiffs, therefore, "were not put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered" (*Nonnon I*, 9 NY3d at 827).Noting that plaintiffs "suggest that due to the equivocal procedural posture of this case, they have not had the opportunity to submit all of their evidence relevant to a determination of causation," the Court of Appeals held that the City is "not now entitled" to dismissal of plaintiffs' complaints for failure to state a cause of action (*id.*).

On or about October 12, 2007, the City filed a motion for summary judgment.[2] Among other things, the City relied on a July 21, 2000 Department of Health Public Health Assessment and a June 1, 1993 Woodward-Clyde Baseline Risk Assessment pertaining to the landfill. The 2000 report discussed potential contaminant exposure pathways and the results of two epidemiological studies conducted by DOH's Environmental Epidemiology Unit, a 1988 study of childhood leukemia and a 1994 DOH cancer incidence study. The 1988 study, a statistical comparison of the incidence of childhood leukemia among children in Bronx districts 4 and 6 during the period from 1974 through 1985, as compared to New York City as a whole, found "scant evidence" of an increased incidence of childhood leukemia in the community adjacent to the landfill.[3]

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[2]The City filed the same motion for summary judgment in all nine cases. However, unbeknownst to the City the eight cases other than *Nonnon* had already been dismissed by the Clerk of the Court, apparently due to a misapprehension about the applicability of *Nonnon I* to the eight related actions. The City and plaintiffs' counsel thereafter stipulated to the applicability of *Nonnon I* to all of the actions and to reinstatement of the eight related cases that had inadvertently been dismissed. The City then moved for summary judgment in the eight related actions, relying on the motion for summary judgment previously filed, dated October 12, 2007.

[3]The study noted that while "excesses" in overall leukemia rates were not found, two findings indicated a possible increased incidence of childhood leukemia, including a statistically significant excess of cases reported in district 4 in the year 1984, and an excess of cases in 4 of the 162 census tracts in districts 4 and 6.

The 1994 DOH study contained the following statistically elevated findings: the annual incidence of lung cancer in women; the cumulative incidence of colon cancer and leukemias in men; and the cumulative incidence of kidney cancer among residents living closer to the cancer than further away. The authors of the study determined, however, that these findings did not present a pattern consistent with potential exposures from the landfill. While acknowledging that "one of the most well documented chemical exposures associated with leukemia is benzene," the authors concluded that there was no evidence of cancer patterns consistent with exposure to the landfill, and that exposure levels were likely too low to result in a detectable increase in cancer rates.

The 1993 Woodward-Clyne report discussed exposure pathways and noted that for area residents, both adults and children, the potential carcinogenic risks posed by inhalation of volatile organic compounds (VOCs) were below the risk level considered negligible by the Environmental Protection Agency (EPA) in setting cleanup goals under Superfund. The potential carcinogenic risks posed by incidental ingestion and dermal absorption from landfill soils were elevated for both workers and youth trespassers, but within the acceptable risk levels used by the EPA in setting Superfund cleanup goals.

The City relied on the affidavit of Dr. Kara Kelly, M.D., a pediatric oncologist, who concluded that "no known medical or scientific basis exists for plaintiffs' claim that exposure to chemicals in the Pelham Bay Landfill, assuming such exposure occurred, caused them to develop ALL."

The City also relied on a new affidavit from its expert Dr. Jonathan Borak, M.D., who opined that no causal link between proximity to the landfill and plaintiffs' cancers could be scientifically established. Dr. Borak claimed, based on a review of the scientific literature, that there is no credible evidence linking childhood ALL to any specific chemical.

Plaintiffs, in opposition, relied on the evidence contained in the prior record on appeal (discussed extensively in this Court's opinion in *Nonnon I* [32 AD3d at 97-100]), as well as new affidavits from experts Dr. Neugebauer, Dr. Trainor and Dr. Landzkowsky, and the affidavit of a new expert, toxicologist and biostatistician Dr. Bruce K. Bernard.

Dr. Richard Neugebauer, an epidemiologist, opined that persons residing in close proximity to the landfill experienced higher incidence rates of acute lymphoblastic leukemia as compared with persons residing further away from the landfill, and concluded that the landfill "is, more likely than not, a cause of the increased rates of childhood leukemia among area

residents."

Dr. Neugebauer's study defined four rings, or bands, located 8,000, 12,000, 16,000 and 20,000 feet, respectively, from the landfill center. He obtained, from the cancer registry, the age, gender and race breakdown in each of the census tracts.[4] To evaluate whether ALL incidence was elevated as a result of proximity to the landfill, Dr. Neugebauer calculated childhood ALL rates in each of the rings. Using indirect standardization to adjust for age, gender, race and location of the population north or south of the landfill (all possible confounding variables), Dr. Neugebauer compared the rates of ALL in each of the three bands closer to the landfill with the rate in the band

[4]The City complains that it lacked access to Dr. Neugebauer's data. Dr. Neugebauer stated that he obtained the relevant information regarding childhood ALL cases from the cancer registry and the City certainly cannot dispute that it had access to this same data. Dr. Neugebauer's affidavit also describes the manner in which he defined the four bands used in his proximity analysis, and the adjustments made to the data to account for age, gender, race and location, all standard adjustments. Dr. Neugebauer states that he obtained data concerning the size of the pediatric population in each of the census tracts and the age, gender and race breakdown from publicly available data from the U.S. Census Bureau, information equally available to the City. Dr. Neugebauer stated that he presented standardized morbidity ratios (SMRs) with a 95% confidence interval. The information furnished by Dr. Neugebauer regarding his methods and data was sufficient for another expert to attempt to replicate his results.

furthest away, Band 4.[5]

When these adjustments were made, the rate of childhood ALL in Band 1 was more than fourfold higher and statistically significantly greater, with a standardized morbidity ratio (SMR) of 4.05, than the rate among persons in Band 4. The rate of childhood ALL among persons in Band 2 was similarly substantially and statistically significantly elevated, with an SMR of 5.2, as compared to persons in Band 4. (The SMR for persons living in Band 3 as compared to Band 4 was 1.95.) Dr. Neugebauer noted that the probability that this pattern of increases in rates with increasing proximity to the landfill arose from random error was 1 in 10,000.[6]

Dr. Neugebauer opined that in this case proximity analysis was the "optimal design," with distance from the landfill a proxy for the measure of exposure. Dr. Neugebauer noted that numerous

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[5]Dr. Neugebauer noted that a judicial ruling prevented access to the same type of data for the county of the Bronx, as a whole, and for the remainder of New York City, precluding comparison to the rates in New York City as a whole.

[6]An SMR of 1.0 would indicate that a given band nearer the landfill has approximately the same cancer incidence rate as the band furthest away; an SMR greater than 1.0 indicates that a given band nearer the landfill has a higher incidence rate than the band furthest away. An SMR of 2.0, for example, would indicate that the incidence of cancer in the band is two times greater than the rate in the band furthest away from the landfill. An SMR with a 95% confidence interval that excludes one is statistically significant at $p \leq .05$.

epidemiological studies had investigated a possible disease excess around a point source of contamination by drawing concentric rings at increasing radial distance from the source and by obtaining data on the number of cancer cases per ring. Dr. Neugebauer stated that the superiority of this type of proximity analysis was "well-established." If the test for a linear trend was statistically significant, the proper conclusion is that a dose-response relationship exists.

Dr. Neugebauer also reanalyzed the Borak study, using six bands rather than seven,[7] extending four miles from the landfill center, and concluded that Borak's data also showed that the risk of ALL increased with proximity to the landfill.

Plaintiffs also relied on the affidavit of Dr. Bruce K. Bernard, an expert toxicologist and biostatistician. In order to determine the general plausibility of a cause-and-effect relationship between an increase in the observed frequency of childhood ALL and exposure to chemicals emanating from the landfill, Dr. Bernard analyzed Dr. Neugebauer's findings using the evaluation scheme propounded by Sir Austin Bradford Hill, a

[7]Dr. Neugebauer excluded these outlying bands when he reanalyzed the data because Borak had excluded from Bands 6 and 7 those persons who did not reside in health districts 4 and 6, effectively eliminating 70% and 95%, respectively, of the population of those bands from his proximity analysis.

well-known epidemiologist and biostatistician. Hill's approach involves analysis of nine factors: (1) strength of association, (2) consistency, (3) specificity, (4) temporality, (5) biological gradient, (6) biological plausibility, (7) coherence, (8) experiment, and (9) analogy.

Dr. Bernard found that strength of association was clearly demonstrated by comparisons between Band 1 and Band 2 versus Band 4, showing a very significant relationship between the incidence of childhood ALL and proximity to the landfill. Dr. Bernard found that Neugebauer's data showed internal consistency with regard to a causal relationship. He opined that the question of external reproducibility turned on the availability of other studies such as animal experimentation and epidemiological studies. Dr. Bernard opined that many of the chemicals known to have been dumped at and emanating from the landfill are well-known, potent human and animal toxicants, mutagens and carcinogens. Dr. Bernard noted that benzene is a leukemogen causing acute myelogenous leukemia and a known risk factor in multiple myeloma and ALL, all closely-related illnesses.

Dr. Bernard acknowledged that epidemiological data was more limited since environmental, occupational and health data limited exposure to these toxic substances. Dr. Bernard noted that human health data on these substances was largely derived through

occupational exposures (which, by definition, would exclude children) and the rare accident or case of malfeasance. Dr. Bernard opined that within these scientific and moral constraints, available data was consistent with the cause-and-effect hypothesis.

Dr. Bernard opined that there was high specificity in the case of the causal relationship between the landfill and childhood ALL. He noted that the proposed causal relationship was limited by age (i.e., children), general disease type (i.e., cancer), specific system (i.e., hematopoietic), disease entity (i.e., ALL) and distance from the landfill (i.e., bands).

As to temporality, Dr. Bernard noted that none of plaintiffs were diagnosed with their illnesses before dumping began and all lived in close proximity to the landfill.

As to biological gradient, Dr. Bernard opined that the data demonstrated a direct dose-response relationship between exposure and the disease.

Dr. Bernard noted that "biological plausibility" (i.e., the notion that the proposed causal relationship should not seriously conflict with the breadth of generally accepted facts of the underlying science), was a question which turned on the etiology of childhood ALL, knowledge about chemicals in and leaching from the landfill, the potential human exposure to those chemicals and

the known latency period for the development of childhood ALL. Dr. Bernard opined that available evidence supported a causal relationship between childhood ALL and exposure to a wide variety of substances, including ionizing radiation, pesticides, and organic solvents, such as benzene, found to have emanated from the landfill. Dr. Bernard noted that etiologies believed to be associated with the induction of leukemias, including childhood leukemias, have as their common mechanism mutagenic effects on chromosomal tissue.

As to coherence, Dr. Bernard opined that he was unaware of a conflict between the proposed relationship (i.e., an increase in childhood ALL and the chemicals dumped in and around the landfill) and established scientific data.[8]

As to "experiment" (i.e., the notion that if A causes B, we should be able to decrease the occurrence of B by removing A), Dr. Bernard stated that he was unaware whether this data was

[8]Dr. Bernard noted that he would have liked to have a better estimate of the actual exposure of the population to these substances, but noted that this was a "standard problem" in environmental exposure cases. Dr. Bernard noted that (1) data showed these substances to be emanating from the landfill at levels exceeding regulatory thresholds years after dumping had ceased, (2) well-known biodegradation rates existed for these substances, and (3) frequency dose-response curves, i.e., multiple points that demonstrate an increase in frequency of ALL the closer one gets to the landfill, existed for these substances.

available or had been analyzed.

Finally, as to analogy, Dr. Bernard noted that the Woburn case, although involving a different pathway, namely, drinking water, concerned exposure to the same chemicals involved in this case and the same medical sequelae.

Upon analysis of Hill's nine factors, Dr. Bernard concluded, with a reasonable degree of toxicological certainty, that it was more likely than not that exposure to chemicals emanating from the landfill was the cause of the increased frequency of childhood ALL observed in the plaintiffs.

Dr. Diane Trainor, Ph.D., an occupational and health and safety expert, studied the history of the landfill and analyzed possible exposure pathways. Dr. Trainor noted that it could not seriously be disputed that known toxic substances, long associated with ALL and Hodgkin's disease, had made their way into the air, ground and water, and that plaintiffs had been exposed to these substances through swimming in Eastchester Bay, eating fish from the bay, ingestion and dermal contact with landfill soils, contact with leachate seeps on sidewalks and jogging trails, eating items grown at a public vegetable garden adjacent to the landfill, and breathing the air in the vicinity of the landfill.

Finally, Dr. Philip Lanzkowsky, M.D., opined that numerous

studies had found a statistically significant relationship between exposure to benzene and ALL or Hodgkin's disease, and cited literature finding a relationship between chronic benzene exposure and leukemia.

The motion court denied the City's motions for summary judgment in all nine actions, stating that "in the instant motion, the City raises no new facts or law to warrant a departure from the prior holding of the Appellate Division, First Department [in *Nonnon I*]." We agree.

The *Frye* test is not concerned with the reliability of a particular expert's conclusions, but rather, with "whether the expert['s] deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" (*Nonnon I*, 32 AD3d at 103 [internal quotation marks omitted]). General acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion, but that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in reaching their conclusions.

As we observed in *Nonnon I*, epidemiology and toxicology are hardly novel sciences, but rather, well-established and accepted methodologies. In such a case, "the focus moves from the general reliability concerns of *Frye* to the specific reliability of the

procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006] [internal quotation marks omitted]).

An expert opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (i.e., general causation), and that the plaintiff was exposed to levels of the toxin sufficient to cause illness (i.e., specific causation) (*Parker*, 7 NY3d at 448). Here, plaintiffs have submitted sufficient evidence, in opposition to the motion for summary judgment, to raise triable issues of fact as to whether exposure to toxins emanating from the landfill caused plaintiffs' ALL.

Epidemiology is the study of disease patterns in human populations. It uses studies "to observe the effect of exposure to a single factor upon the incidence of disease in two otherwise identical populations," seeking to associate unusual patterns of disease with environmental or biological risk factors (Black and Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 Fordham L. Rev. 732, 755 [1984]). Epidemiological studies do not provide "direct evidence" of causation in the sense of proving a particular plaintiff was injured by a particular substance; however, they provide compelling circumstantial evidence of

cause-and-effect by demonstrating that exposure to a particular substance increases the incidence of disease in a given population. Epidemiological studies attempt to disprove the null hypothesis, i.e., the notion that there is no association between two studied variables (in this case benzene and childhood ALL), and to prove the alternative hypothesis, i.e., that the association between two studied variables is indicative of a cause-and-effect relationship. The epidemiologist attempts to ascertain, for a given risk factor, how much that factor will increase an individual's probability of contracting the disease. This magnitude is expressed in terms of "relative risk," the ratio of the number of occurrences of the disease in an exposed cohort to the number of occurrences in an unexposed one. If a given factor does not affect the rate of disease, its relative risk would be 1.0; if a given factor doubled an individual's chances of contracting disease, relative risk would be expressed as 2.0. Epidemiological evidence is critical in toxic tort cases to establish a causal relationship between a chemical substance and a set of symptoms or a disease (*see Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599, 601 [2007] [there was no dispute that the plaintiffs were exposed DEAE, a chemical used in treating a building's heating and cooling systems, and that DEAE exposure is capable of causing injury]).

Dr. Neugebauer opined that the rate of childhood ALL in Band 1 was more than fourfold higher and statistically significantly greater, with an SMR of 4.05, than the rate among persons in Band 4. The rate of childhood ALL among persons in Band 2 was similarly substantially and statistically significantly elevated, with an SMR of 5.2, as compared to persons in Band 4. Dr. Neugebauer noted that the probability that this pattern of increases in rates with increasing proximity to the landfill arose from random error was 1 in 10,000. Dr. Bernard similarly opined that the strength of association was clearly demonstrated by comparisons between Band 1 and Band 2 versus Band 4, showing a very significant relationship between the incidence of childhood ALL and proximity to the landfill.

Plaintiff's evidence of causation is sufficient under *Parker* (7 NY3d at 448) to establish an increased incidence of ALL as a result of substances emanating from the landfill.[9]

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[9]However, for those plaintiffs suffering from Hodgkin's disease, the record does not contain epidemiological data specifically linking the development of that disease to substances emanating from the landfill. Plaintiff's expert Dr. Landzkowsky cites an article entitled "Chronic exposure to benzene as a possible contributory etiologic factor in Hodgkin's Disease," but does not discuss the findings of the study or otherwise address the strength of the association between the incidence of Hodgkin's disease and exposure to benzene. We are thus constrained, as discussed below, to dismiss the claims of the two plaintiffs suffering from Hodgkin's disease.

The City contends that it is impossible to establish specific causation because plaintiffs cannot quantify their exposure to any specific toxin. The City insists that in the absence of a specific dose-response analysis, plaintiffs cannot establish that their current ailments were caused by toxins emanating from the landfill. We disagree. In *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006], *supra*), the Court of Appeals rejected this very argument. The Court recognized that in toxic tort cases it is generally difficult or impossible to quantify a plaintiff's exposure to a toxin, stating, "[I]t is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*Parker*, 7 NY3d at 448; see *Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996] ["We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains"]; *see also B.T.N. v Auburn Enlarged City School Dist.*, 45 AD3d 1339, 1340 [2007]). The Court of Appeals noted that in lieu of establishing causation through a dose-response analysis, an expert might, for example,

rely on mathematical modeling that would take into account relevant factors in estimating exposure to a toxin, or compare the plaintiff's exposure to the exposure levels of subjects in other studies (*Parker*, 7 NY3d at 449).

Thus, so long as plaintiffs' experts have provided a "scientific expression" of plaintiff's exposure levels, they will have laid an adequate foundation for their opinions on specific causation (*Jackson*, 43 AD3d at 602 [internal quotation marks omitted]). For example, in *Jackson*, the court found that the plaintiffs' expert had laid a sufficient foundation for his opinion on causation where, inter alia, the expert was directly involved in the investigation of the potential health consequences of the underlying incident; co-authored a report based on the investigation and research that had been published in a peer-reviewed medical journal, comparing the facts of the incident to those recorded in other studies; and opined that the manner in which DEAE had been fed into the steam system prior to the leak caused concentrated levels of the toxin to be released and that plaintiffs' symptoms were caused by DEAE exposure in a building.

Here, Dr. Bernard opined that the strength of the association was consistent with a cause-and-effect relationship between the landfill and childhood ALL and that the data

demonstrated a direct dose-response relationship between exposure and the disease. He further opined that the available evidence concerning "biological plausibility" supported a causal relationship between childhood ALL and exposure to a wide variety of substances, including ionizing radiation, pesticides, and organic solvents, such as benzene, found to have emanated from the landfill. Dr. Bernard noted that etiologies believed to be associated with the induction of leukemias, including childhood leukemias, have as their common mechanism mutagenic effects on chromosomal tissue.

Given that the City relied on the proximity analyses contained in DOH's 1988 and 1994 studies of the landfill, it must concede that proximity analysis is a recognized substitute for a dose-response analysis. Dr. Neugebauer explained that the purpose of his study was to test the hypothesis of DOH's scientific advisory committee that if an epidemiological study of the landfill were extended into the 1990s and specifically looked at ALL, it might show an increased risk of ALL with increasing proximity to the landfill.

Furthermore, and critically, in this case, the strength of the epidemiological data alone permits an inference of causation. The Federal Reference Manual on Scientific Evidence notes that courts have permitted an inference of specific causation where

the relative risk in an epidemiological study is greater than 2.0 (*see* Federal Reference Manual on Scientific Evidence, Reference Guide on Epidemiology, at 384 [2d ed]). "When the relative risk reaches 2.0, [an] agent is responsible for an equal number of cases of disease as all other background causes" (*id.*) Thus, a relative risk of 2.0 "implies a 50% likelihood that an exposed individual's disease was caused by the agent . . . [and] permit[s] [the] inference that [the] individual plaintiff's disease was more likely than not caused by the [substance at issue]" (*id.*).

In this case, the relative risks in Bands 1 and 2 were 4.05 and 5.2, respectively, when adjusted for confounding factors, well in excess of 2.0. Thus, according to the Federal Reference Manual, at least as to those plaintiffs suffering from ALL,[10] the strength of the relative risk alone is a sufficient basis for a reasonable juror to conclude that the plaintiffs' illnesses were more likely than not caused by exposure to hazardous substances emanating from the landfill (*see e.g. DeLuca v Merrell Dow Pharmaceuticals, Inc.*, 911 F2d 941, 958-959 [3rd Cir 1990]; *In re Joint E. & S. Dist. Asbestos Litig.*, 964 F2d 92, 97 [2d Cir

[10]As indicated above in footnote 9, Dr. Neugebauer's epidemiological study pertains only to the increased incidence of childhood ALL with proximity to the landfill. It does not address Hodgkin's disease.

1992]; *In re Agent Orange Prod. Liab. Litig.*, 597 F Supp 740, 835-837 [ED NY 1984], *affd* 818 F2d 145 [2d Cir 1987], *cert denied* 484 US 1004 [1988]; *Landrigan v Celotex Corp.*, 127 NJ 404, 419, 605 A2d 1079, 1087 [1992]).

The City's criticisms of Dr. Neugebauer's study go to the weight of the evidence, not its admissibility. As the Court of Appeals stated in *People v Wesley* (83 NY2d 417, 422 [1994]), possible infirmities in the analysis of the data, including the methods used to test statistical significance, go to the weight the evidence is to be accorded at trial.

While the strength of the epidemiological evidence, alone, is sufficient for plaintiffs to establish that substances emanating from the landfill are more likely than not the cause of childhood ALL, those plaintiffs suffering from Hodgkin's disease put forth no similar evidence. Thus, we are constrained to dismiss the claims of plaintiffs Nessen and Walsh.

Plaintiffs, residents of the neighborhoods surrounding the landfill, were exposed to toxins, including benzene, over a number of years, via air emissions and contact with contaminated soil and/or contaminated surface and ground waters. Each of the plaintiffs lived in close proximity to the landfill. They played in a park adjacent to the landfill, swam and fished in Pelham Bay, and ate locally grown vegetables. It is undisputed that

over a period of several decades, known carcinogens were disposed of at the landfill. The presence of these carcinogens, including benzene, as well as their concentration levels in the air, soil and surface and ground waters, is well documented. Indeed, the City admitted in various consent decrees that it had allowed leachate to enter surface and ground waters, and that the surface and ground waters had been polluted by these contaminants.

We recognize that in toxic tort cases it is always difficult to prove specific causation. But as plaintiff's expert toxicologist noted, this is a "standard problem" in environmental exposure cases. The Court of Appeals in *Parker* acknowledged this difficulty, specifically holding that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship," provided that his or her expert uses acceptable alternative methods to estimate exposure to a toxin (7 NY3d at 448). Plaintiffs suffering from ALL have sufficiently demonstrated, through epidemiological and toxicological data, a connection between the landfill and their present illnesses, and are entitled to a trial on their claims that exposure to substances emanating from the landfill was the cause of their cancers.

Accordingly, the orders, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about April 26, 2010 and April

27, 2010, which, respectively, denied defendant City of New York's motions for summary judgment dismissing the complaints of the Nessen and Walsh plaintiffs, should be reversed, on the law, without costs, the motions granted and the complaints dismissed. The Clerk is directed to enter judgment accordingly. The orders of the Supreme Court (Larry S. Schachner, J.), entered on or about June 18, 2009, April 26, 2010, and April 27, 2010, which denied defendant's motions for summary judgment dismissing the complaints of the plaintiffs other than the Nessen and Walsh plaintiffs, should be affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 15, 2011

CLERK