SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 16, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1590 Robert Gerrish, Index 159408/13
Plaintiff-Appellant,

-against-

56 Leonard LLC, et al.,
Defendants-Respondents,

Collavino Structures, LLC,
Defendant.

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

Ropers, Majeski, Kohn & Bentley, P.C., New York (Kirsten L. Molloy of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered April 28, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendants 56 Leonard LLC (56 Leonard) and Lend Lease (US) Construction LMB Inc. (Lend Lease) to dismiss plaintiff's Labor Law § 241(6) claim as against them, reversed, on the law and the facts, without costs, and the motion denied.[1]

[1] Plaintiff is not appealing the dismissal of the common-law negligence and Labor Law §§ 200 and 240(1) claims.

Plaintiff, Robert Gerrish, sustained injuries when, while working as an ironworker, he tripped and fell on debris at a work site. At the time of the accident, he was working at a yard in the Bronx, where he was bending and cutting steel rebar to be used for the construction of a new building located at 56 Leonard Street in downtown Manhattan. 56 Leonard was the property owner and Lend Lease was the construction manager. Lend Lease, "[a]cting solely as agent for [56 Leonard]," subcontracted with defendant Collavino Structures, LLC (Collavino) as the superstructure concrete contractor pursuant to a Trade Contract dated February 13, 2012. Collavino in turn subcontracted with plaintiff's employer, nonparty Navillus Tile, Inc. (Navillus), to "receive, bend and install all rebar required for said project." The Collavino/Navillus subcontract further provided that "Collavino will provide all trucking for bent rebar from Bronx yard to the site." It also incorporated by reference numerous other contracts involving defendants, but which are not part of the record and, therefore, are not currently before this Court.

The Trade Contract provided, inter alia, in Schedule 3 - "Temporary Facilities" - that

"[a]ll temporary Project site facilities and storage, sheds, shanties, material storage rooms, field offices, power, hoists, scaffolding, cold weather protection, etc. ('Temporary Facilities') required in performing the Work shall be furnished by Contractor [Collavino]. *Contractor agrees to furnish, at*

Contractor's expense, sufficient Temporary Facilities for the efficient performance of the Work. Contractor agrees to place its Temporary Facilities in locations designated by Owner or Construction Manager. When it becomes necessary, in the opinion of the Construction Manager, for Contractor to provide Temporary Facilities, Contractor will do so in an expeditious manner and at no additional cost. . . ." (emphasis added)

Thereafter, Collavino leased a portion of a work site in the Bronx (Bronx Yard) from nonparty Harlem River Yard Ventures, Inc. (Harlem River). Pursuant to that Temporary License, the only work Collavino was to carry out at the yard was in connection with "a construction site in Manhattan." Collavino could not perform any other type of work at the Bronx Yard without first obtaining prior written approval from Harlem River. Plaintiff's employer was not a party to the Temporary License or the Trade Contract.

Plaintiff commenced this action against defendants, alleging, inter alia, a violation of Labor Law § 241(6).

Labor Law § 241(6) provides, in relevant part, that

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

56 Leonard and Lend Lease moved to dismiss the complaint

against them pursuant to CPLR 3211(a)(1) and (7), arguing that Labor Law § 241(6) did not apply because, at the time of his accident, plaintiff was fabricating "steel rebars at an off-site temporary project facility in the Bronx . . . for a construction project located at 56 Leonard Street in Manhattan," and, therefore, this did not constitute work at a construction site, as required by the statute. The motion court agreed, citing *Flores v ERC Holding LLC* (87 AD3d 419 [1st Dept 2011]). We disagree and reverse, finding that *Flores* is distinguishable.[2] In *Flores*, the plaintiff was injured while working at "*his employer's Bronx facility*" (emphasis added), which was leased *by his employer* for the "storage of its equipment and materials" (87 AD3d at 420). Thus, neither the property owner defendant, nor the general contractor defendant in *Flores* was involved with the Bronx facility.

The *Flores* Court, relying on *Adams v Pfizer, Inc.* (239 AD2d 291 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]), looked to factors such as physical proximity and common ownership and operation of the off-site premises in determining whether the

[2] The dissent contends that we are bound by *Flores*, and thus under the doctrine of stare decisis, we cannot depart from it. We disagree because we find that *Flores* is distinguishable from the case currently before us, as are the cases relied upon by the *Flores* Court.

plaintiff was working in a construction area within the meaning of Labor Law § 241(6) (87 AD3d at 421). However, the facts in *Adams* are distinguishable. In *Adams*, the plaintiff was injured on his employer's premises while working on a mock-up design being constructed by his employer in connection with renovations to be completed at the defendant Pfizer's premises (*id.* at 292). The *Adams* case does not stand for the proposition that a construction area within the meaning of Labor Law § 241(6) must be within a certain mileage of, or proximity to, the actual building site. Nor does it support the proposition that the property owner and/or construction manager must have ownership of, or operate the additional off-site facility, in order to bring it within the purview of the statute. Rather, *Adams* simply stands for the proposition that an individual who was injured while working on a project for his employer in connection with the renovation of a defendant's premises was not involved in "construction" within the intended meaning of the statute, and thus is not afforded the protections of Labor Law § 241(6).

Here, however, and as distinguishable from *Flores*, there is a closer nexus between the leasing of the Bronx Yard and defendants 56 Leonard and Lend Lease. Indeed, Collavino, subcontracted by Lend Lease, which was hired by 56 Leonard, was responsible for furnishing "[a]ll temporary Project site

facilities" and agreed "to place its Temporary Facilities in locations designated by Owner or Construction Manager." Additionally, the Temporary License for the Bronx Yard was secured solely by Collavino, and for the purpose of completing work to be "forwarded directly to a construction site in Manhattan."

The dissent contends that there is no need for this Court to interpret the Trade Contract, because it "governs only temporary *on-site* facilities that Collavino might need to perform its work" (emphasis added). However, the Temporary Facilities clause does not specifically limit its application to "on-site facilities." Rather, it references generally "Temporary Facilities," which will be in "locations designated by Owner or Construction Manager." To find that it applies only to "on-site facilities" requires us to read a term into the contract that is not there. Additionally, the dissent argues that there is nothing in the record to suggest that "56 Leonard and Lend Lease had any reason to dictate where Collavino . . . performed any necessary off-site work . . . ." However, this is merely speculation; whether the Temporary Facilities clause is limited to on-site facilities or is inclusive of off-site facilities is clearly a question of fact that cannot be determined on this prediscovery motion to dismiss.

Nor does the case law cited by the dissent for the

proposition that plaintiff was "not working in a construction area within the meaning of Labor Law § 241(6)" dictate dismissal of plaintiff's claim. In the first instance, all of the cases referenced were decided on summary judgment, after discovery was complete. In *Jock v Fien* (80 NY2d 965 [1992]), the plaintiff was injured when he fell "during his customary occupational work of fabricating a concrete septic tank" at the defendant's facility, "whose business included the manufacture of septic tanks" (*id.* at 966). The case did not involve any construction project or site; hence, the Court's decision that the plaintiff's activity did not fall within the protection of the statute. In *Pirog v 5433 Preston Ct., LLC* (78 AD3d 676 [2d Dept 2010]), the Court found that the plaintiff was not engaged in construction work and was not working in a construction area because he was injured on his employer's property, which was used to "store construction-related materials for use on various construction projects" (*id.* at 676). Similarly, in *Davis v Wind-Sun Constr., Inc.* (70 AD3d 1383 [4th Dept 2010]), the plaintiff was injured while working at his employer's facility, and thus, was not entitled to the protection afforded by the statute (*see also Maragliano v Port Auth. of N.Y. & N.J.*, 2012 NY Slip Op 20374[u], *4-5, [Sup Ct, Queens County 2012] [finding that the plaintiff was injured while working at his employer's facility, which was used as a storage

area, and thus, was not protected under the statute], *affd* 119 AD3d 534 [2d Dept 2014]). Such is not the case here, where the Bronx Yard was leased by Collavino, a subcontractor hired by the defendant construction manager, and not by plaintiff's employer, and was to be used only for work in connection with the Manhattan (56 Leonard Street) construction project.

Further, the dissent places an undue emphasis on *Martinez v City of New York* (93 NY2d 322 [1999]), where the Court of Appeals rejected the analysis "which focused on whether plaintiff's work was an 'integral and necessary part' of a larger project within the purview of section 240(1)" (*id.* at 326). First, *Martinez* concerned only Labor Law § 240(1); it did not address or discuss Labor Law § 241(6). Second, *Martinez* involved different phases of work, specifically, preconstruction "inspection" or "investigatory" work in which the plaintiff was involved (*id.* at 325, 326). The Court of Appeals has since reiterated its holding in *Martinez* to be that the statute "afforded no protection to a plaintiff injured before any activity listed in the statute was under way" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]). To the extent the dissent focuses on the Court's statement that "statutory language must not be strained," the *Martinez* Court also stated that the Labor Law statute at issue was "to be construed as liberally as may be for the accomplishment of the

purpose for which it was . . . framed" (93 NY2d at 326 [internal quotation marks omitted]). Indeed, the Court of Appeals has found that the purpose of Labor Law § 241(6) is "to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition . . ." (*Nagel v D&R Realty Corp.*, 99 NY2d 98,101 [2002]). To apply the dissent's reasoning would be a failure to accomplish the purpose for which Labor Law § 241(6) was framed.

Morever, there is no set distance which would automatically include or exclude applicability of Labor Law § 241(6). Although the dissent cites *Shields v General Elec. Co.* (3 AD3d 715 [3d Dept 2004]) and *Brogan v International Bus. Machs. Corp.* (157 AD2d 76 [3d Dept 1990]) in support of the proposition that fabrication work performed in close proximity to the building under construction falls under the ambit of Labor Law § 241(6), neither Court there was focused on the question of proximity, but rather, the decisive factor was that the injury occurred on property owned by the entity constructing the building. Here, there is still a question of fact as to the property owner and construction manager's involvement with the off-site temporary facilities.

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

SWEENY, J.P. (dissenting)

I dissent. The motion court correctly decided the motions to dismiss.

Defendants 56 Leonard LLC (56 Leonard) and Lend Lease (US) Construction LMB Inc. (Lend Lease), the only defendants that are parties to this appeal, were the property owner and construction manager, respectively, of a construction project located in Manhattan. Lend Lease subcontracted with defendant Collavino Structures, LLC (Collavino) as the superstructure concrete contractor. Collavino in turn subcontracted with plaintiff's employer, nonparty Navillus Tile, Inc. (Navillus), to "receive, bend and install all rebar required for said project."

Plaintiff alleges that he was injured when he tripped and fell on debris at an assembly yard leased by Collavino in Bronx County. At the time he was injured, plaintiff was performing steel fabrication work -- namely, bending and cutting rebar -- at the Bronx yard for his employer, Navillus. The rebar work was for the construction of a new building on property owned by 56 Leonard located in Manhattan, eight miles from the yard.

The pertinent provisions of the contract between Collavino and Lend Lease are set forth in the majority's writing and need not be repeated here. However, it is the majority's strained interpretation of this contract that brings 56 Leonard and Lend

Lease into the ambit of Labor Law § 241(6). Such an expansion of liability is not justified by the terms of the contract, the statutory scheme of that statute, or the facts of his case.

A fundamental principle of contract interpretation is that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "Such agreements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Whether an agreement is ambiguous is "a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

The agreement in this case between Lend Lease and Collavino does nothing to bring Lend Lease and/or 56 Leonard within the ambit of Labor Law § 241(6).

To begin with, there is no need for this Court to interpret that contract. A plain reading of the pertinent provision, when read in a commonsense manner, governs only temporary on-site facilities that Collavino might need to perform its work. Both 56 Leonard and Lend Lease certainly would have an interest in designating where such temporary facilities are located on site

for safety purposes and to coordinate the work with other trades during construction. Indeed, the list of temporary site facilities contained in the contract can only apply to on-site facilities as there is nothing in this record to even suggest that 56 Leonard and Lend Lease had any reason to dictate where Collavino or any of its subcontractors performed any necessary off-site work, or what type of "temporary" facilities Collavino or its subcontractors deemed necessary to erect at such off-site locations. There is certainly no indication or suggestion that 56 Leonard and Lend Lease had supervision or control over any off-site facilities deemed necessary by Collavino or its subcontractors. Significantly, only Collavino signed the lease with the yard's owner and plaintiff does not dispute 56 Lenoard and Lend Lease's contention that the contract between Lend Lease and Collavino makes no reference to the Bronx yard. Thus, there is no material issue of fact that requires a trial.

Dismissal of the Labor Law § 241(6) claim as against 56 Leonard and Lend Lease is additionally warranted since plaintiff's fabrication of steel at the off-site Bronx facility does not constitute construction work at the Manhattan construction site (*see Flores v ERC Holding LLC*, 87 AD3d 419, 420-421 [1st Dept 2011]).

The majority attempts to distinguish the holding in *Flores*.

In reality, *Flores* is squarely on point with the instant case. The main construction sites in *Flores* and here were in Queens and New York Counties, 12 and 8 miles respectively from the Bronx assembly yards where the injuries occurred in each case. In both cases, neither the owners of the buildings under construction owned, leased or directed the subcontractors to use the particular locations where each plaintiff was injured. Although in *Flores*, the general contractor and subcontractor that employed that plaintiff were related entities, that relationship is absent here. This fact only enhances 56 Leonard's argument for dismissal, since here there is absolutely no connection between it and plaintiff's employer Navillus. Indeed, the contract in question was only between Collavino and Navillus. To hold, as the majority does in this case, that a contract between two subcontractors can be used to impute liability under Labor Law § 241(6) for an injury occurring off-site from the main construction site is an unsupported extension of the protections of that statute.

In addition to *Flores*, it has repeatedly been held in this and other Judicial Departments that under these circumstances, an injured plaintiff is not engaged in construction work within the meaning of Labor Law § 240(1) and is not working in a construction area within the meaning of Labor Law § 241(6). To

hold otherwise runs afoul of the limitations of the protections afforded under those statutes (*see e.g. Jock v Fein*, 80 NY2d 965, 968 [1992]; *Adams v Pfizer, Inc.*, 293 AD2d 291, 292 [1st Dept 2002, *lv denied* 99 NY2d 511 [2003]; *Pirog v 5433 Preston Ct., LLC*, 78 AD3d 676, 677 [2d Dept 2010]; *Davis v Wind-Sun Const.*, 70 AD3d 1383 [4th Dept 2010]; *Maragliano v Port Auth. of N.Y. & N.J.*, 2012 NY Slip Op 30374(U) [Sup Ct Queens County 2012], *affd* 119 AD3d 534 [2d Dept 2014]). While these statutes are to be construed in such a way as to accomplish the purposes for which they were enacted, "'the statutory language must not be strained in order to encompass what the Legislature did not intend to include'" (*Martinez v City of New York*, 93 NY2d 322, 326 [1999], quoting 252 AD2d 545,546 [2d Dept 1998], quoting *Karaktin v Gordon Hillside Corp.*, 143 AD2d 637, 638 [2d Dept 1988]).

While it is true that *Martinez* only referenced Labor Law § 240(1), the principle that judicially created inclusions not intended by the legislature in drafting the Labor Law statutes is impermissible still holds true.

The majority here simply disagrees with the reasoning in *Flores*. It is, however, the law of this Department. The absence of a consistent body of law on a particular issue would lead to conflicting opinions and confusion for the practicing bar and the community that expects consistency from this Court in order that

it may guide its actions accordingly. "Continuity and predictability are important values for a [c]ourt. We should adhere to precedent unless it is clear that a prior decision has produced an unjust or unworkable rule" (*Eastern Consol. Props. v Adelaide Realty Corp.*, 95 NY2d 785, 787 [2000]). Indeed, "the doctrine of stare decisis should not be departed from except under compelling circumstances" (*Cenven, Inc. v Bethlehem Steel Corp.*, 41 NY2d 842, 843 [1977] [emphasis omitted]).

Here, there is no reason to depart from the precedent established in *Flores*, which, in my view, is indistinguishable from this case. Plaintiff has "not demonstrated the existence of compelling circumstances so as to warrant departure from the doctrine of stare decisis" (*Yemem Corp. v 281 Broadway Holdings*, 76 AD3d 225, 232 [1st Dept 2010] citing *Eastern Consol. Props.*, 95 NY2d 785, *revd* 18 NY3d 481 [2012]; *Cenven, Inc.* 41 NY2d at 843).

Nor does it matter in this particular case that this is a CPLR 3211 motion to dismiss as opposed to a CPLR 3212 motion for summary judgment. There is no issue of fact that 56 Leonard and Lend Lease had no interest in, or authority to direct, work or activities at the Bronx location. As a matter of law, a cause of action simply does not exist against them in this case.

The majority's contention regarding the lack of space to

build in New York City is a chimerical attempt to circumvent the prohibition against extending liability under Labor Law § 240(6) as set forth above. While it is true that physical proximity to the main construction site is a factor to be considered in determining liability (*see e.g. Shields v General Elec. Co.*, 3AD3d 715, 717 [3d Dept 2004] [fabrication building on owner's property 100 yards from building under construction]; *Brogan v International Bus. Machs. Corp.*, 157 AD2d 76, 79 [3d Dept 1990] [transport from one end of a building to the other]), it is but one of several factors that must be considered in determining whether the Labor Law applies, as noted by the precedents cited above. Indeed, as the majority notes, ownership of the property where the injury occurred is another factor that must be considered. However, to argue in essence that Labor Law § 241(6) must be applicable to off-site fabrication in New York City because there is inadequate space to do so onsite does not comport with the law as it presently exists.

In short, the majority holding today extends liability beyond that envisioned by the Legislature in enacting Labor Law 241(6).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Moskowitz, Gische, Kahn, JJ.

1805 In re Prometheus Realty Corp., et al., Index 653003/16
Petitioners-Respondents,

-against-

The New York City Water Board, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for appellants.

Herrick Feinstein LLP, New York (Michael Berengarten, Kevin Fullington and Jared D. Newman of counsel), for respondents.

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Judgment (denominated an order), Supreme Court, New York County (Carol R. Edmead, J.), entered June 21, 2016, annulling and vacating respondents' resolutions approving a 2.1% increase to the water rates for fiscal year 2017 and a one-time credit of $183 for a class of ratepayers, affirmed, without costs.

In this article 78 proceeding, respondents New York City Water Board (Water Board) and the New York City Department of Environmental Protection (DEP) appeal from a judgment granting the petition to annul and vacate the Water Board's resolution approving a 2.1% increase to the water rates for Fiscal Year 2017 along with a one-time $183 credit to "Class 1" property owners of one, two, and three-family homes. Petitioners contend that the Water Board's actions are ultra vires, but even if they are not,

the rate increase adopted and credit issued to some, but not all, of its customers are without a rational basis and, therefore arbitrary.

The Water Board is a public benefit corporation that functions independently of other branches of City Government (Public Authorities Law §§1045-f[1], 1045[g]). The primary functions of the Water Board include establishing and collecting water and sewer charges and other revenues to raise sufficient funds to operate and maintain the City's water system. In addition, the Water Board is responsible for raising revenues to support debt issued by the Water Finance Authority to finance the water system's capital program to improve and maintain the water system infrastructure. The Water Board is statutorily mandated to "establish, fix, revise, charge and collect and enforce the payment of all fees, rates, rents and other service charges" necessary for the operation and maintenance of the water and sewage systems in New York City (Public Authorities Law §1045-g[4]; *Giuliani v Hevesi*, 90 NY2d 27, 34 [1997]). In accordance with Public Authorities Law §1045-h, since 1985, the Water Board has paid rent to lease the water system from the City. The City's DEP has acted as the Water Board's billing agent. Revenues collected from the water system customers are used to fund, among other things, the rent payments due to the

City and reimburse DEP for its administrative duties. The Water Board is directed to collect revenues that are at least sufficient to make the water system financially self sustaining (Public Authorities Law §§1045-g[4], 1045-j).

The Water Board is the "sole authority" empowered to set the rates it charges its customers for their water and sewage usage (*Perry Thompson Third Co. v City of New York*, 279 AD2d 108, 115 [1st Dept 2000], citing *Matter of Village of Scarsdale v Jorling*, 91 NY2d 507, 515 [1998]). Despite such broad powers, the Water Board's authority is not without limits. A rate-fixing determination by any agency must still have a rational basis and reasonable support in the record (*see Matter of Abrams v Public Serv. Comm.*, 67 NY2d 205, 212 [1986]). In the case of water and sewer charges, public hearings must be held before the Water Board acts (Public Authorities Law §1045-j[3]). Any rate structure ultimately approved by the Water Board must be consistent with its statutory authority and mandate (*see Giuliani v Hevesi*, *supra* at 34; *see also Matter of Medical Soc. of State of New York v Serio*, 100 NY2d 854, 864 [2003]; *Boreali v Axelrod*, 71 NY2d 1, 9 [1987]; *Matter of Leon RR*, 48 NY2d 117, 126 [1979]). According to the Water Board, its mission is to "establish rates for and distribute the collected revenues of the Water and Sewer system of the City of New York, proactively considering the

optimal level to achieve efficient financing of the System's infrastructure and sustainable provision of high-quality service at a fair price for our customers" (New York City Water and Wastewater Rate Report-FY 2017, May 2016, New York City Water Board, p.1) (mission statement).

Initially, in setting its rate schedule for 2017, the Water Board proposed instituting a 2.1% rate increase. The minutes of the Water Board's April 8, 2016 meeting expressly provide that the 2.1% rate increase was intended to fill a $76 million funding gap between anticipated revenue and expenditures projected in year 2017. Notices for the required public hearings were published. On April 25, 2016, however, the City announced its decision to forgo a remaining $122 million rental payment that the Water Board owed for that year. The City recommended that the Water Board use the additional $122 million to issue a one-time only $183 credit on customer water and sewer bills, but only to those customers who are designated class one property owners.[1] Class one property owners consist primarily of one, two and three-family homeowners, regardless of the location of the

[1]The City also indicated that it would forgo collection of all rental payments beyond FY 2017, up through FY 2020. The Water Board claims that the one time credit to class one property owners was for FY 2017 only and that in future years the savings would be passed on to all ratepayers.

property, its value or size. The other customers, for whom no credit was proposed in FY 2017, consist of residential buildings with four or more units, including rental, cooperative and condominium apartments (class 2); most utility property (class 3) and commercial and industrial properties (class 4).[2]

A proposed new rate schedule was then published by the Water Board, adopting the City recommendation for a one-time $183 credit for class one property owners and linking it directly to the City's rent forbearance in 2017. Clearly the two are interrelated since the amount of the rent forbearance ($122 million) closely correlates mathematically to the total cost of the credit (664,000 x $183 = $121,500,000). Public hearings were held, and on May 20, 2016, the Water Board voted to approve the 2.1% rate increase as well as the $183 credit limited only to class one property owners.

We cannot say that as a general matter the Water Board's adoption of a rate increase and/or the implementation of a credit program distinguishing among different classes of customers is an ultra vires action. The Water Board has broad statutory

[2] The Water Board represents that of its 834,000 paying water customers, 664,000 are class one property owners. According to petitioner, in FY 2015 the City reported that class one properties included 1,091,639 residential units, whereas class two properties included 1,871,987 residential units.

authority to set water rates (*see Perry Thompson Third*, 279 AD2d at 115). We agree, however, with the trial court's assessment that the one-time credit adopted for some, but not all, water customers at the same time the Water Board needed to increase overall water rates to fund a projected budget shortfall for that particular year, has no rational basis.[3]

The Water Board typically imposes rates based upon the ratepayers' use of water. Exceptions have been made, however, for certain programs that benefit different categories of ratepayers. For instance, under the Multi-Family Conservation Program (MCP), owners of buildings with four or more dwelling units who invest in low consumption plumbing, hardware and fixtures and cooperate with the Department of Environmental Protection's (DEP) conservation efforts, are billed at a flat rate for water and wastewater services instead of at a metered rate that measures actual water consumption. The Home Water Assistance Program (HWAP) provides credits to low income, senior citizen and disabled account holders, who demonstrate an economic need for such credits. The lead and copper monitoring program

[3]The Court's analysis does not turn on resolution of the parties' arguments about whether the Water Board has authority to issue credits as distinct from charging differential water rates among its customers. Nor do we believe it is necessary to decide whether the credit is a tax as opposed to payment for service.

offers a credit to those customers who meet certain DEP plumbing criteria and satisfy the program's requirements. The Frontage Transition Program for residential units with six or more dwelling units provides temporary financial benefits for customers transitioning from flat rate billing to metered billing. While these programs lend support for the general proposition that the Water Board has and can provide differential rates among categories of customers, it does not necessarily follow that the distinctions made in this case have a rational basis. Notably many of the programs highlighted by the Water Board serve legitimate objectives of the Water Board related to water usage or quality, such as water conservation or the servicing of vulnerable customers who demonstrate a financial need.

At bar, however, the rationale for designating class one property owners as qualified for or deserving of a credit, but not other classes of property owners, is lacking. The Water Board argues that consistent with its right to set rates "equitably," it acted rationally to alleviate the financial burden of water bills for class one property owners by issuing a credit. Such a rationale only repeats the action taken, but does not provide the underlying justification for it. There is no factual basis to conclude, as the Water Board claims, that class

one property owners have been more financially burdened by paying water bills than other classes of users; there is no basis for any conclusion that class one property owners are more needy than other ratepayers. The Water Board claims that a rational basis derives from the fact that class one property owners clearly include "seniors and low or moderate income homeowners." It is equally clear, however, that class one includes owners of luxury brownstones and other high value dwellings in the City; just as it should be clear that class two properties consist of other types of residential buildings, including coops and condominiums, also occupied by seniors and persons of low or moderate income, none of which derive any benefit, directly or indirectly, from this credit. Although the Water Board claims that the credit would be more financially meaningful for class one property owners, the credit is not in any way tied to financial need. There is no rational basis for the conclusion that class one ratepayers have traditionally borne a disproportionate burden of water and sewage fees. While the Water Board argues that some members of class one rate payers experience financial hardship in paying for water, the application of the credit does not in any manner take into consideration an owner's ability to pay or customers' need for this benefit, solely relying on the classification of the property for tax purposes, which bears

little relation to the stated objective.[4]

The one-time credit lacks a rationale basis because it cannot be reconciled with the projected budget shortfall for the year in which the credit is given. Once the City decided to forgo its rent, the resulting credit seems to have eliminated any shortfall for the particular year.[5] The Water Board's justification for the increase as necessary to ensure funding for the costs of repairing or replacing existing portions of the City's water and sewer system, while consistent with its mission statement and statutory mandate, is irreconcilable with the Water Board's implementation of a credit if, the Water Board still needed funds to balance its books for the year. The action seems inconsistent with the Water Board's statutory mandate to make the water system self sustaining. Although the Water Board also argues that it can apply the forgone rental payments in the manner proposed, the Water Board's decision to use the credit as proposed instead of meeting the costs of furnishing water

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[4]The Water Board estimates that 150,000 customers benefitted by the credit are senior citizens, but concedes that there are 664,000 customers who are class one property owners. There is no information provided about the financial means and needs of these 150,000 customers.

[5]The Water Board argues that even with the rent forbearance, there would still be a shortfall, necessitating a rate increase, albeit smaller than 2.1%. The mathematical basis for the Water Board's conclusion is not readily apparent from this record.

services does not reflect any rational basis for doing so.

The Water Board attempts to separately and independently justify the 2.1% increase by claiming that it needs the rate increase regardless of the credit because it is part of its five year projection of expenses. Yet, the Water Board's own meeting minutes confirm that the 2.1% rate increase was only to cover a $76 million budget gap for the FY 2017. Even accepting that the rate increase once adopted is permanent, the Water Board does not explain how its five year projections still have validity when they were made before the City announced its intention to forgo rent for the next five years. Moreover, even if this particular rate increase is unjustified, the Water Board's authority to determine future water rates, including any necessary increases, remains intact.

Accordingly, we find that the trial court correctly granted the petition.

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

KAHN, J. (dissenting)

Because I believe that the actions of the New York City Water Board in approving the 2.1% rate increase and one-time credit to class 1 property owners were neither ultra vires nor demonstrably arbitrary and capricious, I respectfully dissent.

At the outset, it is important to note that the rate increase and credit were approved as components of an overall rate proposal to be implemented in FY 2017 (FY 2017 Rate Proposal). Under that proposal, not only would class 1 property owners receive an immediate credit of $183 in FY 2017, but each ratepayer, including class 2, 3 and 4 property owners, would receive an average benefit of nearly $1200 over the life of the rate schedule through FY 2020.

I. ULTRA VIRES

Petitioners contend that the Water Board's actions in approving the 2.1% rate increase and one-time credit were ultra vires. "[T]he Water Board is granted broad authority to set rates for water usage and is the sole entity which may do so with regard to [New York] City users[,]" however (*Matter of Village of Scarsdale v Jorling*, 91 NY2d 507, 515 [1998]; *see Perry Thompson Third Co. v City of New York*, 279 AD2d 108, 115 [1st Dept 2000]). Here, in approving the rate increase and the credit for class 1 property owners, the Water Board exercised its broad authority to

"establish, fix [and] revise . . . [water] rates" (Public Authorities Law §§ 1045-g[4], 1045-j[1]).

As the majority agrees, although there is no express statutory provision for the awarding of credits in furtherance of the Water Board's authority to fix water rates, the Water Board may do so in the exercise of its broad, inherent powers (*see Perry Thompson Third*, 279 AD2d at 115). Neither the language of the authorizing statutes[1] nor that of the July 1, 1985 Financing Agreement between the Water Board and the City of New York[2] limits the Water Board's authority to fix rates to the setting of amounts to be owed by ratepayers while excluding the award of credits to those ratepayers.

The Court of Appeals has long upheld the broad authority of an administrative agency, as granted by its enabling statute, to establish rates as it sees fit. In *Elmwood-Utica Houses, Inc. v*

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[1] In nearly identical language, both authorizing statutes provide, in pertinent part, that the Water Board shall have the power to "establish, fix [and] revise . . . rates . . . for the use of, or services furnished [by] . . . the . . . water system" (Public Authorities Law §§ 1045-g[4], 1045-j[1]).

[2] Under the terms of the Financing Agreement, the Water Board is to "establish, fix and revise, from time to time, fees, rates, rents or other charges for the use of, or services furnished, rendered or made available by the [Water] System adequate . . . to provide for . . . payment[s and] the proper operation and maintenance of the [Water] System" (Financing Agreement, § 6.1.[a]).

Buffalo Sewer Auth. (65 NY2d 489 [1985]), the petitioner brought an article 78 proceeding challenging both the constitutionality of the statute that authorizes the Buffalo Sewer Authority (BSA) "to establish a schedule of rates, rentals or charges, to be called 'Sewer Rents,' to be collected from all real property served by its facilities" (Public Authorities Law § 1180) and the authority of the BSA to take into account the assessed valuation of the real property served in computing sewer rents, as that ad valorem component of the BSA's computation formula was not among the criteria expressly enumerated in the statute. The statute provided that as an alternative to basing sewer rent assessments upon certain enumerated criteria, such assessments "may be determined by the authority on any other equitable basis" (*id.*).

Relying on the "exceedingly strong presumption" of constitutionality accorded all legislative enactments, the *Elmwood-Utica* Court first held that Public Authorities Law § 1180, as interpreted and applied by the BSA, was not unconstitutional.

With regard to the method used by the BSA to fix sewer rents, the Court stated:

> "[T]he Legislature has conferred virtually unfettered power upon BSA to establish sewer rents, using the specific criteria enumerated in section 1180 and the general 'other equitable basis' standards. In these circumstances, it is clear that the Legislature

> intended that BSA would fix sewer rents that, in its judgment, would best serve its economic and public policy goals, 'including economic differentiations among its charges so long as there is not involved any of the invidious discriminations condemned by statute or Constitution, or some utterly arbitrary discrimination not related to economic considerations or some accepted public goal'"

(*Elmwood-Utica* at 497, quoting *Carey Transp. v Triborough Bridge & Tunnel Auth.*, 38 NY2d 545, 550 [1976], *cert denied* 489 US 830 [1976]). Accordingly, the Court held that "exempting tax-exempt properties from the ad valorem component [of the sewer rent computation formula] is a fair and rational application of the [Public Authorities Law § 1180] 'equitable basis' test" (*Elmwood-Utica* at 497).

Here, as in *Elmwood-Utica*, in enacting the Water Board's authorizing statutes, the Legislature likewise has conferred upon the Water Board virtually unfettered power to "establish, fix [and] revise . . . rates . . . for the use of, or services furnished [by] . . . the . . . water system" (Public Authorities Law §§ 1045-g[4], 1045-j[1]). And, as the motion court acknowledged, there is no indication that the exercise of the Water Board's unfettered discretion in approving the FY 2017 Rate Proposal was impeded by any invidious or utterly arbitrary discrimination. Contrary to the motion court's view, however, the Water Board had the broad power to approve the FY 2017 Rate

Proposal without the need for an express grant of statutory authority to do so.

Furthermore, while the governing statutory and Financing Agreement language provide that the Water Board has the authority to fix rates of payment for water usage and water-related services, the method used to fix those rates need not be directly related to water usage. Some of the water-related services cited by the Water Board during the public hearings on the instant rate changes to be funded by the resulting Water Board revenues, such as completion of the construction of City Water Tunnel number 3 at a cost of $357 million, a $1.5 billion storm water infrastructure project, and projects related to the Green Infrastructure Program at a cost of $900 million, are "bound to bear only limited direct relationship to the volume of water utilized by [a] particular consumer" (*Elmwood-Utica* at 496, quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 60 [1978]). And because these services "provid[e] a public benefit to the entire community, as well as an exclusive benefit to . . . individual properties," there need not be "[exact] congruence between the cost of the services provided and the rates charged to particular customers" as measured solely by water usage (*Elmwood-Utica* at 496, quoting *Watergate II* at 59). In any event, there is no provision in either the authorizing statutes

or the Financing Agreement imposing any requirement that the fixed rates be related to water usage (*see* Public Authorities Law §§ 1045-g[4], 1045-j[1]; Financing Agreement, § 6.1.[a]).

On the issue of whether rates must be gauged in proportion to physical usage of facilities or services provided by a governmental agency, *Carey Transp. v Triborough Bridge and Tunnel Auth.* (38 NY2d 545, 555 [1976]), is also instructive. In *Carey*, the plaintiff, an operator of a franchised airport omnibus line, brought a declaratory judgment action seeking a declaration that the defendant public authority's scheme of fixing bridge and tunnel tolls at a lower rate for "general purpose" bus lines, which provide general transportation services, than for "special purpose" bus lines such as that operated by the plaintiff, which provide services between fixed stations to and from the airport, discriminated against the latter (*Carey* at 548-550). The Court of Appeals rejected the plaintiff's argument that, rather than fix tolls based upon this classification of bus lines, a state authority's power to set tolls "must bear some relation" to the amount of use of that authority's physical facilities, as based on a "too restrictive" reading of the similarly broadly worded authorizing statute (*see* Public Authorities Law § 553[12] ["The authority shall have power . . . [t]o charge tolls, fees or rentals for the use of the [bridge] project"]). The *Carey* Court

explained that "[t]he [statutory] language simply means that the toll is triggered by the use, and not otherwise, and offers no basis for inferring that the toll is to be cost related to the physical use" (*Carey* at 555).

It is of no moment that *Carey* exemplifies a broad grant of statutory authority to a governmental agency to fix differing rates in the context of setting differing tolls for buses that, however similar in appearance and nature, provided differing services, without reference to the setting of a lower rate for "general purpose" bus lines as issuing a credit to them. Whether a governmental agency exercises its authority to fix differing rates for differing classes of ratepayers by declaring that one class of ratepayers should pay tolls at a lower rate, as in *Carey*, or that one class should be awarded a credit, as in this case, both actions are to similar effect, in that one class is to pay at a lower rate than another. Thus, the notion that the authority to issue credits is separate from the authority to establish rates is a fallacy.

Likewise, here, the language "for the use of, or services furnished [by] . . . the . . . water system" in both of the governing statutes (Public Authorities Law §§ 1045-g[4], 1045-j[1]) and the nearly identical language in the Financing Agreement (§ 6.1.[a]) simply mean that the requirement to pay for

water and water-related services at a rate fixed by the Water Board is triggered by a ratepayer's participation in the City's water system. These statutory and Financing Agreement provisions neither provide any basis for inferring that the rates imposed by the Water Board must be cost-related to water usage nor impose any limitation on the Water Board's broad authority to fix rates.

Here, as in *Elmwood-Utica* and *Carey*, the Legislature's broad grant of authority to set rates empowered the agency to take the rate-setting action it employed to serve its authorized general beneficial public purposes, without the need for express legislative authorization of the means it employed to do so.

Moreover, the motion court's determination that Public Authorities Law § 1045-j(1)(vi) limits the Water Board's authority to fix rates to those applicable to projects requested by the City pursuant to the Financing Agreement, and that such authority does not include setting rates for the sole purpose of issuing credits, as that court suggests occurred here, misses the mark. The enabling statute grants the Water Board broad authority "to fix and revise . . . fees, rates . . . or other charges for the use of, or services furnished . . . by, the . . . water system . . . in such amount at least sufficient . . . to provide funds" for six enumerated purposes (Public Authorities Law § 1045-j[1]). Those enumerated purposes include, among other

things, rate setting to provide funds sufficient to enable the Board to pay principal and interest on its debt obligations (Public Authorities Law § 1045-j[1][i]); to pay the City the costs of operating and maintaining and of constructing capital improvements to the water system (Public Authorities Law § 1045-j[1][ii]); and to pay "all other reasonable and necessary expenses of the authority and the water board in relation thereto" (Public Authorities Law § 1045-j[1][v]); as well as the sole authorized purpose cited by the motion court, which was "to the extent requested by the city in or pursuant to the agreement, to pay or provide for such other purposes or projects as such city considers appropriate and in the public interest" (Public Authorities Law § 1045-j[1][vi]). The enabling statute further provides that "[a]ny surplus of funds remaining in the water board after such payments have been made shall be returned to the city for deposit in the general fund" (Public Authorities Law § 1045-j[1]).

Here, the Water Board set forth among its reasons for its FY 2017 Rate Proposal its debt service obligations on $29.8 billion worth of improvements as a result of the DEP's earlier capital construction projects;[3] its continuation of its $250 per unit

[3] These projects included mandated projects such as the Croton Water Filtration Plant, the Catskill/Delaware UV

annual credit for qualified multi-family affordable housing under the Multi-Family Water Assistance Program; its expansion of an annual credit of $118.32 to users in the Home Water Assistance Program; the future construction of City Water Tunnel number 3; construction projects related to the Green Infrastucture Program; and an infrastructure project needed to prevent storm water from overwhelming the waste water system during heavy rainstorms, as well as the 2017 one-time credit of $183 to Class 1 users and the $1200 credit over four years to all ratepayers. These proposals all fall within the Water Board's broad authority to fix rates as established in the previously mentioned subdivisions of Public Authorities Law § 1045-j(1). To the extent the FY 2017 one-time credit falls within subdivision (vi) of the statute, and regardless of any limitations that the Financing Agreement may have on such "other purposes or projects," it is within the Water Board's broad authority to fix rates under the other subdivisions of the statute in the manner it chooses.

Moreover, neither the motion court nor petitioners cite any support for their position that the issuance of the credit was the sole purpose of the 2.1% rate increase, and, as the record noted above reflects, the 2.1% rate increase was not proposed

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Disinfection Facility and the Newtown Creek Wastewater Treatment Plant.

solely to afford a one-time credit to Class 1 ratepayers. The record evidence shows that at the public hearings, the Acting Executive Director of the Water Board provided an explanation for the 2.1% rate increase, which is that notwithstanding the rent forbearance, additional revenue was needed for capital projects such as the completion of City Water Tunnel number 3 and projects related to the Green Infrastructure Program and storm water infrastructure, and for payment of debt service. In light of the Water Board's broad authority to fix rates for various purposes, including to service outstanding debt, and their publicly stated need to raise the rates for these capital projects and other purposes, the evidence, at the very least, is insufficient to support the conclusion that the FY 2017 Rate Proposal was adopted solely to fund the credit. Thus, petitioners have not met their burden of demonstrating, by record evidence, that issuance of the credit was the sole purpose of the FY 2017 Rate Proposal.

Petitioners contend that the rate schedule approved by the Water Board, including the credit for class 1 property owners, is beyond its authorized powers because it would amount to nothing more than an improper tax assessed upon non-class 1 property owners if implemented. Because the revenues that would be collected by the Water Board pursuant to the FY 2017 rate schedule and credit "bear a direct relationship to the broader

reality of the services and benefits actually rendered to property owners as a whole" (*Watergate II*, 46 NY2d at 61), they may not be properly regarded as taxes, "which go to the support of government without any necessity to relate them to particular benefits received by the taxpayer" (*Watergate II*, 46 NY2d at 58). Moreover, a review of the record reveals nothing indicating that the revenues that would be raised pursuant to the Water Board's approved rate schedule and credit were not derived from "reliable factual studies or statistics" or would be "exacted for [general municipal] revenue purposes" or "disproportionate to the costs associated with" the water-related services to which they would be applied, and were, therefore, a tax (*cf. New York Tel. Co. v City of Amsterdam*, 200 AD2d 315, 317, 318 [3d Dept 1994]).

Even were the differentiation among classes of ratepayers proposed by the FY 2017 Rate Proposal to amount to a tax classification, in order for such a classification not to be sustained, it must be "so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it" (*Carey* at 552, quoting *Matter of Keeney*, 194 NY 281, 286 [1909], *affd* 222 US 525 [1912] [internal quotation marks omitted]). Here, the Water Board's classification scheme does have a rational basis, however, as it reflects the principle that owners "may properly be considered less able to pay for a [water]

system, especially insofar as the system redounds to the common benefit of all property rather than to one specific parcel" (*Elmwood-Utica* at 497). Because the FY 2017 Rate Proposal was put forth in order to provide additional funding for a number of specific, publicly stated purposes, this is not a case where a governmental entity is assessing a fee for revenue purposes to fund a "general governmental function" that benefits everyone while imposing the fee burden on a discrete group of residents, thereby assessing an unauthorized tax (*cf. Matter of Phillips v Town of Clifton Park Water Auth.*, 286 AD2d 834 [3d Dept 2001], *lv denied* 97 NY2d 613 [2002]). Moreover, there is no case law that clearly prohibits the Water Board from adopting a rate increase and charging marginally differential rates or issuing credits to a particular class, at least where, as here, all users are charged for the water system's maintenance and construction, and as long it also can be found that the different charges are based on rational policy considerations, as is the case here (*see* II, *infra*).

For the foregoing reasons, I believe that the Water Board's actions in approving the FY 2017 Rate Proposal were not ultra vires.

II. ARBITRARY AND CAPRICIOUS

With regard to whether the Water Board's actions in

approving its FY 2017 Rate Proposal had a rational basis and were, therefore, not arbitrary and capricious, a governmental agency's interpretation of its own plan or regulation must be accorded deference on judicial review "to determine whether there is a rational basis for the decision and, if so, the agency's conclusion must be upheld" (*Matter of Entergy Nuclear Operations, Inc. v New York State Dept. of State*, 28 NY3d 279, **2 [Nov. 21, 2016] [citation and punctuation marks omitted]). The Court of Appeals has further explained:

> "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts[.] If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency[.] Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise"

(*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [internal citations omitted]).

An agency's determination is rational as long as it is not "so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it" (*Carey* at 552). A petitioner challenging an administrative action carries the "heavy burden" of showing that the action was both unreasonable and unsupported by the evidence (*Big Apple Food Vendors' Assn. v Street Vendor Review Panel*, 90 NY2d 402, 408

[1997]).

A. One-time Credit

Petitioners contend that the Water Board's approval of the credit lacked any rational basis. The record does not support petitioners' contention in this regard, however. Rather, the record reflects that the credit was approved for the purpose of providing expedited financial relief to class 1 property owners, including financially overburdened lower and middle-class homeowners, many of whom are seniors, who had been disproportionately and adversely affected by the rise in water rates in recent years.

More importantly, it is the petitioners who have the "heavy burden" of showing that the Water Board's determination was both unreasonable and unsupported by the evidence (*Big Apple Food*, 90 NY2d at 408). In order to meet that burden, petitioners must come forward with prima facie evidence that the Water Board's determination was so purely arbitrary as to have no reason, not even an insufficient reason, to justify it (*Carey* at 552). Here, petitioners have not met their heavy burden of making a prima facie showing that the Water Board's determination was purely arbitrary and without any reason, however insufficient, or support in the record.

In this regard, the reliance of both the motion court and

the petitioners on *Elmwood-Utica* and *Watergate II* is misplaced. In *Elmwood-Utica*, the Court of Appeals found that the petitioners in an article 78 proceeding failed to carry their burden of making a prima facie showing that the public authority's method of calculating sewer rents was without rational basis (*see Elmwood-Utica* at 495, 498). In *Watergate II,* a declaratory judgment action, the Court of Appeals rejected the plaintiff's challenge to the public authority's consideration of assessed valuation imposition of sewer rents, albeit without express reference to which party had the burden of proof (*see Watergate II* at 61). Both the motion court and petitioners have misinterpreted these cases as supportive of placement of the burden of proof in an article 78 proceeding on a governmental agency (in this case, the Water Board) rather than on the challengers of the agency's action (in this case, petitioners).

Petitioners also maintain that the Water Board's approval of the credit lacks a rational basis because the credit is not directly related to water usage or provision of water-related services. As is the case with the overall fixing of a rate schedule, the awarding of a credit need not have any bearing on water conservation or water usage, provided, however, that the Water Board's decision to do so was reasonable. The Water Board, like the public authorities in *Elmwood-Utica* and *Carey*, may

exercise unfettered discretion to fix rates, including credit adjustments of those rates, so long as the determination of those rates does not involve invidious illicit discriminations and the determination is not utterly arbitrary and unsupported by any economic and public policy goals (*Elmwood-Utica* at 497, quoting *Carey* at 553). Here, the Water Board's approval of the credit furthers the economic and public policy goal of providing financial relief to the low and middle-income homeowners comprising many, if not most, of the class 1 property owners. Moreover, the Water Board's approval of the credit is consistent with the Board's mission to "proactively consider[] the optimal level [of rates] . . . and sustainable provision of high quality service at a fair price for our customers" (New York City Water and Wastewater Rate Report - FY 2017, May 2016, New York City Water Board at 1).

Furthermore, the Water Board's approval of the credit in this case is consistent with its previous awarding of credits to certain categories of ratepayers in need of financial relief. For example, the Water Board's Home Water Assistance Program (HWAP) was established to award credits to financially disadvantaged low income homeowners, senior citizens and the physically challenged. The Water Board's awarding of credits under that program, as well as its approval of the credit at

issue in this case, is also consistent with the principle that a governmental agency may provide exemptions or credits to some property owners who are less able to pay for the water and sewer system, especially as such a system "redounds to the common benefit of all property rather than to one specific parcel" (*Elmwood-Utica* at 497). Thus, it is not "irrational to exempt [those property owners who are less able to pay] from those charges designed to defray the costs of the public benefit services supplied by [the water and sewer] system" (*id.* at 497-498; *see Carey* at 553). Moreover, recent Water Board programs, such as the Frontage Transition Program and the Multi-family Conservation Program (MCP) provided credits to non-class 1 property owners but not to class 1 property owners, and the credit approved by the Water Board here helps to reduce the disproportionate burden of payment on class 1 property owners.

Additionally, the record includes the explanation offered by the Acting Executive Director of the Water Board that the credits and accompanying 2.1% rate increase were approved as part of an overall plan to generate revenue to be applied toward such capital projects as City Water Tunnel number 3, the Green Infrastructure Program and storm water infrastructure projects, and to offset the City water system's debt service. This explanation, in itself, provides a sufficient reason for finding

that the Water Board had a rational basis for approving the credit (*see Elmwood-Utica* at 496 [observing that public authority may use "formulae more sophisticated" than consumer water consumption in preparing to fund such projects as "construction and maintenance of . . . sewer lines, sewage collection and treatment facilities"]).

In any event, the credit approved by the Water Board in this case is water-related, in that the credit was approved as a component of an overall proposal to fixing the rates at which revenue will be generated from various classes of ratepayers for the purpose of funding the City's water system. And the Water Board's action in approving the credit relates to water usage for the additional reason that the credit would reduce the disproportionate share of the burden of payment of water bills that has been placed on class 1 property owners in recent years, largely due to recent Water Board programs, such as the Frontage Transition Program and the MCP, that provide credits only to ratepayers other than class 1 property owners.

Petitioners also contend that the Water Board's approval of the credit was without rational basis because it was done in response to a proposal put forward or supported by elected officials. To the extent that the Water Board made its determination to issue the credit for this reason, it was

statutorily authorized to do so, as an administrative agency may "take into consideration the views and policies of any elected official or body" in making its determinations (see Public Authorities Law § 2824[1][g]). Moreover, the record reflects that a number of New York state and city officials, in expressing their support for the proposal, acknowledged the disproportionate and adverse effect of the rise in water rates on lower and middle-class homeowners, including many seniors, in recent years.

Neither was the Water Board's approval of the credit as proposed irrational because of the lack of inclusion in the credit proposal of any requirement, such as that in the HWAP, that each class 1 property owner demonstrate financial need in order to be entitled to the credit. To impose such a requirement upon approximately 664,000 class 1 property owners would entail cumbersome application procedures, substantial processing delays, and additional administrative expenses that would likely result in a further increase in rates.

B. Rate Increase

Petitioners also contend that the Water Board approved the 2.1% rate increase without a rational basis for doing so. The Water Board's determination to approve the rate schedule could be successfully challenged as arbitrary and capricious only if it lacked a rational basis, i.e., was "without sound basis in reason

or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d at 431). If "there is a rational basis for the decision[,]" however, "the agency's conclusion must be upheld" (*Entergy*, at **2).

Again, petitioners' contention in this regard lacks support in the record. Rather, the record reflects that under the Water Board's approved rate schedule, not only would class 1 property owners receive an immediate credit of $183 in FY 2017, but each ratepayer, including class 2, 3 and 4 property owners, would receive an average benefit of nearly $1200 over the life of the rate schedule through FY 2020.

Furthermore, the record includes the explanation of the Water Board's Acting Executive Director that the 2.1% increase would represent an increase in the base rates not only in FY 2017, but over the course of four fiscal years to FY 2020, during which the consumption of City water is expected to further decline, as it has in recent years. In the absence of a rate increase, this decline would result in a reduction of needed revenues. Specifically, in FY 2017, revenue in the amount of $3.548 billion was needed not only to fund water provision in general, but also to pay for ongoing water-related capital projects, including a City Water Tunnel number 3, $1.5 billion storm water infrastructure project, and $900 million in projects

related to the Green Infrastructure Program, as well as to cover debt service costs. As of May 11, 2016, the total revenue collected by the Water Board in FY 2016 was expected to be $3.7 billion. It was believed that, with the anticipated reduction in water consumption plus the inauguration of credit programs for owners of affordable housing and low income homeowners, without a rate increase, the projected revenue for FY 2017 would be $3.475 billion. Thus, because of the anticipated need for $3.548 billion in revenue in FY 2017, a 2.1% rate increase in FY 2017 was required in order to generate $73 million in additional revenue. Apparently, because the revenue to be generated by the Water Board upon implementation of the rate increase would be applied entirely to a combination of water system operations and maintenance, water-related projects and services, and debt service, there would be no surplus of revenues to be returned by the Water Board to the City's general fund in accordance with the statutory requirement (Public Authorities Law § 1045-j[1][vi]).

The record also contains the Water Board's Acting Executive Director's statement that if the $183 credit were eliminated, the 2.1% rate increase would merely drop to a 1.9% increase in FY 2017. Although a statement appears in the minutes of the April 8, 2016 Water Board meeting, prior to the City's rental forbearance announcement, to the effect that a 2.1% rate increase

would fill a $76 million budget gap, petitioners have failed to show that resolving that or any budgetary shortfall occasioned by the issuance of the one-time FY 2017 credit was the Water Board's sole reason for approving the rate increase.

Moreover, the distinctions among classes of taxpayers or ratepayers need not be "exact or perfectly defined" in order for the classification to be sustained by a reviewing court (*see Carey*, 38 NY2d at 552). Here, petitioners argue that the proposed classification should be disallowed because wealthy townhouse property owners or landlords of one-to-three unit rental properties would be entitled to receive a $183 credit for each class 1 property they own. This argument merely refers to anomalies in the classification system and ignores the fact that the class of the property owners who would receive the $183 credit consists primarily of overburdened lower and middle class homeowners, many of whom are senior citizens. The Water Board chose simply to approve the awarding of the credit to the already established tax classification of class 1 property owners, which largely consists of the lower and middle-class homeowners whom the credit was intended to benefit. These class 1 property owners, like the tax exempt governmental, charitable and religious organization property owners in *Elmwood-Utica*, "may properly be considered less able to pay for a [water] system,"

and therefore entitled to the credit (*Elmwood-Utica* at 497). Thus, petitioners have not demonstrated that the tax classification proposed by the Water Board, to the extent that it may be regarded as such, is entirely without reason and should not be sustained (*see Carey*, 38 NY2d at 553).

Furthermore, petitioners have failed to establish that their water charges would be disproportionate to the services that they would receive under the FY 2017 rate schedule approved by the Water Board. Because non-class 1 property owners account for approximately 20% of the City's water system ratepayers while class 1 property owners account for 80% of ratepayers, the average non-class 1 property owner would be paying an increase covering a $183 credit for each of four class 1 property owners, or a total of $732.00. This amount would be more than compensated for by the average benefit of $1200 each ratepayer would receive over the life of the rate schedule through FY 2020. Thus, under the FY 2017 Rate Proposal, the difference in treatment between class 1 and non-class 1 ratepayers would be de minimis.

In reviewing the Water Board's determination, this Court must defer to the Water Board's rational interpretation of its own resolutions in its area of expertise (*see Peckham* at 431). In this case, I believe that petitioners have not met their heavy

burden of showing that the Water Board's actions in adopting the resolutions were irrational and unsupported by the evidence (*Big Apple Food v Street Vendor Review Panel*, 90 NY2d at 408).

Accordingly, I would reverse the order of Supreme Court, deny the article 78 petition and dismiss the proceeding.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Kahn, Gesmer, JJ.

2114 Michael Ahern, Index 158990/13
Plaintiff-Appellant,

-against-

NYU Langone Medical Center, et al.,
Defendants-Respondents,

New York University,
Defendant.

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The DelliCarpini Law Firm, Garden City (Christopher J. DelliCarpini of counsel), for appellant.

Maroney O'Connor LLP, New York (Ross T. Herman of counsel), for NYU Langone Medical Center and Hospital for Joint Diseases, respondents.

Marshall Dennehey Warner Coleman & Goggin, Melville (Mark J. Agin of counsel), for Cardella Trucking Company, Inc., respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 14, 2015, which, to the extent appealed from as limited by the briefs, granted defendant Cardella Trucking Company, Inc.'s motion, and defendants NYU Langone Medical Center and Hospital for Joint Diseases' (together the NYU Hospital defendants) motion, for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated upon an alleged violation of Industrial Code (12 NYCRR) § 23-1.28(b), and denied plaintiff's cross motion for partial summary judgment on the same claim, unanimously modified, on the law, to deny the NYU Hospital

defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim as against them, and otherwise affirmed, without costs.

While working as a laborer on a construction site at defendant Hospital for Joint Diseases, plaintiff allegedly sustained injuries when the wheel of a mini-container rolled over his foot. Defendant Cardella had provided the mini-containers that the laborers used to remove debris from the work site. Plaintiff and the other laborers would move these mini-containers across the floor to a hoist that would lower them to the street level, where a Cardella employee would empty the contents into a Cardella truck, and then return the mini-container to the laborers. Cardella employees were not at the work site daily; they came to the work site only when the contractors called them to empty the containers.

At his deposition, plaintiff testified that just before his alleged accident, he and another laborer were demolishing a cement wall in preparation for a renovation of the hospital's seventh floor. In the course of that work, plaintiff was trying to wheel a mini-container containing 500 to 800 pounds of construction debris to a hoist on the outside of the building so that workers could empty the contents. While pulling the mini-container, plaintiff noticed that it was moving only

"intermittently," and that it would "start and stop." When plaintiff eventually pulled hard on the container in an effort to move it, one of the wheels of the mini-container ran over his foot and came to rest there, injuring him. Within approximately 30 minutes of the alleged accident, plaintiff informed his foreman that the wheel on the mini-container had been "messed up."

Plaintiff commenced this action asserting causes of action under, among other things, Labor Law § 241(6). The Labor Law claim was predicated on Industrial Code (12 NYCRR) § 23-1.28(b), pertaining to hand-propelled vehicles.[1] With respect to those claims, plaintiff alleged in the complaint that the mini-container that had rolled over his foot did not have "free-running" wheels as required by the Industrial Code.

The motion court properly dismissed the complaint as against Cardella. Cardella established that it was not an agent of the owner under Labor Law § 241(6), since it did not have the authority to direct, supervise, or control the injury-producing

[1] Plaintiff originally commenced this action against three NYU defendants: New York University, NYU Langone Medical Center, and Hospital for Joint Diseases. After NYU Langone Medical Center and the Hospital for Joint Diseases admitted that they owned the property on the date of plaintiff's alleged accident, the parties agreed by stipulation that plaintiff would discontinue the action against New York University.

work (*see Lopez v Dagan*, 98 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]). Rather, Cardella was merely the supplier of the allegedly defective mini-container, against whom liability under the Labor Law cannot be imposed (*see Noah v 270 Lafayette Assoc.*, 233 AD2d 108, 109 [1st Dept 1996]).

However, the Labor Law § 241(6) claim against the NYU Hospital defendants should have gone forward. Plaintiff testified that immediately before the alleged accident, he struggled to move the mini-container after the wheel apparently became stuck, and that as a result, he was injured when the mini-container rolled onto his foot when he forcefully pulled it in an attempt to move it. This uncontradicted testimony presents a question of fact on whether the wheels on the mini-container were "free-running" as required by 12 NYCRR 23-1.28(b) (*see Freitas v New York City Tr. Auth.*, 249 AD2d 184, 185-186 [1st Dept 1998]), and the NYU Hospital defendants failed to carry their burden as the movant to show that the wheel on the mini-container was not defective (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]). Likewise, the motion court properly denied

plaintiff's cross motion for partial summary judgment on his § 241(6) claim.

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2328 The People of the State of New York, Respondent, Ind. 3630/07

-against-

Kahson B., Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Analisa Torres, J.), rendered December 21, 2009, convicting defendant, after a jury trial, of assault in the second degree, adjudicating him a youthful offender, and sentencing him to a term of five years' probation, affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The complainant identified defendant in photo and lineup identification procedures that were properly conducted. We reject the dissent's contention that we should find, contrary to the jury's finding, that the complainant was unable to correctly identify defendant. We disagree with any suggestion that, based on the complainant's condition due to the assault he suffered, causing some loss of consciousness, his identification is not credible. There is

nothing the dissenting justice points to in the record that would indicate that the complainant lost consciousness at the time he first saw his attacker.

In the cases cited by the dissent in which complainants' identifications were rejected and convictions reversed as a result, the reasons for completely discounting the identifications were far more compelling. In *People v Bailey* (102 AD3d 701 [2d Dept 2013]) the complainant was admittedly intoxicated, was unable to remember prominent features of the defendant's face, acknowledged that he had been looking mostly at a gun and had not had a good opportunity to look at the shooter, and, in addition, the identification took place more than two months after the crime. In *People v Russell* (99 AD3d 211 [1st Dept 2012]), there were numerous significant, and worrisome, discrepancies between the complainant's narrative and what was seen on the surveillance video, and a strong alibi defense along with a reasonable alternative explanation for why the complainant had recognized the defendant.

Those grounds for undercutting one-witness identifications are not comparable to the dizziness and loss of consciousness caused by the subject assault, and the limited nature of the complainant's two opportunities to look directly at his attacker. Our system of criminal justice relies on victims of violence

identifying their attackers when they are able to do so. It would be ironic indeed if the severity of an attack and the resulting injuries were to prompt courts to treat the subsequent identification as unworthy of belief, despite the complainant's certainty. Of course, the defense is entitled to question an identification based on the complainant's compromised condition caused by the attack. However, that argument did not sway the jury here, and upon our review of the evidence at trial, it does not appear that the complainant was unable to make an identification.

Any inconsistencies in the complainant's testimony were minor, possibly due to limitations in his English skills, and did not undermine his overall credibility. Nor are grounds to upset the verdict presented by jurors' post-verdict assertions of escalating tempers, shouting, and bad conduct by jurors during deliberations (*see People v Redd*, 164 AD2d 34 [1st Dept 1990]). In addition, the verdict may not be revisited based on jurors' change of heart after the verdict was announced, when defendant cried and denied committing the crime, or based on jurors' belated realization that the crime of which they convicted

defendant was a felony rather than a misdemeanor. A jury verdict may only be impeached upon a showing of improper influence (*see People v Brown*, 48 NY2d 388 [1979]), which was not established here.

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

GESMER, J. (dissenting)

I respectfully dissent.

The complainant in this case was clearly the victim of a heinous, unprovoked attack. However, the trial evidence raises a reasonable doubt as to whether he reliably identified defendant as one of his attackers. Accordingly, this is one of the rare cases in which, upon exercising our unique authority to act as a second jury empowered to assess the proof independently, we should determine that the People did not prove defendant's identity beyond a reasonable doubt, and acquit him (*see People v Delamota*, 18 NY3d 107, 116-117 [2011]).

FACTS

On August 21, 2007 at around 10:00 p.m., the complainant was attacked by a group of people near East 167th Street and Sheridan Avenue, close to his home in the Bronx.

At the time of the incident, the complainant was wearing two necklaces, two gold rings, a gold watch, and a gold bracelet. He was carrying a wallet that he testified contained cash he had obtained earlier, including $450 to pay bills, in the one pocket, and $50 in a zipper compartment.[1] Although the night was dark, the complainant testified that the area was lit by store signs.

[1] During cross-examination, the complainant testified he had spent $10 on groceries.

As he was walking, he saw a male teenager leaning against a car and speaking to a woman, and two men speaking to each other, one of whom was looking directly at him. The complainant described the man looking at him as six feet, one inch tall, with "corn rows, with the lump on the ear" and about 24 or 25 years old. He had seen him around the neighborhood about "ten to 15 times before." The complainant described the teenager leaning against the car as "slim, dark skinned with an afro," about "five six, seven," and "16, 17 or 18" years old. The complainant said he had seen the teenager in the neighborhood about four or five times. The complainant would later identify the teenager leaning against the car as defendant, and the man looking at him as the codefendant. However, the complainant testified that he had never seen the teenager and the man together before.

The complainant testified that, as he walked past the teenager, he heard him ask, "What the fuck you looking at [sic]?" The complainant turned around and the teenager asked him again, "[W]hat the fuck you looking at?" After this, the codefendant approached the complainant, told him the teenager who had spoken to him was his "little brother," and asked him, "What the fuck are you looking at him for?" The codefendant then punched the complainant in the face. The complainant felt dizzy from the punch and leaned on the hood of a nearby car for support. After

this, the complainant was punched from behind his back by a man whom the complainant later claimed was defendant. Although he was punched from behind, the complainant claims to have turned around at some point to look at his attacker. The punches caused the complainant to bleed heavily.

As the assault continued, the codefendant grabbed at the complainant's necklaces, causing one to fall to the ground. The complainant reached for it, but the codefendant stepped on it. The complainant attempted to place it in his back pocket but claimed to feel that someone, although he could not say who, reached in and took it. The complainant also claims that his wallet was taken out of his back pocket by someone he could not identify. He testified at trial and in the grand jury that his bracelet and watch were taken.

The complainant testified that others joined in the attack. He claimed that one of three triplets who lived in the neighborhood punched him, although he could not recall which triplet it was. He also testified that another man asked him what was wrong, and, when the complainant asked him for help, he too punched the complainant. The complainant could feel his many attackers kicking his body. He later said he had been in "[e]xtreme pain," and described the attack as the "worst thing [he] ever experienced." At trial, he testified that, in all,

about six or seven people attacked him.

Police Officers Heilig and Zerella came upon the complainant while on patrol. Officer Heilig testified that the complainant was bleeding from his face and mouth, and appeared to be "uneasy on his feet," and "confused and frustrated." When Officer Heilig asked what happened, the complainant responded, "Help me help me," but provided no further details about the incident. Officer Heilig testified that he had trouble communicating with the complainant, which he attributed to the blood in the complainant's "nose and . . . airway," and the complainant's being "frustrated and upset."[2]

Officer Heilig called an ambulance for the complainant. Officer Zerella prepared a complaint report that stated that the complainant had been "hit repeatedly by unknown perps." At defendant's trial, Officer Zerella had no independent recollection of the events of August 21, 2007.

EMT Martell responded to the call for an ambulance. He described the complainant as communicative and was able to speak with him. He noted in an ambulance call report (ACR) that the

[2] Officer Heilig also said that he believed English was not the complainant's first language. In fact, the complainant learned English as a child in Nigeria. He emigrated to the United States in 1990. The complainant described his English as "good" but not "perfect."

complainant stated that he was assaulted by "four or five males." EMT Martell also noted in the ACR that the complainant complained of loss of consciousness and dizziness.[3] While examining him, EMT Martell observed that the complainant had three hematomas on the left side of his forehead and was bleeding out of his nose, which appeared deformed. EMT Martell transported the complainant to Lincoln Hospital and provided him oxygen to address his dizziness. Because EMT Martell viewed the complainant's claim that he had lost consciousness as serious, he gave Lincoln Hospital advance notice that he was bringing in a patient.

The complainant's care at Lincoln Hospital was described at trial by Dr. Philbert. Although Dr. Philbert did not see the complainant until the morning of August 22, when he authorized his discharge, he had reviewed the complainant's medical records, which were admitted into evidence. Dr. Philbert testified that the complainant's diagnosis was "intercranial damage or loss of consciousness," a nasal bone fracture, nasal bleeding, and a lip abrasion. The complainant stated at the hospital that he had been assaulted by "three individuals." His medical records showed no injuries or trauma to his neck, body, or legs.

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[3] This is consistent with both the complainant's statement on cross-examination that he became "unconscious" and "zoned out" and his statement to the grand jury, brought out on cross-examination, that he "lost . . . consciousness."

Dr. Philbert testified that the complainant's belongings were collected and placed in safekeeping at the hospital, consistent with a routine procedure for trauma patients. According to the hospital's records, the complainant entered the hospital with, among other things, a wallet containing $40, a watch, and a bracelet.

On August 23, 2007, Detective Ovalle contacted the complainant about the incident and met with him at the 44th Precinct. At defendant's trial, Detective Ovalle recalled that, at that meeting, the complainant described the codefendant as a black male around six feet tall, between 200 and 220 pounds, with cornrows or braids and "displayed skin" under his right ear.

Detective Ovalle also testified on direct that the complainant had given him a description of the man believed to be defendant, but he could not recall this description. At one point on cross-examination, Detective Ovalle testified that the description was of a black male around the same age as the codefendant. At the time of their arrests, the codefendant was 23 years old and defendant was 16 or 17. Detective Ovalle also testified that the complainant could not recall any of his other attackers.

Detective Ovalle memorialized the complainant's description of the codefendant in a DD-5, a form used by detectives to

document investigations. Detective Ovalle did not include a description of defendant in the DD-5, despite his claim that the complainant had described defendant to him.

While the complainant was at the precinct, Detective Ovalle asked him to look at a set of photographs that he had assembled based on the complainant's description of the codefendant.[4] After looking at these photographs, the complainant identified the codefendant. Detective Ovalle did not ask the complainant to view a photo array in order to identify defendant.

The complainant testified at trial that he gave a description of the attacker he believed to be defendant to Detective Ovalle but he was unsure as to whether he gave this description on August 23, 2007 or some time later. At trial, he explained his confusion about the date by saying that the amount of pain he was in following the incident made it hard to remember; he also claimed that defendant's attorney confused him.

Detective Ovalle arrested the codefendant on August 28, 2007, relying largely on the complainant's identification of him. While the codefendant was at the precinct, his younger brother and defendant went to pick up his belongings. Detective Ovalle asked for identification from both young men so that he could run

[4] Detective Ovalle assembled this set of photographs using Photo Manager, which is essentially an electronic mug shot book.

a background check before giving them the codefendant's property. After the two young men left, he compiled a photo array consisting of defendant and five other men. Detective Ovalle testified that he put defendant in the photo array because he believed he was a friend of the codefendant and that they lived together, although he did not explain the basis for his belief. Detective Ovalle explained that there was a "possibility [defendant and the codefendant] could have been together at the time of the crime." However, Detective Ovalle admitted that he could not say that defendant matched any description given by the complainant, because he could not remember any description the complainant had given him. Detective Ovalle did not create a photo array containing a photograph of the codefendant's brother.

Detective Ovalle contacted the complainant on August 28, 2007 and asked him to return to the 44th Precinct to view a photo array. Detective Ovalle did not ask the complainant for another description of the individual he believed to be defendant before showing him the photo array. Detective Ovalle showed the complainant the photo array, including defendant's photograph, which was in the "No. 2" position, and asked him if he "recognized anybody that robbed him." The complainant identified defendant. Detective Ovalle issued an identification card for defendant's arrest. Defendant, through an attorney, voluntarily

surrendered himself on September 10, 2007, and was arrested.

On September 10, 2007, Detective Ovalle drove the complainant to 1028 Simpson Street to view a lineup. As in the photo array, defendant was in the "No. 2" position. Detective Ovalle asked the complainant if he recognized anyone, and he identified defendant.

Defendant and the codefendant were indicted on robbery and assault charges. At trial, the jury deliberated for several days and finally returned a verdict as to defendant, acquitting him of the robbery counts but convicting him of assault in the second degree.[5]

ANALYSIS

The Appellate Division possesses the "exclusive statutory authority to review the weight of the evidence in criminal cases" (*People v Bleakley*, 69 NY2d 490, 492-493 [1987]; CPL 470.15[5]). The Court of Appeals has explained:

> "This special power requires the court to affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*Delamota*, 18 NY3d at 116-17]).

[5]The jury hung as to the codefendant.

Since this is a determination made on the facts, this Court's conclusion that a guilty verdict is against the weight of the evidence "results in an unreviewable order that rectifies an unjust conviction and precludes subsequent re-prosecution" (*id.* at 117; CPL 450.90[2][a]). Accordingly, this power allows this Court to sit, "in effect, as a second jury" (*id.*).[6]

Here, I would find that the verdict was against the weight of the evidence for three interrelated reasons: the effect of the assault on the complainant's ability to identify defendant as one of his attackers, the initial identification of defendant in a photo array that was assembled without a sound basis for including defendant's photograph, and the inconsistencies in the complainant's account of the assault.

As to the complainant's ability to identify defendant, I would find that the trial evidence supports the conclusion that his identification of defendant as one of his attackers was unreliable because of his dizziness, loss of consciousness, and stress during and after the assault. Verdicts in other one-

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[6] While this unique power is in some sense broad, "[o]ur review of the . . . weight of the evidence is limited to the evidence actually introduced at trial" (*People v Dukes*, 284 AD2d 236, 236 [1st Dept 2001] *lv denied* 97 NY2d 681 [2001]). Therefore, I agree with the majority that we cannot consider either the posttrial repudiation of the verdict by some of the jurors or the trial court's statement that this Court might be inclined to intervene.

witness identification cases have been held to be against the weight of the evidence when the complainant's ability to accurately identify the perpetrator was impaired due to intoxication (*People v Bailey*, 102 AD3d 701, 703 [2d Dept 2013]) or stress (*People v Russell*, 99 AD3d 211, 215 [1st Dept 2012]).[7] This is consistent with the standard jury instruction, given in this case, that juries in one-witness prosecutions must consider "the mental, physical, and emotional state of the witness before, during, and after the observation" (CJI2d[NY] Identification-One Witness).

In this case, the complainant only claimed to have had two opportunities to observe the attacker he believed was defendant. The first opportunity came when the complainant turned around after this attacker asked for a second time why he was looking at him. The second opportunity came when the complainant turned around after being punched from behind by this attacker. The

[7] I cite these cases to illustrate that both this Court and the Second Department have considered various ways in which a complainant's perception could be adversely affected, in the context of determining whether a verdict was against the weight of the evidence in a one-witness identification case. I do not disagree with the majority that the facts of those cases differ in several respects from this case. However, in this case, as in *Bailey* and *Russell*, there are additional sources of doubt in the record, besides the complainant's impaired perception, that lead me to the conclusion that the verdict was against the weight of the evidence.

first opportunity immediately preceded, and the second opportunity immediately followed, the codefendant's punch, which made the complainant so dizzy that he had to lean on a car for support. In addition to being dizzied, the complainant also lost consciousness, a fact that appears several times in the record: in the complainant's testimony on cross-examination, in prior grand jury testimony brought out on cross-examination, in EMT Martell's ACR, and in the testimony of the People's medical expert, Dr. Philbert.

The complainant described the incident as the "worst" thing he had ever experienced. Officer Heilig, the first witness to interact with the complainant following the assault, described him as acting erratically.

Accordingly, the complainant's mental, physical, and emotional state during and after his observation of this attacker supports the conclusion that the circumstances of the assault "negatively affect[ed] the reliability of his identification of . . . defendant" (*Bailey*, 102 AD3d at 703). While the majority highlights that the trial jury did not find this way, our weight of the evidence review empowers us to perform a "de novo review of the evidence." (*People v Diaz*, 115 AD3d 498, 500 [1st Dept 2014]). Thus, we are not tethered to the jury's interpretation of the facts. Particularly in a case such as this one, which

presents a significant issue of identification, our careful reexamination of the proof is important to ensuring that defendant was not wrongfully convicted. As the Court of Appeals has stated:

> "We are concerned, of course, about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years. The unfortunate fact is that juries occasionally do not return proper verdicts. An important judicial bulwark against an improper criminal conviction is . . . the protection provided by weight of the evidence examination in an intermediate appellate court" (*Delamota*, 18 NY3d at 116).

I agree with the majority that the testimony of complainants who suffer serious injuries should be given careful and thoughtful attention by our criminal courts. However, under the unique facts of this case, and when considered alongside the other sources of doubt in the record, the complainant's dizziness, loss of consciousness, and stress suggest that he misidentified defendant as one of his attackers.

Next, the complainant's initial identification of defendant occurred in a photo array in which Detective Ovalle included defendant's photograph without any sound basis for doing so. Detective Ovalle conceded that he could not say that defendant matched any description he had been given by the complainant. Indeed, Detective Ovalle did not recall any description of defendant by the complainant, and at one point claimed that the

complainant had described him inaccurately as being the same age as the codefendant. Detective Ovalle's paperwork contained no contemporaneous or close-in-time memorialized description of defendant by the complainant, which is in striking contrast to the complainant's contemporaneously recorded descriptions of the codefendant.[8]

Instead, Detective Ovalle included defendant in a photo array based only on his accompanying the codefendant's brother to the precinct to pick up the codefendant's belongings. If anything, this should have suggested that defendant was not one of the complainant's attackers. If defendant were the codefendant's accomplice, it would be extremely unlikely that he would travel to the precinct where the codefendant was being held and then give his identification to a detective when asked.

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[8] Creating a photo array in the absence of a contemporaneous description of the assailant runs afoul of the Court of Appeals' statement that

> "[c]omparison of the verbal description — made on the basis of recollection alone, close to the time of the crime — with the actual features of the person later . . . identified can assist the jury in evaluating the degree to which the later . . . identification may or may not have been the product of intervening memory failure" (*People v Huertas*, 75 NY2d 487, 493 [1990]).

Here, the sparse and inconsistent evidence about the complainant's purported close-in-time description of defendant hinders this Court's ability to make the comparison endorsed by *Huertas*.

Accordingly, a finding that the verdict is against the weight of the evidence is also supported by the lack of a sound basis for the photo array in which the complainant first identified defendant (*cf*. *Bailey*, 102 AD3d at 703 [finding verdict against the weight of the evidence when, among other issues, lineup evidence was undermined by a two-month delay following the time of the incident]).[9]

Finally, I would find the verdict against the weight of the evidence based on the complainant's inconsistencies in describing several details of the assault.

First, the complainant was inconsistent in describing the number of his attackers. He told Police Officer Zerella that he was attacked by an unspecified number of attackers. He told EMT Martell that he was attacked by four or five people. He told Lincoln Hospital staff that he had been attacked by three people. At trial in 2009, he testified that he was assaulted by six or seven people.

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[9] The motion court's denial of the motion to suppress does not bar us from looking carefully at the photo array. Presumably, in *Bailey*, the lineup evidence had also survived a pretrial suppression hearing. Even though the photo array in this case was found to be properly conducted, "suggestiveness is only one of the possible sources of [identification] mistakes. A witness to whom no one has made any suggestion can be mistaken for any one or more of many reasons" (*People v Marte*, 12 NY3d 583, 589 [2009], *cert denied* 559 US 941 [2010]).

Second, the complainant testified that he was kicked "all over," and felt "extreme pain." This was inconsistent with Dr. Philbert's testimony that there was no trauma or visible injury to his body or legs.

Third, the complainant testified at trial and in the grand jury that his attackers stole his watch and bracelet. His medical records established that he entered Lincoln Hospital with both the watch and the bracelet in his possession.

Fourth, the complainant claimed that his attackers took his wallet, which contained close to $500. His medical records established that, when he entered Lincoln Hospital, his wallet contained $40. It seems implausible that his attackers took his wallet, removed some money from it, and then returned the wallet to the complainant before fleeing.

Fifth, Detective Ovalle testified that the complainant could not remember anything about his attackers, other than defendant and the codefendant. However, the complainant testified that one of his assailants, other than defendant and the codefendant, was one of three triplets who lived in his neighborhood.

I disagree with the majority's view that these inconsistencies are minor. When considered with the other evidence in the record, the complainant's inability to accurately recall details of the incident buttresses the doubts surrounding

his identification of defendant. In other one-witness identification cases, this Court has held that the complainant's inconsistencies supported a finding that the verdict was against the weight of the evidence when combined with the record's other sources of doubt (*see Diaz*, 115 AD3d at 499-500 ["Although they are not as significant, the complainant demonstrated other lapses in memory which, when considered in light of those two more substantial inconsistencies, lead us . . . to harbor significant doubts as to the complainant's ability to accurately identify his attacker"]; *see also Russell*, 99 AD3d at 211 ["While no one factor in this case mandates reversal, the combination of factors . . . (is) sufficient to warrant reversal based on the weight of the evidence"]).

I also disagree with the majority's implication that these inconsistencies should be discounted as the byproduct of a language barrier. The complainant testified that he learned English at a young age in Nigeria. He had been living in the United States more than 15 years at the time of the incident. Only Officer Heilig found the complainant hard to communicate with, and he attributed it to the complainant's stress and the amount of blood in his "nose and . . . airway." At trial, the complainant demonstrated an ability to express himself in English and, when he was asked questions he did not understand, he

requested clarification. In all, the record does not suggest that his English skills were so poor that these inconsistencies flowed from a language barrier.

Accordingly, I would find that the trial evidence lacked "proof that leaves [one] so firmly convinced of the defendant's guilt that [there is] no reasonable doubt . . . of the defendant's identity as the person who committed the crime" (CJI2d[NY] Reasonable Doubt). I would therefore reverse the judgment and dismiss the indictment.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, JJ.

2822- Index 650919/14
2823-
2824 Oribe Canales, derivatively on behalf of
Oribe Hair Care, LLC, etc.,
Plaintiff-Respondent,

-against-

Tevya Finger, et al.,
Defendants-Appellants.

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Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL (Michael N. Kreitzer of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellants.

Fish & Richardson, PC, New York (Brian J. Doyle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 21, 2015,[1] to the extent it set an undertaking in the amount of $250,000, unanimously affirmed, without costs, and the appeal therefrom, to the extent it granted plaintiff's motion for a temporary restraining order (TRO), unanimously dismissed, without costs, as moot; order, same court and Justice, entered June 5, 2015, which granted plaintiff's motion to act as his own surety and denied defendants' motion to increase the amount of the undertaking, unanimously modified, on the law and the facts, to alter the form of the undertaking;

[1] The order was a transcript of a decision dated February 25, 2015, subsequently so-ordered by the Supreme Court.

order, same court and Justice, entered July 14, 2015, which, upon vacating the TRO and denying plaintiff a preliminary injunction, vacated the undertaking without defendants having an opportunity to move against it, unanimously modified, on the law, the facts, and in the exercise of discretion, to set the undertaking in the amount of $250,000 in cash placed in escrow or a surety bond, pending a determination of defendants' damages, if any, as a result of the pendency of the TRO, and otherwise affirmed, without costs.

The IAS court did not abuse its discretion in setting an undertaking at $250,000 for the TRO. Based on the record before the court, this amount was reasonably related to defendants' potential harm from the pendency of the TRO (*see Peyton v PWV Acquisition LLC*, 101 AD3d 446, 447 [1st Dept 2012]).

However, the court erred in vacating the undertaking when it denied the preliminary injunction and dissolved the TRO. The purpose of the undertaking is to provide a source of recovery to the nonmovant for damages suffered from the pendency of the restraint (*see* CPLR 6315). As such, the undertaking should be reinstated, in the amount of $250,000, pending a determination of defendants' damages, if any, from the pendency of the TRO. Here, the court allowed plaintiff to use his personal condominium, which was co-owned with another person, as security. As

defendants correctly note, if they established damages from the TRO and wanted to collect, they would have to foreclose on any lien that was filed, and bring another proceeding against plaintiff and the co-owner to force the sale of the real property. This defeats the purpose of the undertaking here, where the TRO has been vacated. Thus, under these circumstances, the undertaking of $250,000, shall be from a third-party surety, or funds placed in an escrow account. The undertaking, in this form, shall be posted within 15 days of the date of this order.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3104 The People of the State of New York, Ind. 2120/14
Respondent,

-against-

Eric Patterson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda K. Regan of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered November 26, 2014,

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

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

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3105 Venbi Arifi, Index 159334/12
Plaintiff-Appellant,

-against-

Central Moving & Storage Co., Inc.,
Defendant-Respondent.

_____

Stewart Lee Karlin Law Group, PC, New York (Daniel E. Dugan of counsel), for appellant.

Pitta & Giblin LLP, New York (Barry N. Saltzman of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered December 4, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In moving for summary judgment dismissing plaintiff's claims for age-based employment discrimination under the New York State and City Human Rights Laws, defendant proffered video footage, which it believed showed plaintiff and another employee surveying and intending to purloin a customer's computer equipment, as a legitimate, nondiscriminatory reason for terminating plaintiff (*see Stephenson v Hotel Employees & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 271 [2006]). In response to this showing, plaintiff failed to point to any evidence raising an

issue of fact as to whether defendant's proffered reason was "pretextual or whether [plaintiff's protected characteristic] otherwise played a part in its decision" (*Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 [1st Dept 2015]; *see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 39-40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

The absence of any evidence of age-based discriminatory animus likewise "is fatal to [plaintiff's] claim of hostile work environment" (*Llanos v City of New York*, 129 AD3d 620, 620 [1st Dept 2015]; *see Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3106 Jimmy Vargas, Index 160556/13
Plaintiff-Appellant,

-against-

Cadwalader Wickersham & Taft, LLP,
Defendant-Respondent.

_____

Diamond & Diamond LLC, Brooklyn (Stuart Diamond of counsel), for appellant.

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

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 12, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment was improperly granted, because the record presents triable issues of fact as to whether defendant had constructive notice of the alleged defective condition. The deposition testimony of defendant's manager of office and building services and the affidavit of its assistant manager are insufficient to demonstrate that defendant lacked constructive notice of the piece of metal sticking out from the leg of one of its mailroom tables, because both individuals lacked personal knowledge as to when the table or its legs were last inspected or

their condition before the accident (*see e.g. Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537 [1st Dept 2016], *affd* 27 NY3d 1055 [2016]; *Rodriquez v Concourse Vil. Inc.*, 104 AD3d 410 [1st Dept 2013]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3110 The People of the State of New York, Ind. 2269/08
Respondent,

-against-

Keith Waters,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel) and Wachtell, Lipton, Rosen & Katz, New York (Michael J. McDuffie of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered January 4, 2010, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to concurrent terms of 16 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations, including its evaluation of any discrepancies between an identifying officer's description of defendant and his actual appearance. There was ample direct and circumstantial evidence lacking any reasonable explanation except

that defendant participated in the drug sales at issue.

The court properly admitted, under the hearsay exception for coconspirator declarations, a recorded narcotics-related conversation between the codefendant and an undercover officer, in which the codefendant, using defendant's first name, implicated defendant. The People established the requisite independent prima facie showing that the defendant participated in the conspiracy (*see generally People v Caban*, 5 NY3d 143, 148-151 [2005]). There was extensive evidence connecting defendant to the conspiracy, including an officer's observations of defendant at the time of one of the sales. To the extent that defendant is arguing that the People improperly rendered the codefendant unavailable as a witness by joining him for trial with defendant, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendant did not preserve his present claim that exclusion of the general public (as opposed to exclusion of a particular spectator not at issue on appeal) from the courtroom during the undercover officer's testimony was unwarranted, and we decline to review it in the interest of justice. Defendant's arguments are similar to arguments we rejected on the codefendant's appeal

(*People v Spears*, 94 AD3d 498 [1st Dept 2012], *lv denied* 19 NY3d 1001 [2012]), and we find no reason to reach a different conclusion either as to preservation, or on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3111-
3112 Andrew Flores,
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Index No. 15618/07

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about January 26, 2016, insofar as appealed from as limited by the briefs, upon a jury verdict, awarding plaintiff damages in the aggregate amount of $1,032,532.65, and bringing up for review an order, same court and Justice, entered on or about August 7, 2015, which, insofar as appealed from as limited by the briefs, denied defendant's motion to set aside the verdict pursuant to CPLR 4404(a), unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff tripped and fell over a wooden board used to cover the edge of the train platform at a subway station. On the day in question, plaintiff was walking across a crowded platform

towards a standing subway train, when his right foot became ensnared in a defect in the cover board, which he described as being 12 inches in width and which his foot became stuck underneath, thereby causing his left leg to become caught in the gap between the train and the platform.

The Court of Appeals has held that "'there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable,' and therefore . . . [dismissal of the complaint] 'based exclusively on the dimension[s] of the . . . defect is unacceptable'" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015], quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Factors considered in determining whether a defect is trivial as a matter of law include "the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere*, 90 NY2d at 978 [internal quotation marks omitted]).

Here, the verdict was supported by sufficient evidence because the alleged defect in the cover board on the subway platform was not trivial as a matter of law. Plaintiff's testimony describing the defective nature of the cover board, and photographs of this condition, showed that there was an edge to the board that posed a tripping hazard that ultimately ensnared

plaintiff's right foot. Given the circumstances surrounding the accident, namely that plaintiff was attempting to traverse a crowded subway station during morning rush hour, it is evident that plaintiff's observation of the defect, and even the cover board itself, was highly unlikely (*see Glickman v City of New York*, 297 AD2d 220 [1st Dept 2002]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *compare Alonso v New York City Tr. Auth.*, 298 AD2d 311 [1st Dept 2002]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3113 Toma Kalaj, et al., Index 156556/15
Plaintiffs-Respondents,

-against-

Tortola Salon,
Defendant-Appellant.

_____

Law Offices of Tobias & Kuhn, New York (Alexander Statsky of counsel), for appellant.

The McHale Law Firm, P.C., New York (Paul A. Burg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 23, 2015, which, in this action for personal injuries sustained when plaintiffs slipped and fell on ice on the sidewalk in front of defendant salon, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant's documentary evidence, attempting to show that it did not own the building adjacent to the sidewalk, does not conclusively refute plaintiffs' allegation that defendant owed a

duty to plaintiffs with regard to the subject sidewalk (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3114 The People of the State of New York, Ind. 4315/13
Respondent,

-against-

Armando Torriente,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 16, 2014,

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

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

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3115 Board of Managers of Harbor Pointe at Shorehaven Condominium III,
Plaintiff-Respondent,

-against-

Janice I. Hidalgo Melendez,
Defendant-Appellant,

The Secretary of Housing and Urban Development, et al.,
Defendants.

Adam Plotch,
Nonparty Respondent.

Index 260025/14

Law Office of Ricardo Aguirre, Bronx (Peter Shipman of counsel), for appellant.

Jay L. Yackow, Westbury, for Board of Managers of Harbor Pointe at Shorehaven Condominium III, respondent.

Law Offices of Thomas J. Finn, Forest Hills (Thomas J. Finn of counsel), for Adam Plotch, respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about July 30, 2015, which, after a traverse hearing, denied defendant Janice I. Hidalgo Melendez's motion to vacate a default judgment of foreclosure and sale, unanimously affirmed, without costs.

We decline to disturb the hearing court's credibility-based determination that defendant's blanket denial of receipt of every document in this action failed to rebut the affidavits of service

and testimony of plaintiff's process server (*see Matter of de Sanchez*, 57 AD3d 452 [1st Dept 2008]). Defendant's contentions that the hearing court improperly allocated the burden of proof and improperly admitted evidence are unpreserved, and we decline to reach them. Were we to reach these contentions, we would find them unavailing.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3116 Lupe Diaz, Index 306604/12
Plaintiff-Respondent,

Roberto Diaz,
Plaintiff,

-against-

NY Affordable Housing DeKalb Associates LLC.,
Defendant-Appellant.

_____

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for appellant.

Ferro, Kuba, Mangano, Skylar, PC, New York (Kenneth Eugene Mangano of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J., entered on or about April 18, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly found that defendant failed to provide evidence concerning its inspection, maintenance or cleaning of the stairs where plaintiff fell and, therefore, failed to make a prima facie showing of the absence of notice of the liquid and debris on the step and of the loose stair (*see Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445 [1st Dept 2014]; *Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-632 [1st Dept 2015]).

Moreover, even if defendant satisfied its initial burden,

the testimony of plaintiff's witnesses that wetness in the area was a recurring problem and that they had complained to the superintendent and to the management office about the loose and cracked stairs on the staircase was sufficient to raise triable issues of fact (*see Bido v 876-882 Realty*, LLC, 41 AD3d 311, 312 [1st Dept 2007]).

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3117 In re William Bramwell, Index 100606/15
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

1225 Park Corp.,
Intervenor-Respondent-Respondent.

_____

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for appellant.

Mark F. Palomino, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 1225 Park Corp., respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered December 9, 2015, denying the petition to annul a final order of respondent New York State Division of Housing and Community Renewal (DHCR), dated February 4, 2015, which affirmed an order of the Rent Administrator, dated July 23, 2014, that deregulated petitioner's rent stabilized apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR correctly determined that petitioner's apartment continued to be subject to high rent/high income luxury decontrol

after the expiration of J-51 tax benefits, because the building was rent stabilized prior to the receipt of those benefits (*see* Rent Stabilization Law of 1969 [Administrative Code of the City of NY] § 26-504[c]; RPTL 489[7][b][2]). "[A] building that is already regulated when it receives J-51 benefits will continue to be regulated under the original rent-regulation scheme when the tax benefits expire . . . . [Reversion to pre-J51 status] includes the right of an owner to seek luxury deregulation in appropriate cases" (*Matter of Schiffren v Lawlor*, 101 AD3d 456, 457 [1st Dept 2012]). Contrary to petitioner's argument, the owner was not required to serve a J-51 notice/J-51 rider to petitioner's leases to trigger reversion of his rent stabilized apartment to the original rent-regulation regime (*72A Realty Assoc. v Lucas*, 101 AD3d 401, 402 n [1st Dept 2012]). Under Administrative Code § 26-504(c) and RPTL 489(7)(b)(2), a notice informing petitioner that his apartment would cease to be rent stabilized after the J-51 benefits expired would have been incorrect; those statutes provide that such an apartment will remain rent stabilized after the expiration of J-51 tax benefits.

Contrary to petitioner's argument, this conclusion is consistent with the holding of *Roberts v Tishman Speyer Props, L.P.* (13 NY3d 270 [2009]), that all apartments in a building receiving J-51 tax benefits are exempt from deregulation while

the building is receiving the benefits. Upon termination of the benefits, however, the applicable statutes expressly provide for different treatment of apartments that were regulated before the receipt of J-51 tax benefits and those that became rent stabilized solely by virtue of J-51 tax benefits.

The owner's failure to serve an income certification form (ICF) upon petitioner and to name him in Section I of the petition for deregulation were non-prejudicial errors that did not amount to a violation of lawful procedure (*see Matter of Klein v New York State Div. of Hous. & Community Renewal*, 17 AD3d 186 [1st Dept 2005]). Since petitioner and his wife were the only tenants of record, by serving the wife with an ICF, the owner substantially complied with Administrative Code § 26-504.3 and Rent Stabilization Code (9 NYCRR) § 2531.2. Petitioner himself could have completed the ICF, even if it was addressed only to his wife (*see Matter of Klein*, 17 AD3d at 187). He was listed among the tenants and occupants of the apartment in the owner's petition for deregulation, and he and his wife, who were

represented by counsel, answered the petition for deregulation.

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3118 Peter Alphas, Index 155790/15
Plaintiff-Appellant,

-against-

Scott Smith, et al.,
Defendants-Respondents.

_____

Spinak Law Office, White Plains (Robert Spinak of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Philip J. Furia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 8, 2016, which granted defendants' motion to dismiss the second amended complaint pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to deny the motion as to the first cause of action insofar as it relates to plaintiff's individual damages, and otherwise affirmed, without costs.

In opposition to defendants' motion, plaintiff's counsel submitted an affirmation citing *Good Old Days Tavern v Zwirn* (259 AD2d 300 [1st Dept 1999]) and averring that plaintiff was the president and sole shareholder of the Alphas Company of New York, Inc. (Alphas NY) and that running that corporation was the business from which plaintiff derived his livelihood. Thus, contrary to defendants' contention, plaintiff is not claiming for the first time on appeal to have derived his livelihood from

Alphas NY. In light of the similarity between this case and *Good Old Days,* and in light of the procedural posture of this case (a CPLR 3211 motion to dismiss), plaintiff should be allowed to assert an individual malpractice claim, even though defendants represented only Alphas NY in the federal action in which they allegedly committed malpractice. However, plaintiff's damages are limited to those he suffered individually (e.g., the loss of $1.4 million in unsecured loans that he made to Alphas NY, the losses he incurred as a result of guaranteeing the company's debt, lost income, loss of his Perishable Agricultural Commodities Act license, a lower personal credit score, legal fees for his personal liabilities, and the cancellation of an agreement for 30% of his interest in Alphas NY), as opposed to damages suffered by Alphas NY (e.g., the $1.2 million judgment entered against it in the federal action, its bankruptcy, the liquidation of its cooperative shares in the Hunts Point Terminal Produce Cooperative Association, and the legal fees incurred by it) (*see generally Griffith v Medical Quadrangle,* 5 AD3d 151, 152 [1st Dept 2004]).

While the motion court did not discuss whether the second cause of action (breach of contract and fiduciary duties) was duplicative of the first (malpractice), defendants did make this argument below, as well as on appeal. Defendants are correct.

"Unless a plaintiff alleges that an attorney defendant breached a promise to achieve a specific result, a claim for breach of contract is insufficient and duplicative of the malpractice claim" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal citations and quotation marks omitted]). As in *Mamoon*, "[p]laintiff does not allege that . . . defendants breached a promise to achieve a specific result" (*id.*).

Plaintiff argued below that the fiduciary duty claim was not "predicated on the same allegations" as the malpractice claim (*Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002]) because the former alleged that defendants acted willfully and intentionally due to a conflict of interest, whereas the latter merely alleged that they were negligent. However, we have found that a breach of fiduciary duty claim was "properly dismissed" as "redundant of the legal malpractice cause of action" (*Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd* 14 NY3d 874 [2010]), even though the fiduciary duty claim was based on the defendants' conflict of interest (*id.*).

Plaintiff also contended below that the relief sought in the fiduciary duty claim was not "identical to that sought in the malpractice cause of action" (*Nevelson*, 290 AD2d at 400). However, we have dismissed a fiduciary duty claim as duplicative

of a malpractice claim where it "allege[d] *similar* damages" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003] [emphasis added]). Except for damages for emotional and mental distress – which cannot be recovered on a legal malpractice claim (*see Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]; *see also Dombrowski v Bulson*, 19 NY3d 347, 349, 351-352 [2012]) – and punitive damages – which are "awarded only in exceptional cases" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013]; *see also Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 13 [1st Dept 2008]) – the damages sought in the first and second causes of action are the same.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3119 In re Carolyn Morales, Index 101312/14
Petitioner,

-against-

Roberto Velez, etc., et al.,
Respondents.

_____

Bronx Legal Services, Bronx (Maxine A. Ketcher of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for respondents.

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Determination of respondent Office of Children and Family Services, dated July 10, 2014, which, after a fair hearing, found that petitioner maltreated the subject child, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered July 15, 2015), dismissed, without costs.

The determination that a fair determination of the evidence showed that petitioner maltreated her foster child, is supported by substantial evidence (*see e.g. Matter of Valentine v New York State Cent. Register of Child Abusers & Maltreatment*, 37 AD3d 249 [1st Dept 2007]), including petitioner's admission that she struck the child, and a report from an examining therapist who found that the child had belt-shaped welts on her body (*see e.g.*

Matter of Castilloux v New York State Off. of Children & Family Servs., 16 AD3d 1061 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]; *Matter of Vincent KK. v State of N.Y. Off. of Children & Family Servs.*, 284 AD2d 777 [3d Dept 2001]). The Administrative Law Judge (ALJ) also properly found that the child, a foster child with a diagnosis of post-traumatic stress disorder, had a special vulnerability, and that petitioner was barred from using corporal punishment against her (*see* 18 NYCRR 441.9[c]). Due to the child's special vulnerability, petitioner's use of a belt to whip the child physically injured her and put her at risk of emotional and physical impairment. Furthermore, petitioner showed no remorse, denying that she used a belt on the child. There exists no basis to disturb the ALJ's conclusion that petitioner likely would exercise the same poor judgment if faced with similar circumstances in the future.

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3120 The People of the State of New York, Ind. 1497/13
Respondent,

-against-

Michael Rodriguez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 27, 2014, convicting defendant, upon his plea of guilty, of operating as a major trafficker and conspiracy in the second degree, and sentencing him to an aggregate term of 13 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the trafficking conviction to 10 years, and otherwise affirmed.

We do not find that defendant made a valid appeal waiver, and we find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3121-
3122N Violeta M. Gamino,
Plaintiff-Respondent,

-against-

DDSR Properties, Inc.,
Defendant-Appellant.

Index 302232/11

_____

Maizes & Maizes, LLP, Bronx (Michael H. Maizes of counsel), for appellant.

The Law Offices of Helen F. Dalton & Associates, P.C., Forest Hills (Oneshwer Michael Totaram of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 28, 2015, which denied defendant's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered April 13, 2016, which denied defendant's motion to compel plaintiff to submit to a medical examination, preclude plaintiff from submitting evidence of her physical condition at trial, or vacate the note of issue, unanimously modified, on the law, to require plaintiff to serve HIPAA compliant authorizations on defendant's counsel within 30 days of entry of this order, and otherwise affirmed, without costs.

Issues of fact exist as to whether there was snowfall at the time and location of plaintiff's accident and, if so, whether the ice on which plaintiff allegedly slipped and fell derived from

prior snowfalls and existed for a sufficient length of time to put defendant on notice (*see Ndiaye v NEP W. 119th St. LP* 124 AD3d 427, 428 [1st Dept 2015]). Specifically, both plaintiff and her partner submitted affidavits stating that it did not snow on the day of her accident until after the accident, plaintiff testified that there was ice on the ground at the time of her accident, and her partner averred that there was ice at the location of the accident an hour before it started snowing and that it had not snowed in days prior to the accident, which was corroborated by daily meteorological records which also showed an accumulation of 15 inches of snow on the ground from previous snowfalls. The meteorological records relied on by defendant showing snow at LaGuardia Airport at the time of plaintiff's accident, but unaccompanied by an expert affidavit, are not dispositive of weather conditions in the Bronx, where the accident occurred (*Duffy-Duncan v Berns & Castro*, 45 AD3d 489, 490 [1st Dept 2007]; *see also Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]).

Further, Supreme Court did not abuse its discretion in denying defendant's motion, made some 10 months after the note of

issue had been filed, to compel plaintiff to submit to a medical evaluation. However, plaintiff should be required to serve HIPAA compliant authorizations on defendant's counsel within 30 days of entry of this order.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3123N Herman Rookwood, et al., Index 301784/13
Plaintiffs-Appellants,

-against-

Busy B's Child Care Daycare Inc., et al.,
Defendants-Respondents.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for appellants

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains (John A. Darminio of counsel), for Busy B's Child Daycare Inc., respondent.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Raquel Burton, Roger A. Burton and Margaret Burton-Forrester, respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 1, 2015, which granted plaintiffs' motion for discovery and spoliation sanctions against defendants to the extent of precluding the individual defendants from presenting evidence as to the condition of the subject stairs at the time of plaintiff Herman Rookwood's accident, and otherwise denied the motion, unanimously modified, on the law, on the facts, and in the exercise of discretion, to grant the motion to the extent of striking defendants' answers, and as so modified, affirmed, without costs.

Herman Rookwood seeks damages for injuries sustained by him

due to an allegedly defective staircase at premises owned by the individual defendants and leased to defendant daycare.

Plaintiffs' pre-action service of preservation letters on the daycare, the initiation of this action, and the issuance of the preliminary conference order, placed defendants on notice of the need to preserve the staircase. The staircase was removed and destroyed in November 2013, days before the scheduled court-ordered inspection. As found by the motion court, "[I]t is clear that the individual defendants destroyed the stairs in question in violation of the order of th[e] court, knowing that plaintiff's inspection was to take place a few days later."

The intentional destruction of the staircase, key physical evidence, severely prejudices plaintiffs' ability to prove their case, and warrants the extreme sanction of striking defendants' answers (*see Chan v Cheung*, 138 AD3d 484, 486 [1st Dept 2016]; *Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]). The record contains no evidence that photographs depicting the staircase exist. Nor is this a case where plaintiffs sat on their rights (*compare Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010] [striking answer not warranted where, among other things, the plaintiff did not schedule an inspection of premises for more than two years], *and Jimenez v Weiner*, 8 AD3d 133 [1st Dept 2004] [striking answer not warranted where, among other things, the

ramp at issue was preserved for a reasonable period of time, during which no inspection was held by the plaintiff]).

The mere fact that the daycare did not own the premises does not warrant the denial of the motion to strike defendants' answers or the imposition of a lesser penalty, given that plaintiffs served the daycare with a preservation letter and that the daycare's chief executive officer was one of the owners of the premises (*see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 219-220 [1st Dept 2004]; *Amaris v Sharp Elecs. Corp.*, 304 AD2d 457, 457-458 [1st Dept 2003], *lv denied* 1 NY3d 507 [2004]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3124N David Mema, et al., Index 452392/15
Plaintiffs-Respondents,

-against-

25 Broadway Realty doing business as
The Wolfson Group, et al.,
Defendants,

One State Street, LLC,
Defendant-Appellant.

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Carolyn Comparato of counsel), for appellant.

Daniel J. Costello, Staten Island, for respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered December 17, 2015, which denied defendant One State Street, LLC's (One State Street) motion to vacate its default, extend its time to serve an answer, and compel plaintiff to accept service of the answer nunc pro tunc, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Supreme Court correctly determined that the affidavit One State Street submitted in support of its motion sufficiently demonstrated that it did not personally receive the summons and

complaint in time to defend, but erred when it determined that One State Street did not present a meritorious defense (CPLR 317; *see Marte v 102-06 43 Ave., LLC*, 135 AD3d 457 [1st Dept 2016]; *see Ortiz v City of New York*, 103 AD3d 468, 469 [1st Dept 2013]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3125 The People of the State of New York, Respondent, Ind. 4104/13

-against-

Adam Rivera, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Daniel P. FitzGerald, J. at plea and sentencing), rendered November 5, 2014, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's claim that his abandonment of the marijuana that initially prompted his arrest was in response to unlawful police activity is unpreserved because counsel did not raise that claim at the hearing, and the record does not establish that the court "expressly decided" this issue "in re[s]ponse to a protest by a party" (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263-264 [1st Dept 2007]).

We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Inasmuch as the sergeant had not engaged defendant in any way before defendant threw the marijuana to the ground, the sergeant's conduct did not constitute even a level one intrusion. Regardless of the sergeant's subjective intent, at the time defendant abandoned the marijuana, the police had not yet interfered with him in any way (*see e.g. People v Foster*, 302 AD2d 403 [2d Dept 2003], *lv denied* 100 NY2d 581 [2003]; *People v Sanchez*, 248 AD2d 306, 307 [1998], *lv denied* 92 NY2d 930 [1998]; *see also People v Thornton*, 238 AD2d 33 [1st Dept 1998]). In any event, the observation of defendant counting small objects in his hand in a drug-prone location provided, at least, an objective, credible reason to warrant a level one request for information, particularly given the well-known fact that "street-level drug sales typically involve small, easily concealable packages" (*People v Graham*, 211 AD2d 55, 59 [1st Dept 1995], *lv denied* 86 NY2d 795 [1995]). Accordingly, there is no basis for finding that defendant's abandonment of the marijuana was prompted by any unlawful conduct by the police.

The stationhouse strip search that revealed a quantity of cocaine was based on reasonable suspicion that defendant was concealing evidence underneath his clothing, and the search was

conducted in a reasonable manner (*see People v Hall*, 10 NY3d 303, 310-311 [2008]). The sergeant found a safety pin attached near the "pocket area" of defendant's pants, and was aware that drug dealers sometimes used safety pins to secure drugs inside their clothing. Additionally, the police encountered defendant in a drug-prone area, he answered evasively when asked where he lived, and his behavior while being patted down was suspiciously aggressive. The record does not support defendant's claim that the positioning of the pin was incompatible with using it to hide drugs. Given the totality of circumstances, the police had the requisite reasonable suspicion that defendant was using the safety pin to conceal drugs under his clothing.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3127 In re B & M Nachos Corp., Petitioner, Index 100651/16

-against-

New York State Liquor Authority, Respondent.

_____

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for respondent.

_____

Determination of respondent New York State Liquor Authority (SLA), dated February 26, 2016, sustaining charges of violations of Alcoholic Beverage Control Law § 65(1) and 9 NYCRR 48.2, and imposing a civil penalty of $7,500, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Kathryn Freed, J.], entered on or about July 19, 2016), dismissed, without costs.

An underage agent's four typewritten supporting depositions, each signed by the agent and containing a notice pursuant to Penal Law § 210.45, constitute the functional equivalent of a statement under oath (*see Matter of Shermaine J.*, 208 AD2d 158, 165 [1st Dept 1995]) and substantial evidence establishing a violation of Alcoholic Beverage Control Law § 65(1) (*see Matter*

of Purdy v Kreisberg, 47 NY2d 354, 358 [1979]; *Matter of 25-24 Café Concerto Ltd. v New York State Liq. Auth.*, 65 AD3d 260, 265-266 [1st Dept 2009]). In each of the depositions, the agent noted her own birth date in March 1995 and the date of the transaction in September 2015, thereby establishing that she was less than 21 years of age; described the purchase of a named alcoholic beverage, or series of beverages; identified the sale as having occurred in petitioner's premises; and identified by name the bartender who sold the beverages in each transaction. The underage agent also noted that, in each case, neither the vending bartender nor any other agent of petitioner asked her how old she was or for identification. The agent's sworn statements of her own age were supported by a photocopy of her driver's license, by state police database documents verifying the license's accuracy, and by the supervising police lieutenant's testimony that he checked the license on the night of the incident to ensure that the agent was under 21.

The underage agent's statements, detailing four separate transactions from four separate bartenders within a space of less than 15 minutes, constitute substantial evidence of a lack of adequate supervision at the premises, in violation of 9 NYCRR 48.2.

The administrative law judge providently exercised his

discretion in declining to permit questioning about the underage agent's Facebook page (*see generally Matter of Concerned Citizens Against Crossgates v Flacke*, 89 AD2d 759, 761 [3d Dept 1982], *affd* 58 NY2d 919 [1983]), and in declining to discredit the underage agent's statements on the ground of her familial relationship with one of the arresting officers or some discrepant information (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]).

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3128 The People of the State of New York, Respondent, Ind. 159/16

-against-

Barbara Maisonet, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered February 16, 2016, convicting defendant, upon her plea of guilty, of promoting prison contraband in the second degree, and sentencing her to a term of 90 days, unanimously affirmed.

Defendant's claims that her plea was involuntary and that she received ineffective assistance of counsel are unreviewable on direct appeal because they involve matters not reflected in the record. Accordingly, since defendant has not made a CPL

440.10 motion, the merits of these claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that it fails to support defendant's claims, which are largely based on speculation.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3129 Betty L. Richardson, Index 150146/10
Plaintiff-Appellant,

-against-

Brookfield Properties OLP Co. LLC,
et al.,
Defendants-Respondents,

Liberty Marble, Inc.
Defendant.

_____

Jason Levine, New York, for appellant.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for Brookfield respondents.

Byrne & O'Neill, LLP, New York (Elaine C. Gangel of counsel), for Cooper, Robertson & Partners Architects, LLP, respondent.

Camacho Mauro Mulholland, LLP, New York (Wendy Jennings of counsel), for Turner Construction Company, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Quennell Rothschild & Partners, LLP, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 14, 2015, as amended November 12, 2015, which granted defendants summary judgment dismissing the third amended complaint, unanimously affirmed, without costs.

Defendant owners and contractors met their prima facie burden (*see e.g. Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [1st Dept 2010]; *Jones v Presbyterian Hosp. in City of N.Y.*,

3 AD3d 225 [1st Dept 2004]; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), and plaintiff failed to raise a triable issue of fact as to whether an optical confusion contributed to her accident (*see Remes*, 73 AD3d at 666).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3130 In re Albert Lumezi, Index 101279/15
Petitioner,

-against-

William J. Bratton, etc., et al.,
Respondents.

_____

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for respondent.

_____

Determination of respondent Police Commissioner, dated June 16, 2015, after a hearing, dismissing petitioner from the Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered December 4, 2015), dismissed, without costs.

The determination that petitioner ingested cocaine is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Pursuant to department drug-testing procedures, in connection with petitioner's application to the Highway Unit, three samples of hair from his arm were subjected to repeated testing by

independent laboratories and yielded positive results for the presence of cocaine.

The penalty imposed does not shock our sense of fairness (*see Matter of Jones v Kelly*, 111 AD3d 415 [1st Dept 2013]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3131 Erma Mitchell, Index 102333/10
Plaintiff-Respondent-Appellant,

-against-

Long Acre Hotel, et al.,
Defendants,

NJB Security Services, Inc.,
Defendant-Respondent,

Circuit LLC, et al.,
Defendants-Appellants-Respondents.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants-respondents.

Segal & Lax, New York (Patrick D. Gatti of counsel), for respondent-appellant.

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 12, 2016, which, inter alia, denied the motion of defendant 317 Aladdin Hotel Corp. (Aladdin) for summary judgment dismissing the complaint as against it, and granted the motion of defendant NJB Security Services, Inc. (NJB) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Aladdin failed to make out a prima facie showing that minimal security was provided at its building, a homeless shelter

(*see Stora v City of New York*, 117 AD3d 557 [1st Dept 2014]). Plaintiff testified that she complained about another resident's alleged propensity for violence, and in the weeks before her assault, the other resident was involved in two other altercations (*compare Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994 [2016]). Moreover, Aladdin's night manager observed the resident on the night in question in a drunk and belligerent state in the hallway. Thus, Aladdin failed to make an initial showing that it had no reason to know from past experience "that there [was] a likelihood of conduct on the part of third persons . . . which [was] likely to endanger the safety of the visitor" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980] [internal quotation marks omitted]; *see Kahane v Marriott Hotel Corp.*, 249 AD2d 164 [1st Dept 1998]).

Summary judgment was warranted however in favor of NJB, the security contractor for Aladdin (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Nothing in the oral agreement or course of conduct between NJB and Aladdin evidenced an intent to make plaintiff a third-party beneficiary (*see Tamhane v Citibank, N.A.*, 61 AD3d 571 [1st Dept 2009]; *see also Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234 [1st Dept 2013]). Nor was there any evidence that an exception to the rule in *Espinal* applies. Aladdin's argument that its claim for common-

law indemnity should not have been dismissed is unpersuasive, since nothing in the record indicates that such a claim was interposed against NJB, nor did Aladdin oppose NJB's motion below.

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3132-
3133 In re Naomi S.,
Petitioner-Respondent,

-against-

Steven E.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

_____

Appeal from order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about February 24, 2015, which denied respondent-father's objections to the Support Magistrate's January 5, 2015 order and January 2, 2015 findings of fact on procedural grounds, unanimously dismissed, without costs, as waived. Order, same court and Justice, entered on or about June 18, 2015, which, to the extent appealable, denied the father's motion to renew, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

The father's failure to file proof of service of his objections is a failure to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of his right to appellate review (*see Matter of Dallas C. v Katrina J.*, 121 AD3d 456 [1st

Dept 2014]; *Matter of Lusardi v Giovinazzi*, 81 AD3d 958 [2d Dept 2011]).

Renewal was properly denied, since a motion to renew requires the movant to show, inter alia, new facts "which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]; CPLR 2221[e][2]). The father failed to present any new facts in support of his motion, and thus failed to satisfy the requirements for renewal.

No appeal lies from an order denying reargument (*see Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).

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

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3134 In re Nicole Clark, Index 100596/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Proskauer Rose LLP, New York (Philip W. Arnold of counsel), for petitioner.

David I. Farber, New York (Seth E. Kramer of counsel), for respondent.

_____

Determination of respondent, dated January 31, 2014, which, after a hearing, denied petitioner's claim to succession rights to an apartment formerly leased to her grandmother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered May 22, 2015), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner did not qualify as a remaining family member, because while she initially entered the household lawfully, she departed in 1989, and was no longer included in her grandmother's income reports (*see Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]).

Although petitioner contends that she continuously occupied her grandmother's apartment and submits the testimony of a neighbor who stated that petitioner stayed with her grandmother when her mother left the apartment, such testimony conflicts with the documentary evidence. Not only was petitioner marked out of the household in 1989 on her grandmother's tenant data summary, she fails to adequately explain her grandmother's temporary residence request form submitted on her behalf in 2009, in which petitioner noted a different address, or why she was not identified on her grandmother's 2010 income affidavit (*see Matter of Jacobowitz v New York City Hous. Auth.*, 49 AD3d 278 [1st Dept 2008]). Despite petitioner's assertion that she brought the 2011 income affidavit and a permanent residence request form to her grandmother in the hospital, the fact that her grandmother passed away several weeks later precludes a finding that petitioner was able to satisfy the one-year residency requirement necessary to establish succession rights (*see Matter of Ortiz v Rhea*, 127 AD3d 665 [1st Dept 2015]). Furthermore, petitioner's claim that even if she was not

included on the income affidavit forms, the evidence of her residency in the apartment is overwhelming, is unavailing (*compare Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 655 [2013]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3135- Ind. 4677/13
3136 The People of the State of New York, 2139/14
Respondent,

-against-

Maurice Culp,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

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

_____

Judgments, Supreme Court, New York County (Edward McLaughlin, J.), rendered February 9, 2015, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3137 Carmen O'Jon, Index 300209/13
Plaintiff-Respondent,

-against-

William Brown,
Defendant-Respondent,

Consolidated Edison Company of
New York, Inc.,
Defendant,

Vales Construction Corp.,
Defendant-Appellant.

_____

Barry, McTiernan & Moore LLC, White Plains (Laurel A. Wedinger of counsel), for appellant.

Friedman & Simon, L.L.P., Jericho (Marie G. Costello of counsel), for Carmen O'Jon, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for William Brown, respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 8, 2015, which denied the motion of defendant Vales Construction Corp. (Vales) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Vales established its entitlement to judgment as a matter of law through the testimony of its corporate secretary that Vales performed no work on the sidewalk in front of the premises where

plaintiff claimed she tripped and fell. The corporate secretary denied having found a permit issued to Vales for that location in his search of records, and explained that the issuance of a permit did not necessarily mean that work had been performed at the location.

In opposition, neither plaintiff nor defendant Brown, who was the owner of the building in front of which plaintiff fell, raised a triable issue of fact. They relied on a work order issued to Con Edison several years before the accident, which was not linked to Vales, and failed to submit any other evidence rebutting Vales's prima facie showing (*see Bermudez v City of New York*, 21 AD3d 258 [1st Dept 2005]; *see also Zhilkina v City of New York*, 121 AD3d 975 [2nd Dept 2014]). Furthermore, Brown testified that no sidewalk repair work had been performed at the accident location before plaintiff's accident occurred.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3139- Ind. 3317/11
3140 The People of the State of New York, 1535/11
Respondent,

-against-

Stephen Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing and self-representation colloquy; Bruce Allen, J. at plea and sentencing), rendered July 19, 2012, convicting defendant of eight counts of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

When defendant indicated, during the allocution on one of the eight counts of first-degree robbery to which he pleaded guilty, that he "simulated" a firearm, he did not negate any element of the crime or cast any doubt on his guilt. Accordingly, his claim that the court should have inquired into the possibility of an affirmative defense (*see* Penal Law

160.15[4]) is not exempt from the preservation requirement (*see People v Toxey*, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Wallace*, 247 AD2d 257 [1st Dept 1998]). We decline to review this unpreserved claim in the interest of justice. Defendant was faced with the potential for multiple consecutive life sentences as a persistent violent felony offender, even if convicted of a lesser degree of robbery on one or more of the counts.

The record fails to support defendant's claim that the suppression court deprived him of his right to represent himself. When defendant said that he wanted to represent himself, the court conducted a lengthy colloquy to ensure that defendant understood the various challenges and pitfalls of self-representation. At the end of the colloquy, when asked whether he still wished to proceed pro se, defendant clearly stated, twice, that he wanted to be represented by counsel, albeit by a different attorney. Thus, defendant withdrew his request to proceed pro se, or at least, failed to make an unequivocal request to do so (*see People v McIntyre*, 36 NY2d 10, 17 [1974]).

The suppression court correctly concluded that a photo array, in which one victim identified defendant before identifying him in a lineup, was not rendered unduly suggestive by the fact that defendant had the shortest hair of any person in

the array. The record supports the court's finding that the difference in hairstyles between defendant and the other persons in the photos, who also had short hair, was not so significant as to single defendant out for identification (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). Morever, although suggestiveness does not turn solely on this factor (*People v Perkins*, 28 NY3d 433 [2016]), we also note that hair length played no part in the description that had been provided by the particular victim. Defendant's remaining challenges to the suppression ruling are unpreserved, and we decline to review them in the interest of justice.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3141 Angelo Spinello, Index 105724/08
Plaintiff-Appellant,

-against-

Depository Trust & Clearing Corporation,
Defendant-Respondent.

_____

Ballon Stoll Bader & Nadler, P.C., New York (Lily A. Ockert of counsel), for appellant.

Norton Rose Fulbright US LLP, New York (Ralph C. Dawson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 4, 2015, which, to the extent appealed from as limited by the briefs, granted defendant employer's motion for summary judgment dismissing the complaint insofar as it alleged age discrimination, unanimously affirmed, without costs.

Even assuming plaintiff established a prima facie claim of age discrimination in connection with the appointment of a new hire to a Senior Associate position in another department, as well as with the reassignment of a current employee in the company's Tampa, Florida office from mailroom clerk to security guard, defendant, in each instance, provided legitimate, nondiscriminatory reasons for its challenged actions.

According to defendant's human resource director in the New

York office where plaintiff worked, the appointee to the Senior Associate position was more qualified in that he met the qualifications sought in the job posting, namely a college education and experience. Plaintiff had experience in the relevant department, but only a high school education. As to the security guard position in Tampa, Florida, defendant's human resources directors testified at deposition, in short, that the security guard position was an entry-level position not covered by the collective bargaining agreement and, in any event, the person who had been reassigned from the mailroom to the position had accommodated defendant's needs for experienced personnel in that office by moving to the Tampa office in 2004.

The burden having shifted back to plaintiff, he failed to raise an issue of fact that defendant's stated reasons for hiring the new Senior Associate appointee constituted a pretext for age discrimination (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623 [1997]). Plaintiff did not point to any evidence of a policy, statements or a pattern by defendant or its personnel in the hiring or reassigning of candidates and/or personnel on the basis of age.

As to plaintiff's claim pursuant to Administrative Code of City of NY § 8-107(1)(a), which requires a court to consider all the evidence and determine whether, in light of such evidence, a

triable issue exists that the employer was motivated at least in part by age discrimination while making the challenged appointments or reassignments (*see generally Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), in light of the record before us, there is "no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action" taken by the defendant (*id.* at 40). Summary judgment is warranted where, as here, there is no evidence of pretext or discriminatory motive (*see generally Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3142 Maimouna Kamate, Index No. 22512/15E
Plaintiff-Respondent,

-against-

MJ Cahn Co., et al.,
Defendants-Appellants.

_____

Bonnaig & Associates, New York (Denise K. Bonnaig of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (Leonard M. Winters of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered May 9, 2016, which, to the extent appealed from, denied defendants' CPLR 3211(a)(2) and (a)(7) motion to dismiss the claims under the New York City Human Rights Law, unanimously affirmed, without costs.

Supreme Court correctly rejected defendants' argument that plaintiff elected her remedy by filing a complaint with the New York Division of Human Rights (DHR) before she commenced this action (*see* Executive Law § 297[9]), since, notwithstanding that she sought dismissal of the DHR complaint only after commencing this action, DHR dismissed the complaint on the ground that her election of remedy was annulled (*see generally Eastman Chem. Prods. v New York State Div. of Human Rights*, 162 AD2d 157 [1st Dept 1990]; *see also Mitsubishi Bank v New York State Div. of*

Human Rights, 176 AD2d 689 [1st Dept 1991], *appeal withdrawn* 81 NY2d 1068 [1993]). The only prerequisite to dismissal of the DHR complaint on this ground is that dismissal be sought "prior to a hearing before a hearing examiner" in the DHR proceeding (Executive Law § 297[9]). The statute does not require that dismissal be obtained prior to commencement of the state court action. Plaintiff made her request prior to a hearing before a hearing examiner, and her election of remedies was annulled upon DHR's dismissal of her complaint. She was then free to pursue her claims in state court.

The court's interpretation of the statute is consistent with the stated goal of the 1997 amendment permitting DHR to dismiss a case "on the grounds that the complainant's election of an administrative remedy is annulled" (L 1997, ch 374), i.e., to allow the complainant to pursue an action in state court (*see* Bill Jacket, L 1997, ch 374 at 5), and thereby to "preserve

agency resources" (*see Acosta v Loews Corp.*, 276 AD2d 214, 220-221 [1st Dept 2000]; *Kordich v Povill*, 244 AD2d 112, 115-116 [3d Dept 1998]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3147N Ambac Assurance Corporation, et al., Index 651612/10
Plaintiffs-Respondents,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Appellants,

Bank of America Corp.,
Defendant.

_____

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin of counsel), for appellants.

Patterson Belknap Webb & Tyler LLP, New York (Harry Sandick of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 27, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion to strike all legal opinions in the expert report of James P. Corcoran, dated April 1, 2015, including sections V.B, V.C and V.D and paragraphs 22 and 113, and to preclude Corcoran from testifying regarding any legal opinions at trial, unanimously affirmed, with costs.

The court properly exercised its discretion in precluding defendant's expert from offering opinions and testimony

concerning the legal issues of the availability of certain remedies and the burden of proof that may apply to plaintiffs' claims (*see Colon v Rent-A-Center*, 276 AD2d 58, 61 [1st Dept 2000]).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3148N Edith Joseph, as Administratix of the Estate of Michael Green,
Plaintiff-Appellant,

-against-

Saint Joseph's Medical Center, et al.,
Defendants-Respondents,

St. Joseph's Hospital Holding Corporation, et al.,
Defendants.

Index 24836/13E

C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellant.

DeCorato Cohen Sheehan & Federico LLP, New York (Anthony Lugara of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 2, 2015, which, to the extent appealed from, denied plaintiff's motion to strike the answer of defendant Saint Joseph's Medical Center, St. Joseph's Hospital Holding Corporation, St. Joseph's Hospital Nursing Home of Yonkers, New York, Inc., and St. Joseph's Medical Practice, P.C., C.'s (collectively defendant Hospital) and to award sanctions and attorneys fees, and denied plaintiff's request to amend the complaint to include periods of treatment of the decedent by defendant Hospital from April 11, 2011 through April 19, 2011, unanimously affirmed, without costs.

The court properly denied that branch of plaintiff's motion seeking to strike defendant's answer, and for an award of sanctions and attorneys fees. The record demonstrates that defendant's delay in providing the requested medical records of the decedent was not willful or contumacious, or in violation of any outstanding discovery orders, and did not prejudice plaintiff (*see* CPLR § 3126; *Caterine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]).

The court also properly denied plaintiff's request to amend the complaint to include medical malpractice claims for treatment of the decedent by defendant from April 11, 2011 through April 19, 2011, as these claims are barred by the applicable statute of limitations (*see* CPLR § 214-a).

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3149N Salvatore Lauria, Index 152324/14
Plaintiff-Appellant,

-against-

Jody Kriss,
Defendant-Respondent.

_____

Beys Liston & Mobargha LLP, New York (Joshua Liston of counsel), for appellant.

Simon & Partners LLP, New York (J. Evan Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 25, 2016, which denied plaintiff's motion for a stay of the proceedings pending resolution of related federal actions, unanimously affirmed, without costs.

In considering whether to stay an action pursuant to CPLR 2201 in favor of parallel federal proceedings, comity and judicial efficiency may warrant a stay where there is substantial overlap of claims and parties (*see Asher v Abbott Labs.*, 307 AD2d 211 [1st Dept 2003]). Here, however, plaintiff's description of the federal action in which he is involved with defendant, and the contempt proceedings in which defendant was named, do not sufficiently overlap or show the likelihood of estoppel such that the denial of a stay was an abuse of discretion. This is all the

more true given the subsequent dismissal of plaintiff from the parallel federal action and of defendant from the contempt proceedings. There are at present no parallel proceedings upon which to base a stay.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2554 The People of the State of New York, Ind. 5468/12
Respondent,

-against-

Carolina Villanueva,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 6, 2014, affirmed.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Richard T. Andrias
David B. Saxe
Judith J. Gische, JJ.

2554
Ind. 5468/12

_____x

The People of the State of New York,
Respondent,

-against-

Carolina Villanueva,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered January 6, 2014, convicting him, after a jury trial, of robbery in the second degree and grand larceny in the fourth degree, and imposing sentence.

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

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

ACOSTA, J.P.

The main issue on appeal centers on the definition of threat of immediate use of force in the context of a robbery conviction (*see* Penal Law §160.00). Defendant argues that the element of force was not established beyond a reasonable doubt with respect to her robbery in the second degree conviction (Penal Law §160.10[1]), because neither defendant nor her codefendant ever touched the complainant and the threat of use of force was in fact not a threat of immediate harm. Rather, defendant contends, it was a threat of possible future harm, delivered by verbal threat indicating that calls were going to be made to others, and that the others, once notified, would come to the scene at some time in the future possibly to harm the complainant. We disagree, because the threat in this case was part of a chain of actions by defendant and her codefendant, by which they conveyed the impression that disobeying their demands would result in imminent physical harm. Defendant's other arguments are also meritless.

On December 6, 2012, at around 9:00 p.m., Carlos Diaz made a food delivery at an apartment building at 367 Madison Street in Manhattan. The entrance to the building was set back from the sidewalk by about one-half of a city block.

When Diaz arrived, he locked his bicycle outside the

building and saw defendant and her codefendant, Ruby Verdi,[1] standing in front of an adjacent apartment building. As Diaz got to the front of 367 Madison Street, Verdi approached him and asked him if he wanted to have sex with her, and he responded no. Verdi followed Diaz as he entered the building and walked into the elevator.

Inside the elevator, Verdi grabbed Diaz's private parts and propositioned him for sex in exchange for $20. Diaz again refused the offer. Once Diaz had delivered the food and gotten back into the elevator to go downstairs, Verdi again followed him and grabbed him and told him to have sex with her. When Diaz again refused, Verdi told him that if he did not give her $20 dollars she was going to scream and that she would call the police and tell them that Diaz had tried to attack her.

When the elevator reached the ground floor, Diaz exited the building and walked toward his bicycle, with Verdi following behind. Defendant was standing near Diaz's bicycle, leaning against it, preventing him from unchaining it. Verdi told defendant that she had had sex with Diaz inside the elevator but Diaz did not want to pay her. Defendant told Diaz to pay Verdi, but Diaz refused to do so, denying that he had had sex with

[1] The codefendant pleded guilty to attempted robbery in the second degree.

Verdi. Defendant demanded $20 from Diaz, telling him that if he did not pay, "she was going to call her boyfriend, he was a tall black guy, and he would beat [Diaz] up." She also threatened to call the police.

Diaz saw a black male exiting the adjacent apartment building, holding a cell phone. Defendant walked over to the man, and the two began to speak. Diaz could not hear the conversation, but he observed the man make a gesture with his cell phone as if he were about to call someone. At the same time, Verdi "grabbed" Diaz's bicycle, and prevented him from unchaining it.

Defendant returned to where Diaz was standing and told him "her boyfriend was coming over and they were going to bring more people to beat [him] up." Diaz became "scared," and gave Verdi $20. Defendant then demanded that Diaz give her $20 as well, and Diaz complied. The women then let Diaz go.

Diaz returned to the restaurant about two minutes later and reported the incident to his boss, who called the police. Approximately 30 minutes later, defendant and Verdi were arrested. As defendant was entering the patrol car, she dropped two $20 bills on the ground.

Defendant argues on appeal that the evidence was legally insufficient to establish her guilt of robbery in the second

degree and grand larceny in the fourth degree, and that, in the alternative, the jury's verdict was against the weight of the evidence. With respect to her robbery conviction, defendant argues that the People failed to demonstrate that she threatened Diaz with the immediate use of physical force, since she told Diaz that the man that was standing outside the adjacent building was going to call his friends to beat up Diaz, and that, "[s]ince the verbal threat, by its words, indicated that calls were going to be made to others, and that others, once notified, would come to the scene at some time in the future to possibly harm Diaz, it was not a threat of immediate harm."

With respect to her conviction of grand larceny in the fourth degree, defendant argues that "the evidence showed that Diaz fearfully but voluntarily 'gave' the cash to [defendant] from his hands," and thus defendant did not take property from Diaz's person. Accordingly, defendant contends that her conviction should be reduced to the lesser included offense of petit larceny.

A verdict is based upon legally sufficient evidence if "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt" (*People v Cintron*, 95 NY2d 329, 332 [2000] [internal quotation marks omitted]). The court must view the evidence in the light most favorable to the

People (*People v Kancharla*, 23 NY3d 294, 302 [2014]; *People v Danielson*, 9 NY3d 342, 349 [2007]).

In reviewing the weight of the evidence, an intermediate appellate court should

> "affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116-117 [2011]; *see also Danielson*, 9 NY3d at 348).

Great deference, however, is accorded to the jury's credibility determinations, since the jury had an "opportunity to view the witnesses, hear the[ir] testimony and observe [their] demeanor" (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

Applying these standards here, we find that the evidence was legally sufficient to prove defendant's guilt of robbery in the second degree and grand larceny in the fourth degree and that the verdict was not against the weight of the evidence. With respect to defendant's robbery conviction, the evidence demonstrates that defendant threatened Diaz with the immediate use of physical force. Pursuant to Penal Law § 160.00(1), a person is guilty of robbery "when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . [p]reventing or overcoming resistance to

the taking of the property or to the retention thereof immediately after the taking." However, "[t]he statute does not require the use of any words whatsoever, but merely that there be a threat, whatever its nature, of the immediate use of physical force" (*People v Woods*, 41 NY2d 279, 283 [1977]). There is also no requirement that a weapon be displayed or that the victim be physically injured to demonstrate that there was a threat of immediate physical force (*see People v Bennett*, 219 AD2d 570 [1st Dept 1995], *lv denied* 87 NY2d 844 [1995]). Further, the threat of the immediate use of force may be demonstrated by "a chain of actions on the part of [the] defendant" (*People v Thomas*, 273 AD2d 161, 162 [1st Dept 2000], *lv denied* 95 NY2d 908 [2000]), that convey[s] the impression that disobeying [her] commands could result in imminent physical repercussions" (*People v Smith*, 22 NY3d 1092, 1094 [2014]).

Diaz testified that he gave defendant the $20 because he was "scared" after defendant and Verdi prevented him from leaving and defendant explicitly threatened him that if he did not comply, her boyfriend would beat him up. Defendant then went to speak to a man who gestured that he was going to call someone (*see People v Read*, 228 AD2d 304, 305 [1st Dept 1996] *lv denied* 88 NY2d 1071 [1996] ["defendant and his accomplices at the least threatened the use of force by the manner in which they surrounded defendant

and prevented his movement"]).

Based on the totality of the circumstances, the jury reasonably concluded that defendant threatened Diaz with the immediate use of physical force (*People v Wood*, 41 NY2d at 282 ["we do not have to evaluate . . . words in a vacuum, but rather, it was proper for the trial court to allow the jury to interpret these words in light of the myriad facts and circumstances of this case, and it is within the province of the jury to determine the weight to be accorded the testimony"]).

Defendant also argues that the evidence supporting her conviction of grand larceny in the fourth degree was legally insufficient and that the verdict was against the weight of the evidence, since she did not take property from Diaz's person, but, rather, Diaz voluntarily gave her the cash.

Initially, defendant's legal sufficiency challenge is unpreserved, since she did not move for a trial order of dismissal on the grand larceny count on the ground that the People failed to prove beyond a reasonable doubt that she took property from Diaz's person.[2] In any event, defendant's argument is unavailing.

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[2]Defendant's claim of ineffective assistance of counsel on the ground that trial counsel failed to make this motion is discussed below.

A person is guilty of grand larceny in the fourth degree when she steals property, and the property "is taken from the person of another" (Penal Law § 155.30[5]). Further, a larceny "from the person" (Penal Law § 155.30[5]) occurs when the victim is forced to hand over property against his will (*People v Nelson*, 36 AD3d 532, 533 [1st Dept 2007]).

Here, the record demonstrates that defendant wrongfully obtained Diaz's money when she forced him to turn it over against his will by threatening to have him beaten up. When Diaz handed defendant the money, she "exercised dominion and control over the property" in a manner "wholly inconsistent" with his ownership rights (*see People v Washington*, 191 AD2d 278, 278 [1st Dept 1993]).

Further, contrary to defendant's contention, the money was taken from Diaz's person. Although defendant did not physically take the money from Diaz, she repeatedly threatened him. Thereafter, Diaz removed the cash from his person and handed it to defendant and Verdi, thus satisfying the elements of grand larceny in the fourth degree (*compare People v Alexander*, 208 AD2d 757, 757-758 [2d Dept 1994] ["Property obtained by the threat of the immediate use of force constitutes a 'taking' whether the victim hands the perpetrator the property or the perpetrator removes it himself from the victim"] *lv denied* 84

NY2d 1008 [1994] *with People v Robert YY*, 58 AD2d 920 [3rd Dept 1977] [the complainant testified that the defendant pointed a shotgun at him and "relieved" him of $5, while the defendant testified that the complainant gave him the $5 as a loan, and that the shotgun "played no part in the incident"; larceny conviction "inconsistent" with acquittal of robbery charge, since the jury rejected the complainant's account of the use of the shotgun], and *People v Washington*, 155 AD2d 634 [2nd Dept 1989] [no "taking" where the complainant voluntarily gave the defendant $20 with the expectation of receiving heroin in return]).

Defendant's argument that she received ineffective assistance of counsel because her trial counsel did not move to dismiss the grand larceny count on the ground that the People failed to prove beyond a reasonable doubt that she took property from Diaz's person is unavailing. Even if counsel had raised this argument below, the record demonstrates that it would not have changed the outcome of the trial or the outcome of this appeal.

Accordingly, the judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered January 6, 2014, convicting defendant, after a jury trial, of robbery in the second degree

and grand larceny in the fourth degree, and sentencing her, as a second felony offender, to an aggregate term of five years, should be affirmed.

All concur.

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

ENTERED: FEBRUARY 16, 2017

DEPUTY CLERK