SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 28, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4277 The People of the State of New York, Respondent, Ind. 11073/90

-against-

Danny Colon, Defendant-Appellant.

- - - - -

4278 The People of the State of New York, Respondent, Ind. 11073/90

-against-

Anthony Ortiz, Defendant-Appellant.

Joel B. Rudin, New York, for Danny Colon, appellant.

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for Anthony Ortiz, appellant.

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Order, Supreme Court, New York County (Michael A. Corriero, J.), entered October 18, 2005, which denied defendants' CPL 440.10 motions to vacate judgments of the same court (Clifford A. Scott, J.), rendered October 5, 1993, convicting defendants, after a jury trial, of murder in the second degree and related

crimes, and imposing sentence, unanimously affirmed.

The trial prosecutor failed to disclose notes from her interviews with two witnesses who possessed potentially exculpatory information. The prosecutor also failed to disclose the fact that she assisted in the relocation of a prosecution witness's grandparents. Insofar as the relocation constituted an additional benefit to the witness, the prosecutor improperly failed to correct the witness's testimony that, other than a guilty plea to disorderly conduct, he had not been promised any other benefit, and, in her summation, the prosecutor misstated the benefits the witness received. Each of these acts or omissions was improper (*see Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Novoa*, 70 NY2d 490, 498 [1987]).

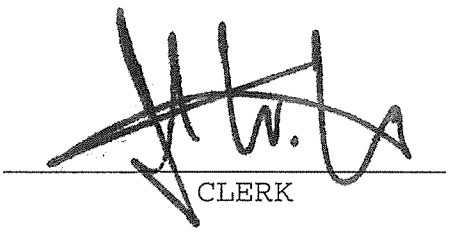
Nevertheless, while we conclude the reasonable possibility standard applies (*see People v Vilardi*, 76 NY2d 67, 77 [1990]), we find no reasonable possibility that the undisclosed information, the incorrect testimony and the prosecutor's comments during summation affected the verdict. The exculpatory documents contained layers of hearsay, not apparently admissible under any hearsay exceptions (*see People v Burns*, 6 NY3d 793, 794 [2006]; *People v Alvarez*, 44 AD3d 562, 564 [2007], *lv denied* 9 NY3d 1030 [2008]), and there is no basis other than speculation

upon which to conclude that, if disclosed, they might have led to admissible exculpatory evidence. There is no evidence that the witnesses, or the sources of their statements, would have been willing or able to testify at trial. As for the relocation of the witness's grandparents, its impeachment value would have been cumulative because the jury's awareness that the witness was receiving a favorable plea agreement in exchange for his testimony "was far more crucial in assessing his credibility" (*People v Sibadan*, 240 AD2d 30, 35 [1998], *lv denied* 92 NY2d 861 [1998]). Moreover, there was other evidence against defendants, including the testimony of another witness who identified them as the perpetrators of the crimes.

Except as indicated, we find no other violations of the People's obligations to disclose information or correct inaccurate testimony, and we reject defendants' arguments to the contrary. In the alternative, we find no reasonable possibility that any such violations affected the outcome of the case.

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

ENTERED: OCTOBER 28, 2008



CLERK

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4229 Geraldo Gomez, et al.,
Plaintiffs,

Index 23476/04
84824/05

-against-

Sharon Baptist Board of Directors, Inc.,
Defendant/Third-Party Plaintiff-Appellant,

-against-

S.M. Construction Co.,
Third-Party Defendant-Respondent.

Bamundo, Zwal & Schermerhorn, LLP, New York (Kenneth M. Dalton of counsel), for appellant.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 27, 2007, which, to the extent appealed from as limited by the brief, denied the cross motion of defendant/third-party plaintiff Sharon Baptist Board of Directors, Inc. (Sharon Baptist) for summary judgment on its claim for contractual indemnification against third-party defendant S.M. Construction Co. (SMC), unanimously affirmed, without costs.

Plaintiff Gomez, an employee of SMC, was injured as a result of falling from a scaffold that shifted as he performed SMC's work on premises owned by Sharon Baptist. The scaffold wheels were not locked, and plaintiff was not provided with safety devices. Plaintiff commenced an action against Sharon Baptist

and was granted summary judgment on the issue of liability on his Labor Law § 240(1) cause of action.

Supreme Court correctly denied Sharon Baptist summary judgment against SMC based in its indemnification claim. The contract between these two parties specifically provides that SMC is obligated to indemnify Sharon Baptist for losses only to the extent that they were caused in whole or in part by the negligent acts or omissions of SMC, its agent, or anyone else for whom SMC was responsible. In its papers in support of its cross motion, Sharon Baptist relied exclusively on plaintiff's allegations of a Labor Law § 240 violation, that is, that the lack of safety devices caused his accident. However, a determination of liability against the owner under Labor Law §240 was not the equivalent of a finding of negligence. Liability under section 240 is not predicated on fault but "imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Brown v Two Exch. Partners*, 76 NY2d 172, 179 [1990]). Thus far there has been no finding that either SMC or its agents were negligent let alone that such negligence proximately caused plaintiff's injuries. Accordingly, summary judgment on the contractual indemnification claim is premature

(*see Di Perna v American Broadcasting Companies, Inc.*, 200 AD2d 267, 270 [1994]; *Cichon v Brista Estates Associates*, 193 AD2d 926, 927-928 [1993]).

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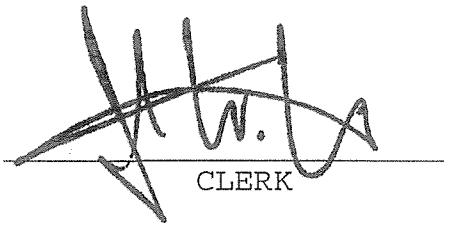
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 28, 2008



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Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

4258-
4259N Eileen Singleton, Index 18867/06
Plaintiff-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for The City of New York, appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, appellants.

James M. Lane, New York, for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered June 7, 2007, which, in an action for personal injuries, denied defendant City of New York's motion to dismiss the complaint for failure to file a timely notice of claim, and granted plaintiff's cross motion to deem the notice of claim timely filed, and order, same court and Justice, entered June 12, 2007, which denied the motion of defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority to dismiss the complaint for failure to file a timely notice of claim, unanimously reversed, on the law, without costs, defendants' motions granted, plaintiff's cross motion denied, and the complaint dismissed. The Clerk is directed to enter judgment

accordingly.

Dismissal of the complaint is warranted, since plaintiff's notice of claim was not served within 90 days of the date on which her claim arose (General Municipal Law § 50-e[1][a]), and she failed to timely move for leave to serve a late notice of claim within one year and 90 days after the claim arose (General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Defendants were not required to raise the late filing as an affirmative defense (*see Maxwell v City of New York*, 29 AD3d 540 [2006]), nor were they estopped from seeking dismissal of the complaint on this ground (*see Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509 [2007]; *Rodriguez v City of New York*, 169 AD2d 532 [1991]).

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

ENTERED: OCTOBER 28, 2008

CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4341 Mary Koester, Index 111481/03
Plaintiff-Appellant,

-against-

New York Blood Center,
Defendant-Respondent.

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Jason Habinsky of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Rolando T. Acosta, J.), entered September 19, 2007, granting defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

McDonnell Douglas Corp. v Green (411 US 792 [1973]) sets forth a framework for courts to assess discrimination claims. The plaintiff must satisfy the minimal burden of making out a prima facie case. The burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to show that the proffered nondiscriminatory reason was a pretext and that the defendant actually discriminated against the plaintiff.

Plaintiff demonstrated that she suffered from a mental

impairment and presented evidence sufficient to raise a triable issue as to whether she was able to perform her job in a reasonable manner before she was terminated from her employment. However, she offered no evidence that she was terminated because of her disability or behavior caused by her disability, and thus failed to establish a prima facie case of discrimination (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; Executive Law § 292[21]). Nor did plaintiff either allege or show that she proposed a reasonable accommodation that defendant refused to make (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 [2006], *lv denied* 7 NY3d 707 [2006]). To the contrary, the evidence established that she requested a four-day work week and a 10 A.M. start time to accommodate her disability and that defendant granted that request, as well as her requests for medical leave. Even if plaintiff had met her burden of establishing a prima facie case of discrimination, defendant demonstrated by admissible evidence that its action was motivated by legitimate nondiscriminatory reasons, and plaintiff presented no basis for inferring that those reasons were pretextual (*see Matter of McEniry* at 558).

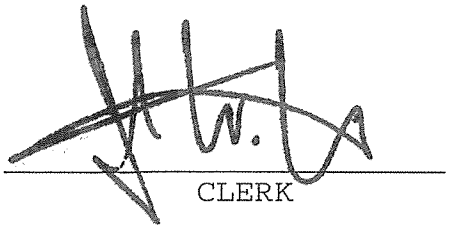
Plaintiff's claim of retaliation similarly fails. In order

to make out a retaliation claim, plaintiff must show that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). Although she made a complaint of discrimination based on disability or race through defendant's hotline shortly before she was terminated, there is no basis for finding a causal connection between that protected activity and the termination (*id.* at 313). The termination followed more than a year of progressive disciplinary complaints from plaintiff's supervisors concerning her repeated unapproved absences and failure to notify supervisors that she would be late, instances of poor performance, breach of company policies, and unprofessional behavior. Under the circumstances, the temporal proximity between plaintiff's hotline complaint and defendant's adverse action is alone insufficient to support a claim of retaliatory discharge (*see Hunts Point Multi-Serv. Ctr., Inc. v Bizardi*, 45 AD3d 481, 481-482 [2007], *lv dismissed* 10 NY3d 909 [2008]; *Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 95 [2d Cir 2001], *cert denied* 534 US 951 [2001]).

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: OCTOBER 28, 2008



CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4343 Cheryl Lattan, et al., Index 108071/04
Plaintiffs-Respondents,

-against-

Gretz Transit Inc., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Victor Tsai, New York, for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered January 28, 2008, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to dismiss the claims based on cervical, lumbar and right knee injuries, and otherwise affirmed, without costs.

Defendants demonstrated prima facie that plaintiff did not sustain a serious injury to her cervical or lumbar spine or right knee, by submitting the affirmed reports of an orthopedic surgeon and a neurologist finding normal cervical and lumbosacral ranges of motion and no evidence of disability and a radiologist's affirmed report finding a preexisting degenerative condition of

the cervical spine and no evidence of recent trauma to the right knee. Thus, the burden shifted to plaintiff (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Smith v Brito*, 23 AD3d 273 [2005]). In opposition, plaintiff's doctor addressed the cervical injury only and failed to raise a triable issue of fact, since he failed to quantify his findings at each plane of motion, to identify any objective tests, to compare his findings to normal ranges, and to address the degenerative changes found (*see Rodriguez v Abdallah*, 51 AD3d 590, 592 [2008]; *Smith v Cherubini*, 44 AD3d 520 [2007]).

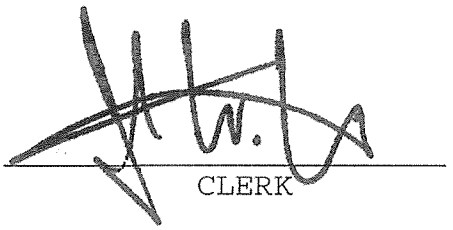
Plaintiff's testimony that she was confined to bed and out of work for four months was insufficient to establish a serious injury, in the absence of "competent medical proof" of an injury or impairment that prevented her from performing substantially all her daily activities for at least 90 of the first 180 days following the occurrence of the injury (*see Rossi v Alhassan*, 48 AD3d 270 [2008]).

Defendants' failure to make a prima facie showing as to plaintiff's jaw injuries, including temporomandibular dysfunction, required the denial of that aspect of their motion, regardless of the claimed insufficiency of plaintiff's opposition

(*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

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

ENTERED: OCTOBER 28, 2008



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4389 The People of the State of New York, Ind. 3698/06
Respondent,

-against-

Juan Serrano,
Defendant-Appellant.

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

Juan Serrano, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Squires of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered February 22, 2007, convicting defendant, after a nonjury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously reversed, on the law, and the indictment dismissed.

The verdict was based on legally insufficient evidence. The victim's apartment was burglarized at some time between noon and 5 P.M. At about 1:30 P.M. that same day, but before the burglary was reported, defendant, a homeless man, was observed by a police officer about a block away from the burglary, standing near a dumpster. The officer observed a collection of small items on defendant's person, in a bag he was holding, and on top of the dumpster. Since the officer did not yet know about the burglary

and had no reason to detain defendant, the officer permitted him to leave, and did not recover any of the items. However, when the victim reported the burglary the following day and described the items stolen, the officer remembered having seen defendant in possession of the same group of items. There was also evidence that defendant was known to have occasionally received food in the basement of the church-owned building where the burglary occurred.

The crime of burglary may be established by way of the presumption of guilt that flows from recent, exclusive, and unexplained or falsely explained possession of the fruits of a crime (*see People v Galbo*, 218 NY 283, 290 [1916]; *People v Costello*, 162 AD2d 276 [1990], *lv denied* 76 NY2d 854 [1990]). Even assuming that a trier of fact could reasonably conclude that the items the officer saw in defendant's possession and proximity constituted the same group of items stolen from the victim, the difficulty here is that defendant's possession has a reasonable innocent explanation. These objects were of very little value, and some of them were on the dumpster. Thus, the evidence supports a reasonable inference that defendant rummaged in the dumpster and found items that the actual burglar discarded after realizing they were unmarketable. Given this inference, the trier of fact lacked any basis for concluding, beyond a

reasonable doubt, that defendant stole the property as opposed to finding property stolen by someone else (*compare People v Moore*, 291 AD2d 336 [2002], *with People v Scurlock*, 33 AD3d 366 [2006], *lv denied* 7 NY3d 928 [2006]. Defendant's connection with the building where the burglary occurred is too equivocal to warrant a different conclusion.

Were we not reversing on the law, we would find that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: OCTOBER 28, 2008

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 28, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 313C/05
Respondent,

-against- 4392

Hector Rosario,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about November 16, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:

Clerk.

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

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4393-
4393A BDP International Finance Corporation, et al., Plaintiffs-Appellants-Respondents, Index 600409/06

-against-

Pedro Castillo, et al., Defendants-Respondents-Appellants,

Intertrade Development Corporation, Defendant.

Liddle & Robinson, L.L.P., New York (Blaine H. Bortnick of counsel), for appellants-respondents.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 6, 2008, awarding defendants Castillo and First Affiliated the principal sum of $254,003.68, and order, same court (Marian Lewis, Special Referee), entered December 11, 2007, which granted defendants attorney fees and costs except with regard to their application for damages in vacating a temporary restraining order, unanimously affirmed, without costs.

The award of attorney fees and costs incurred in vacating the temporary restraining order was not premature. The Special Referee properly applied the appropriate factors (*see Jordan v Freeman*, 40 AD2d 656 [1972]) and her own knowledge, expertise and

experience as to the time required to perform the legal services (*David Realty & Funding, LLC v Second Ave. Realty Co.*, 26 AD3d 257, 258 [2006], *lv denied* 7 NY3d 705 [2006]) in determining the amount of fees for the vacatur. Upon our own review (*see Park Regis Apt. Corp. v Zang*, 237 AD2d 150 [1997]), we agree with the determination. Amounts with respect to the appeal from the vacatur (*see Roberts v White*, 73 NY 375, 381 [1878]) and billings redacted on the ground of privilege (*see Soiefer v Soiefer*, 17 AD3d 268, 269 [2005]) were properly included. The court properly declined to allow evidence regarding the propriety of the vacatur as beyond the scope of the reference (*see Matter of AMC Computer Corp. v Geron*, 38 AD3d 402, 403 [2007]). Fees and costs for the damages application were properly denied based on the amount and type of legal work performed and the Special Referee's apt recognition that such ruling would appropriately offset any excessiveness in the legal fees and costs sought for the vacatur.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4395 In re Edwin Torres, Index 119071/06
Petitioner,

-against-

Tino Hernandez, as Chairperson of
the New York City Housing Authority,
Respondent.

William E. Leavitt, New York, for petitioner.

Ricardo Elias Morales, New York (Corina Leske of counsel), for respondent.

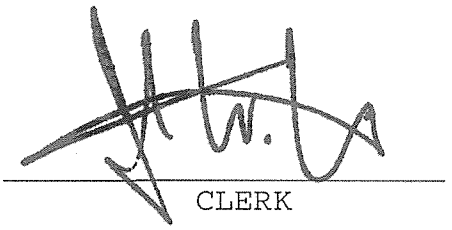
Determination of respondent New York City Housing Authority, dated October 25, 2006, after hearing, denying petitioner's grievance to succeed to his mother's public housing tenancy as a remaining family member, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carol Edmead, J.], entered March 30, 2007), dismissed, without costs.

No basis exists to disturb the Hearing Officer's finding crediting the testimony of respondent's employees that respondent did not receive any requests from petitioner to be added to his mother's household prior to the one received two days before his mother's death (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Lacking respondent's written consent to his

permanently joining his mother's household, and thus unable to show that he thereafter remained in occupancy of the subject apartment for a continuous period of at least one year prior to his mother's death, petitioner's grievance was properly denied (New York City Hous. Auth. Mgt. Manual, ch IV, § J[1]; ch VII, § E[1][a], as amended by GM-3692 Amended, ch IV, §§ A, B [July 11, 2003]; *see Matter of Lancaster v Martinez*, 298 AD2d 585, 585 [2002]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: OCTOBER 28, 2008



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Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4396 In re Davione Rashaun H.,

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

Sharon H., etc.,
Respondent-Appellant,

Leake & Watts Services, Inc.
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

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

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about May 8, 2007, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage

and strengthen the parental relationship by providing referrals for individual counseling and parenting skills training, scheduling regular supervised visitation and monitoring the treatment programs in which respondent stated she was enrolled (*see Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Israel Zacarias G.*, 306 AD2d 106 [2003]; Social Services Law 384-b[7][f]). Despite these diligent efforts, respondent was incarcerated on several occasions, inconsistent in her visitation, failed to complete the substance abuse program during the statutorily relevant time period and otherwise failed to meaningfully address the problems that led to the placement of her child (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]).

A preponderance of the evidence demonstrated that termination of respondent's parental rights was in the child's best interests. The child has been the same stable and caring pre-adoptive home for several years where he has bonded with his foster family (*see Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]). Contrary to respondent's

contention, the circumstances presented do not warrant a suspended judgment.

THIS CONSTITUTES THE DECISION AND ORDER
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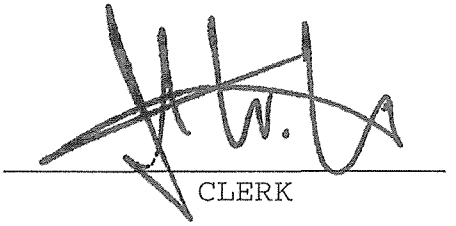

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Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4397-
4397A NYCTL 1999-1 Trust, et al., Index 27686/02
Plaintiffs-Respondents,

-against-

573 Jackson Avenue Realty Corp.,
Defendant-Appellant,

City of New York Bureau of
Highway Operations, et al.,
Defendants.

Joseph A. Altman, Bronx, for appellant.

Rosicki, Rosicki & Associates, P.C., Plainview (Owen M. Robinson of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered May 24, 2007, granting foreclosure of a tax lien and directing sale of real property, and order, same court and Justice, entered on or about December 7, 2007, which denied defendant 573 Jackson Avenue Realty's motion to vacate the foreclosure sale, unanimously affirmed, without costs.

After much litigation, Jackson Avenue Realty deposited with the court the payoff amount demanded by plaintiffs a few days before the scheduled foreclosure sale, and then notified plaintiffs of the payment and asserted that the sale was stayed "per statute." The sale proceeded nonetheless, and the property

was sold to a third party.

In a foreclosure action where the defendant pays into court the amount due for principal, interest and costs of the action, together with the expenses of the proceeding to sell, the court is required to dismiss the complaint and stay all proceedings on the judgment (RPAPL 1341), without regard to discretionary interpretation or application (*Gabriel v 351 St. Nicholas Equities*, 168 AD2d 338, 339 [1990]). However, a stay of proceedings under this statute is not self-executing; it requires a motion (*see Green Point Sav. Bank v Oppenheim*, 237 AD2d 409, 410 [1997], *lv denied* 90 NY2d 806 [1997]). Jackson Avenue Realty failed to make such a motion, and its deposit of the amount demanded by plaintiffs did not qualify as an undertaking since it was not reviewed or fixed by the court (CPLR 5519[a][4],[6]).

There is no evidence of fraud or other misconduct on plaintiffs' part in failing to advise Jackson Avenue Realty that the sale would proceed despite the latter's payment into court. Absent a confidential or fiduciary relationship, there is no duty to disclose, and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud

(see Mobil Oil Corp. v Joshi, 202 AD2d 318 [1994]).

The attorneys' fee award had ample support in the record.

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

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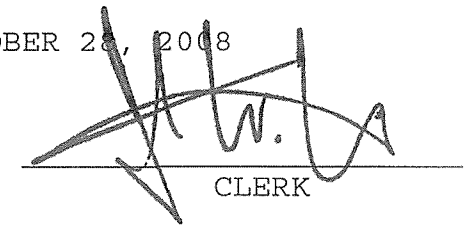

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Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4398 Biron V. L. Turecamo, et al., Index 603749/06
Plaintiffs-Appellants,

-against

B. David Turecamo,
Defendant-Respondent.

Michael H. Zhu, New York, for appellants.

William M. Pinzler, New York, for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 5, 2007, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

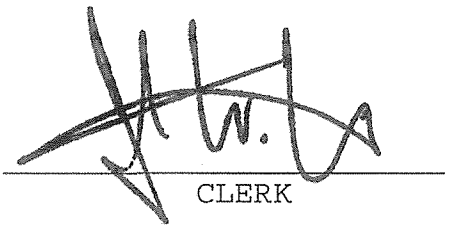
The claim for tortious interference with contract is time-barred, having been brought more than three years after the cause of action accrued and damages were suffered (CPLR 214[4]; *see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1983]). The transfer of stock was completed no later than 1999, after which defendant began receiving income from his ownership. The fact that the stock became more valuable with the 2005 sale of real property held by the corporation did not create a separate date of injury, but merely increased the potential damages.

Since plaintiffs never owned, possessed or controlled the

stock, they could not maintain an action for its conversion (*see Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [2006]). In any event, such a claim is untimely (CPLR 214[3]; *see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]).

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

ENTERED: OCTOBER 28, 2008



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4400 The People of the State of New York, Ind. 63153C/04
Respondent,

-against-

Andrew Voss,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered on or about October 2, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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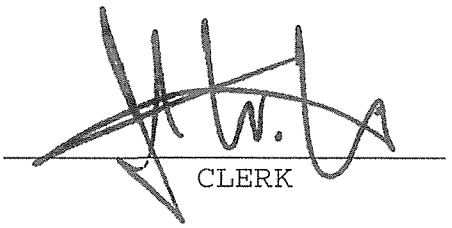

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4401 Nancy Patricia Espinosa, et al., Index 110983/07
Plaintiffs-Appellants,

-against-

The Delgado Travel Agency, Inc.,
Defendant-Respondent.

Peter G. Eikenberry, New York, for appellants.

Farrell Fritz, P.C., Uniondale (Domenique C. Moran of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 16, 2007, which denied plaintiffs' motion for a preliminary injunction requiring defendant to circulate to its employees certain provisions of a pretrial settlement agreement, and granted defendant's cross motion to dismiss the action without prejudice to plaintiffs to renew in the event defendant failed to comply with the terms of the agreement, unanimously modified, on the law, the cross motion denied and the amended complaint reinstated, and otherwise affirmed, without costs.

The court correctly denied plaintiffs' motion for a preliminary injunction requiring defendant to include in its antidiscrimination policy ¶¶ 7(c)-(e) of the settlement agreement, since a plain reading of ¶¶ 7(a)-(e) establishes that

only the document containing antidiscrimination policies and procedures as described in ¶ 7(a) was to be circulated to defendant's employees.

In view of the inclusion of the amended complaint in the order's recitation of the papers considered on the motions, the motion to dismiss for failure to state a cause of action should have been denied. The amended complaint alleges that, at a meeting held shortly after the agreement was executed, defendant's president warned employees against bringing complaints of sexual harassment and told them he would prevail in any such action as he had prevailed in plaintiffs' federal action - which in fact was discontinued pursuant to the agreement. Since the agreement requires defendant to draft, disseminate and enforce a written policy prohibiting discrimination, including sexual harassment and discrimination based on gender or pregnancy, and to provide its representatives with appropriate training concerning the policy, the amended complaint adequately

pleads a cause of action for breach of the agreement (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morrison v Filmways, Inc.*, 25 AD2d 837 [1966]).

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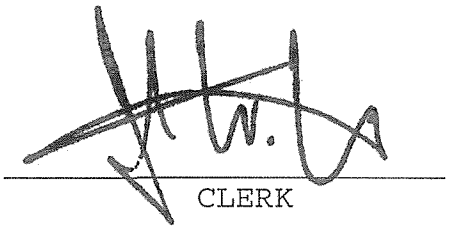


CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4402-
4402A Wioleta Kielar, etc., et al., Index 115524/04
Plaintiffs-Respondents, 591277/04

-against-

The Metropolitan Museum of Art, et al.,
Defendants-Appellants,

Total Safety Consulting, L.L.C.,
Defendant.

- - - - -

The Metropolitan Museum of Art,
Third-Party Plaintiff-Appellant-Respondent,

-against-

R. Smith Restoration, Inc.,
Third-Party Defendant-Respondent-Appellant.

Bivona & Cohen, P.C., New York (Curtis B. Gilfillan of counsel), for appellants and appellant-respondent.

Petrocelli & Christy, New York (Peter Basil N. Christy of counsel), for respondent-appellant.

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

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 3, 2008, which, in an action for personal injuries and wrongful death arising out of plaintiff's decedent's fall through a tempered glass skylight while working on the roof of a building owned by defendant City and leased by defendant museum, inter alia, awarded plaintiff summary judgment on her

Labor Law § 240(1) claim; dismissed plaintiff's Labor Law § 200 and common-law negligence claims against the museum and the City; awarded third-party defendant, plaintiff's employer, summary judgment dismissing the museum's and the City's claims for indemnification against it "to the extent of coverage provided for them as additional insureds under the [employer's primary] policy"; and awarded the museum and the City summary judgment "to the extent that liability is determined in their favor with respect to their respective contractual indemnification [claims] against [the employer] only insofar as their additional insured coverage under the [employer's primary] policy is exhausted, unanimously modified, on the law, to the extent of (1) denying the employer's motion to dismiss the museum's and the City's indemnification claims against it in its entirety pending the outcome of a separate declaratory judgment action bearing New York County index number 102177/08, with leave to re-submit the motion at the conclusion of such action, (2) granting the museum and the City summary judgment on their claims for contractual indemnification to the extent coverage under the employer's primary and excess insurance policies are exhausted, (3) awarding the museum and the City summary judgment on their claims for common-law indemnification to the extent of finding liability in

their favor, and otherwise affirmed, without costs. Appeals from order, Supreme Court, New York County (Walter B. Tolub, J.), entered June 2, 2008, unanimously dismissed, without costs, as taken from a nonappealable insofar as it denied reargument, and as academic insofar as it denied renewal.

Evidence entitling plaintiffs to summary judgment on the Labor Law § 240(1) claim establishes that her decedent, pursuant to the employer's contract with the museum to, among other things, re-caulk and seal glass skylights on the museum roof, was working on the roof 60 feet above the ground; that he and his co-workers had to move counterweights across the roof in order to utilize the swing-stage scaffolding; that the safety lines on the roof could not reach the area of the skylights; that the decedent's foreman decided that they should move the counterweights over the skylights and not over the area near the edge of the roof because that area was wet and it was awkward to move the counterweights there; that when the employer's workers were caulking the skylights they were tied off to cables that the employer had installed and stretched along the skylights, but that such safety cables were not in place at the time of the accident; and that foam and plywood should have been placed down over the skylights on the roof for the transfer of counterweights

and that a manlift could have been used for the work, as was done following the accident; and that OSHA concluded that serious violations had taken place at the work site, including that employees on the roof did not have protection while moving counterweights over skylights (*see Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234, 236 [1997]). No issues of fact are raised as to whether the decedent's actions were the sole proximate cause of the accident. In moving the counterweights over the skylights he was following the directions of his foreman and could not utilize the safety rope system since the rope did not reach to the area of the skylights. "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

The motion court erred in finding that American International Specialty Lines Insurance Company (AISLIC), the employer's excess insurance carrier, was not required to extend coverage to the museum and the City. Indeed, as a result of a separate declaratory judgment action, the parties had entered

into a confidential agreement in which AISLIC agreed to extend coverage to the museum and the City.

The employer seeks to dismiss the museum's and the City's claims for indemnification, as violative of the anti-subrogation rule, to the extent of the full coverage provided by its primary and excess insurance policies (*see Washington v New York City Indus. Dev. Agency*, 215 AD2d 297 [1995]). The motion court improperly granted the employer's motion in part. Indeed, since both Admiral Insurance Company, the employer's primary insurance carrier, and AISLIC are denying coverage to the employer, and since the employer has commenced a separate declaratory judgment action to determine the issue of coverage, it is premature to determine whether the anti-subrogation rule bars the City's and the museum's claims. Accordingly, the employer's summary judgment motion is denied in its entirety pending the outcome of the separate declaratory judgment action, with leave to re-submit the motion at that time.

The motion court properly granted the museum and the City summary judgment on their contractual indemnity claims in view of the employer's indemnification agreement with the museum and the City. Contrary to the employer's assertions on appeal, the

record establishes that the museum did not have actual or constructive notice of any unsafe practices, and no issues of fact as to whether the museum was affirmatively negligent are otherwise raised (*see Correia v Professional Data Mgt.*, 259 AD2d 60 [1999]; *Rizzuto v L.A. Wenger Contr. Corp.*, 91 NY2d 343, 352 [1998]).

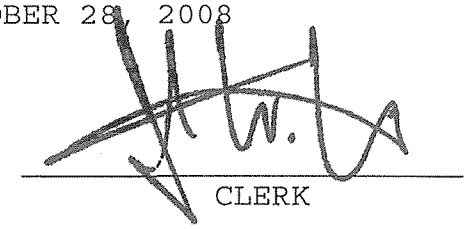
However, in light of the fact that AISLIC agreed to cover the museum, we modify the order to grant summary judgment on the contractual indemnity claim only insofar as both the Admiral and the AISLIC policies are exhausted.

The motion court failed to address the museum's and the City's common-law indemnification claims. As noted, since there was no evidence of affirmative negligence on the part of the museum and the City, they, as property owners liable vicariously under the Labor Law, are entitled to common-law indemnification from the employer (*Aragon v 233 W. 21st St.*, 201 AD2d 353 [1994]). Accordingly, we modify to grant summary judgment to the museum and the City on their common-law indemnification claims against the employer to the extent of determining liability in their favor.

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

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

ENTERED: OCTOBER 28, 2008



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, JJ.

4403 Dorothea Perry, Index 600064/03
Plaintiff-Appellant,

-against-

Collegis, Inc.,
Defendant,

New York Law School,
Defendant-Respondent.

Himmel & Bernstein, LLP, New York (Andrew D. Himmel of counsel), for appellant.

Nixon Peabody LLP, Jericho (Christopher G. Gegwich of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 2, 2007, which granted the motion of defendant New York Law School (NYLS) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly found that plaintiff's employment agreement with defendant Collegis was terminable at will and thus could only support a claim for tortious interference with prospective contractual relations *(see e.g. Carvel Corp. v Noonan*, 3 NY3d 182, 191-192 [2004]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191-192 [1980]). The evidence demonstrates that plaintiff has no tenable claim that NYLS acted for the sole purpose of harming her, or that it utilized

"wrongful means" (*see Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999]). Plaintiff's contention that her employment was terminated because NYLS threatened not to renew its contract with Collegis is unsupported by the evidence, and, in any event, is an insufficient basis for the tortious interference claim (*see Sumitomo Bank of N.Y. Trust Co. v DiBenedetto*, 256 AD2d 89 [1998], *lv denied* 93 NY2d 804 [1999].

THIS CONSTITUTES THE DECISION AND ORDER
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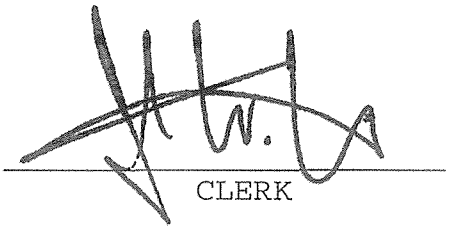

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Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4404 The People of the State of New York, Ind. 29448C/05
Respondent,

-against-

Zaida Sanchez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered March 17, 2007, convicting defendant, upon her plea of guilty, of bribery in the third degree, driving while intoxicated (two counts), and obstructing governmental administration in the second degree, and sentencing her to an aggregate term of 6 months, concurrent with 5 years' probation, and imposing a fine of $2,500, unanimously affirmed.

Defendant has not established any basis for "deeming" her driving while intoxicated convictions to be misdemeanors. To the extent that she is claiming she did not knowingly and intelligently plead guilty to DWI as a felony, that claim is unpreserved (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendant's plea of guilty to the "entire indictment" clearly covered the felony DWI charges, and there was nothing in the plea allocution that cast significant doubt on her guilt (*see People v Toxey*, 86 NY2d 725 [1995]). As for her claim that the People failed to file a special information pursuant to CPL 200.60 charging that she had previously been convicted of driving while intoxicated, that procedural defect was waived by defendant's guilty plea (*People v Gill*, 109 AD2d 419, 420 [1985]; *People v Guiliano*, 52 AD2d 240, 243-244 [1976]; *see also Wright v Davies*, 41 AD2d 879, 880 [1973]). Furthermore, since the felony complaint specified the prior conviction that was the basis for the elevated felony charge, and the indictment specified that two counts were felony offenses, defendant was apprised that she was being charged with felonies.

We perceive no basis for reducing the fine.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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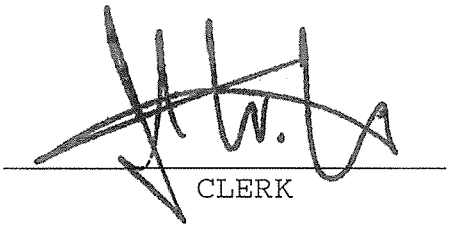

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Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4405-
4405A Index 105554/04
590118/05

Richard Conrad,
Plaintiff,

-against-

105 Street Associates, LLC,
Defendant-Appellant,

BFC Construction Corp., et al.,
Defendants.

- - - - -

105 Street Associates, LLC,
Third-Party Plaintiff-Appellant,

BFC Construction Corp., et al.,
Third-Party Plaintiffs,

-against-

Larry E. Knight, Inc., et al.,
Third-Party Defendants,

JEM Erectors, Inc.,
Third-Party Defendant-Respondent.

Schneider Goldstein Bloomfield LLP, New York (Donald F. Schneider of counsel), for appellant.

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

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 19, 2007, which, in an action for personal injuries sustained at a construction site by a worker employed by third-party defendant subcontractor JEM, insofar as appealed from as limited by the briefs, denied defendant site owner 105

Street's motion for summary judgment, or conditional summary judgment, on its claim for contractual indemnification against JEM, unanimously reversed, on the law, without costs, to grant 105 Street's motion to the extent of awarding it conditional summary judgment on its contractual indemnification claim against JEM. Appeal from order, same court and Justice, entered April 22, 2008, which denied 105 Street's motion to reargue its motion for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable order.

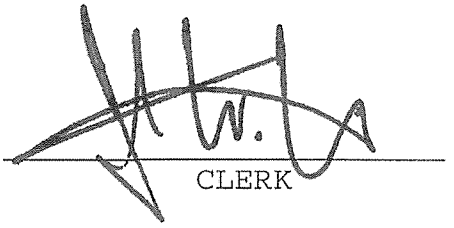
The indemnification clause of JEM's subcontract requires JEM to indemnify 105 Street against claims and damages arising from the performance of JEM's work under the subcontract and attributable to its negligent acts or omissions. Further, under the subcontract, JEM was solely responsible for directing and supervising the subcontract work and obligated to take reasonable safety precautions with respect to its performance of the subcontract work. The record shows that plaintiff fell into an unguarded opening in the floor near where he was working after tripping over debris, and evidence that defendant general contractor undertook to erect a barrier around the opening raises issues of fact as to whether a barrier was removed, and, if so, who removed it and whether JEM had timely notice of the unsafe

opening. Given JEM's contractual obligation and failure to implement safety measures adequate to guard against a fall of one of its workers into the opening, the clear causal connection between plaintiff's injury and the absence of a barricade or other appropriate safety measure guarding against falls into the opening, and the absence of any evidence of negligence on the part of 105 Street, the latter is entitled to conditional summary judgment on its claim for contractual indemnification against JEM in advance of any factual determination of the extent of JEM's negligence for the accident (*see Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 300 [2007], citing *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200 [1998]). That the general contractor may have assumed responsibility for erecting a barricade around the opening did not, absent contractual provision to the contrary, absolve JEM of its contractual obligation to implement adequate safety measures itself. We reject 105 Street's additional argument for summary judgment on its contractual indemnification claim against JEM based on the latter's failure to remove debris near the opening. The subcontract expressly limits JEM's liability for injury caused by debris it had created, and issues

of fact exist as to whether the debris over which plaintiff tripped was created by other contractors.

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

ENTERED: OCTOBER 28, 2008



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4406 Matt Egnotovich, et al., Index 604101/06
Plaintiffs-Appellants,

-against-

Katten Muchin Zavis & Roseman LLP,
Defendant-Respondent.

Menaker & Herrmann LLP, New York (Richard G. Menaker of counsel), for appellants.

Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 24, 2008, which granted defendant law firm, the escrow agent for a real estate venture, summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs each invested $150,000 as "membership dues" in a business venture to acquire vacation properties for plaintiffs' use. A portion of plaintiffs' dues were held as a deposit in an escrow account for which defendant acted as escrow agent. In 2006, the venture failed as a going concern and lacks funds to pay plaintiffs' damages.

Thereafter plaintiffs brought this action against the escrow agent, claiming that it wrongfully released their escrowed funds in furtherance of fraud by the venture's sponsors. An escrow agent, who acts a trustee for both parties, is obliged to release

escrow funds only in compliance with the conditions in the escrow agreement (*Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 349 [1986]). Defendant complied with the terms of the operative escrow agreement by disbursing funds only for authorized purposes and upon being presented with the required documentation.

Contrary to plaintiffs' contentions, the "Punta Esmeralda" development agreement was an authorized purpose because it constituted a binding contract. It contained an exchange of promises and "all of the essential terms of the contract" (*Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1993]). Accordingly, the escrow agreement authorized those disbursements. Moreover, the escrow agent properly disbursed some escrowed funds before the parties had fully satisfied their obligations under the Punta Esmeralda agreement or other payment triggers had occurred (*see, e.g., Roan/Meyers Assocs. L.P. v. CT* Holdings, 26 AD3d 295, 296 [2006]), since the escrow agreement required that defendant disburse "the amount evidenced by such agreements" for "contractually committed expenditures."

Plaintiffs' contention that defendant improperly released the entire rent amounts for residences that the sponsors had leased in Punta Esmeralda and in the Time Warner Center in New York is equally unavailing, as the leases obligated the sponsors

to pay the full amount due on them, even if installment payments were permissible (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995]).

The invoices for furnishings and related expenses constituted enforceable agreements between the sellers and the sponsors (*see Battista v Radesi*, 112 AD2d 42, 42 [1985]), and accordingly constituted proper documentation for authorized expenditures under the escrow agreement. Although some of the invoices were unsigned, the sponsors' transfer instructions, which accompanied each and every invoice to defendant, provided sufficient evidence of the venture's intent to be bound by them (*Liberty Mgt. & Constr. Ltd. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77 [1995]).

With respect to the escrow agent's disbursement for legal services rendered by a Mexican law firm, that firm's failure to provide a retainer agreement does not preclude it from recovering legal fees for its services (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 62-64 [2007]).

The court properly dismissed plaintiffs' alternative causes of action, including breach of fiduciary duty, aiding and abetting fraud, and conversion. Although defendant, as designated escrow holder, had a fiduciary relationship with

plaintiffs (*see Bardach v Chain Bakers*, 265 App Div 24, 27 [1942], *affd* 290 NY 813 [1943]), plaintiffs have failed to identify any action by defendant that breaches that fiduciary relationship or conflicts with the escrow agreement. Nor is there any evidence of defendant's awareness of, or complicity with, the sponsors' purported fraud. On this basis, plaintiffs' claims for conversion and aiding and abetting fraud also fail. An action for money had and received does not lie where there is an express contract between the parties such as here (*Phoenix Garden Rest. v Chu*, 245 AD2d 164, 166 [1997]).

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

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4408 The People of the State of New York, Ind. 5681/05
Respondent,

-against-

Edwin Negron,
Defendant-Appellant.

Glenn R. Abolafia, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered September 5, 2006, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

By failing to object, or by failing to make a specific objection, defendant failed to preserve his challenges to certain portions of the victim's testimony, including defendant's constitutional claims, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. None of the victim's testimony concerning his observations of the behavior of the apartment's other occupants constituted hearsay or was otherwise inadmissible. To the extent defendant is challenging the sufficiency of the

evidence, that claim is likewise unpreserved and without merit. The victim's testimony, coupled with circumstantial evidence (*see e.g. People v Torres*, 33 AD3d 318 [2006], *lv denied* 7 NY3d 929 [2006]), clearly established that defendant entered the apartment without anyone's permission and with the contemporaneous intent to commit a crime.

The court properly declined to submit criminal trespass as a lesser included offense, since there was no reasonable view of the evidence that defendant entered the apartment unlawfully, but without the intent to commit a crime. Although defendant now asserts there was a reasonable view that he entered as a guest of a nontestifying occupant, but then remained unlawfully, he did not preserve that argument (*see People v Liner*, 262 AD2d 250 [1999], *lv denied* 93 NY2d 1021 [1999]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, as being based entirely on speculation.

We perceive no basis for reducing the sentence.

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

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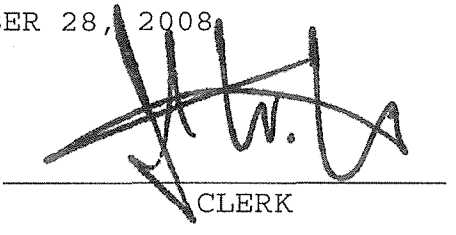


CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4409N Arthur M. Handler, Index 109702/01
Plaintiff-Respondent,

-against-

Steven R. Lapidus, et al.,
Defendants-Appellants,

1050 Tenants Corp.,
Defendant-Respondent.

M. W. Moody LLC, New York (Mark Warren Moody of counsel), and Law Office of Theodore P. Kaplan, New York (Theodore P. Kaplan of counsel), for appellants.

Handler & Goodman LLP, New York (Robert S. Goodman of counsel), for Arthur M. Handler, respondent.

Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for 1050 Tenants Corp., respondent.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 25, 2007, directing the Lapidus defendants to pay principal sums of $111,936.96 to plaintiff and $279,773.65 to defendant tenants corporation, unanimously affirmed, with costs.

In accordance with the order of reference, the Referee evaluated the reasonable amount of attorney fees incurred as a result of the Lapidus violation of the 2002 stipulation (*see Handler v 1050 Tenants Corp.*, 24 AD3d 231 [2005]), and considered

all the requisite factors (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]). The Referee's report was properly confirmed as supported by the record (*see 1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [2008]). The recommended fees were reasonable and fully documented, and did not constitute compensation of plaintiff and the tenants corporation for aspects of this litigation outside the scope of the reference. We have considered and rejected the Lapidus defendants' remaining arguments.

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

ENTERED: OCTOBER 28, 2008

CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4413-
4414-
4415 In re Osbourne S.,
Petitioner-Respondent,

-against-

Regina S.,
Respondent-Appellant.

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Order, Family Court, Bronx County (Alma A. Cordova, J.), entered on or about August 22, 2006, which, after a hearing, granted petitioner father's petition for custody of the subject child, and awarded liberal visitation to respondent mother, unanimously affirmed, without costs.

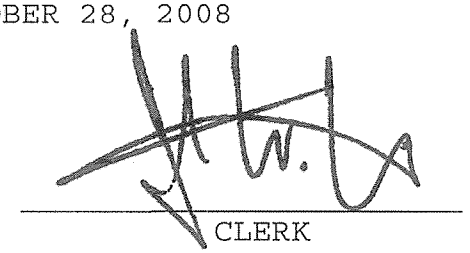
The court's conclusion that an award of custody to the father with liberal visitation to the mother was in the best interests of the child has a sound and substantial basis in the record (*see generally Miller v Pipia*, 297 AD2d 362, 364 [2002]; Domestic Relations Law § 70[a]). The totality of the circumstances considered by the court showed that the home environments of both parents were suitable, that both parents had the means to adequately provide for the child's material needs,

and that both parents had similar abilities to provide for the emotional and intellectual development of the child, who has special needs (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). However, the mother's negative attitude and hostility toward the father, as evidenced by her maligning of the father in the child's presence, the filing of unsubstantiated reports of abuse and neglect against him, and encouraging the child to lie to support her false claims, failed to demonstrate a willingness or ability on her part to facilitate and encourage a close and optimum relationship between the child and his father (*see Janecka v Franklin*, 150 AD2d 755, 757 [1989]). The court's decision was also in accord with the Law Guardian's recommendation that the child be placed in the custody of the father (*see Matter of Krebsbach v Gallagher*, 181 AD2d 363, 368 [1992], *lv denied* 81 NY2d 701 [1992]). Furthermore, the granting of liberal visitation to the mother ensures that she will remain an integral part of the child's life and furthers the goal of allowing the child to be nurtured and guided by both of his natural parents (*see Weiss v Weiss*, 52 NY2d 170, 175 [1981]; *Courten v Courten*, 92 AD2d 579, 580 [1983]).

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

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4416 Carmen D. Acosta, Index 24327/05
Plaintiff-Respondent,

-against-

Blatt Plumbing Inc., et al.,
Defendants-Appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellants.

Helen F. Dalton & Associates, P.C., Forest Hills (Helen F. Dalton of counsel), for respondent.

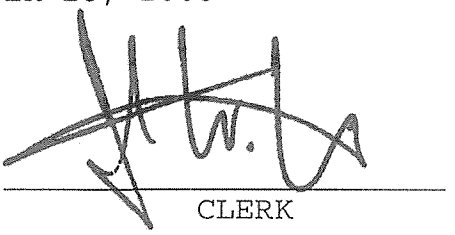
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about February 13, 2008, which, in an action for personal injuries resulting from a car accident, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

It cannot be said, as a matter of law, that plaintiff's conduct was the sole proximate cause of the accident. The evidence shows that both plaintiff and defendant driver had stop signs before them, and each claims to be the first to enter the intersection where the collision occurred. Accordingly, there are triable issues of fact as to the events surrounding the accident, including which driver had the right of

way (*see e.g. Pappalardi v Jones*, 29 AD3d 391 [2006]; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381 [2003]).

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4417 Edmundo Catarino, et al., Claimants-Respondents, Claim No. 107465

-against-

The State of New York, Respondent-Appellant.

The Law Offices of Kenneth Arthur Rigby, PLLC, New York (John R. Wiess of counsel), for appellant.

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for respondents.

Order of the Court of Claims of the State of New York (S. Michael Nadel, J.), entered June 4, 2007, which denied the State's motion for summary judgment and granted claimants' motion for partial summary judgment on liability, unanimously affirmed, without costs.

Claimant laborer was injured on a State-owned construction site and asserts a claim under Labor Law § 241(6), premised on a violation of Industrial Code (12 NYCRR) § 23-8.1(f)(5), which provides that "[m]obile cranes, tower cranes and derricks shall not hoist, lower, swing or travel while any person is located on the load or hook." He testified that he was standing on top of a concrete box that had been unloaded from a flatbed truck to the ground by a crane. As he put his right hand on the cables between the hook and the cable block for balance, using his left

hand to disconnect the crane's hook from the cables affixed to the box, the crane operator, without warning, started reeling in the cable. Claimant's right hand was pulled into the cable block and crushed.

The State moved for summary judgment on the ground that § 23-8.1(f)(5) was inapplicable because the concrete box or load was not in motion at the time of the accident. However, the language of the regulation is not limited to situations where a person is on the load while the load itself is being moved. The regulation also prohibits using the crane while a person is physically on the load. As claimant was injured when the crane was operated while he was on the load, § 23-8.1(f)(5) is clearly implicated.

The State also argues that the court erred in granting partial summary judgment on liability to claimant because there are triable issues of fact concerning proximate cause, comparative negligence, and whether reasonable safety measures were employed by the contractor. Violation of an administrative regulation promulgated pursuant to statute is simply some evidence of negligence. The owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241(6), including contributory and comparative

negligence (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). Although the defenses of reasonable safety measures, proximate cause and comparative negligence were raised, the State failed to present evidentiary proof sufficient to present a triable issue of fact in response to claimant's prima facie demonstration of entitlement to judgment as a matter of law.

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

ENTERED: OCTOBER 28, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 28, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
Milton L. Williams
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 204/06
Respondent,

-against- 4419

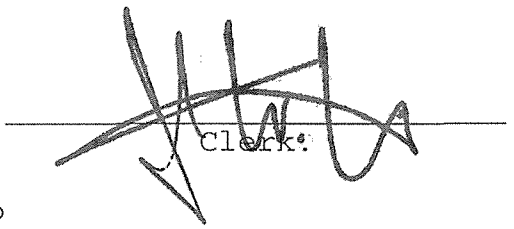
Michael Hamilton,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert H. Straus, J.), rendered on or about October 4, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:



Clerk.

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

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4420-
4420A-
4420B In re Kevin J., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Tanisha J.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc.,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John Newbery of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about June 15, 2007, which, to the extent appealed from, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose adoption, unanimously affirmed, without costs.

Respondent's contention that the petitions were pled with insufficient particularity to satisfy the requirements of Family Court Act § 614(1)(c) is unpreserved as it is raised for the

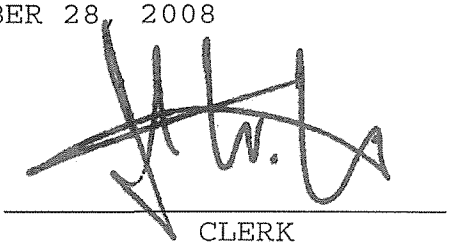
first time on appeal (*see Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review this argument, we would find that the petitions set forth in sufficient detail the diligent efforts made by the agency to encourage and strengthen the parental relationship.

Clear and convincing evidence supports the findings of permanent neglect (Social Services Law § 384-b[7][a]). Despite the diligent efforts by the agency, which included providing respondent with referrals to drug abuse treatment centers, assisting her to obtain housing, monitoring her drug abuse problems, and scheduling regular visitation, respondent failed, during the statutorily relevant time period, to satisfactorily complete the requisite programs and remain drug free (*see Matter of Tiffany R.*, 7 AD3d 297 [2004]). While respondent apparently did complete one treatment program, a continuing series of relapses began immediately thereafter, demonstrating that the primary problem that led to the children's placement has not been ameliorated (*see Matter of Jah'lil Dale Emanuel McC.*, 44 AD3d 547 [2007]). Furthermore, the record demonstrates that respondent's

visitation with the children was sporadic at best (*see Matter of Angel P.*, 44 AD3d 448 [2007]).

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4421 Carlos Corrales, et al., Index 106510/05
Plaintiffs-Respondents,

-against-

Reckson Associates Realty Corp., et al.,
Defendants-Appellants-Respondents,

One Source Facility Services, Inc.,
Defendant-Respondent-Appellant,

American Christmas Decorations, Inc., et al.,
Defendants.

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

Gallo Vitucci Klar Pinter & Cogan, New York (Kimberly A. Ricciardi of counsel), for respondent-appellant.

Tedd Kessler, New York, for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 31, 2007, which denied the motion of defendants Reckson Associates Realty Corp., Reckson Management Group, Inc., Metropolitan 919 3rd Avenue LLC, H. Grant Limited Partnership and Rany Management Group, Inc. (collectively Reckson defendants) for summary judgment dismissing the complaint or, in the alternative, for conditional summary judgment on their cross claims for indemnification against defendant One Source Facility Services, Inc. (One Source), and denied One Source's motion for summary judgment dismissing the complaint and all cross claims as

against it, unanimously modified, on the law, One Source's motion granted to the extent of dismissing the complaint as against it, and otherwise affirmed, without costs.

Plaintiff slipped and fell on an oily substance on the plaza outside of an office building owned or managed by the Reckson defendants, which had retained One Source to provide cleaning services for the interior and exterior of the building. Dismissal of the complaint on the basis that defendants lacked either actual or constructive notice of the hazardous condition, or that there was a lack of evidence that an oily spot caused plaintiff to slip, was properly denied (*see e.g. Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Triable issues of fact regarding notice and causation were raised by the deposition testimony of a nonparty witness to plaintiff's fall, who stated that she had seen the oily spot and reported it to an agent of the building one or two days prior to the accident (*see Lorenzo v Plitt Theatres*, 267 AD2d 54, 55-56 [1999]).

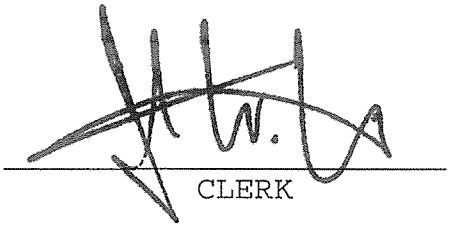
However, dismissal of the complaint as against One Source is warranted, since none of the exceptions to the general rule that a contractor does not owe a duty of care to a noncontracting third party are applicable (*see e.g. Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The record demonstrates that One Source's service contract with the Reckson defendants was not

"comprehensive and exclusive" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]) as to preventative maintenance, inspection and repair, and that the Reckson defendants' on-site property manager retained responsibility for and control over maintenance and safety of the premises (*see Lawson v OneSource Facility Servs., Inc.*, 51 AD3d 983, 984 [2008]; *Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 65-66 [2006]).

The court properly determined that issues of fact as to whether the Reckson defendants were negligent precluded granting them conditional summary judgment against One Source (*see Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [2004]). Nor was One Source entitled to summary judgment dismissing the indemnification cross claims, because, as noted, the record presents questions regarding whether it had notice of the alleged oily condition and failed to remedy it.

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4422 The People of the State of New York, Ind. 2471/06
Respondent,

-against-

William Rosenstein,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Michael Sonberg, J.), rendered on or about May 14, 2004, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

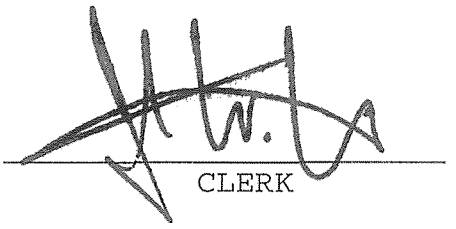
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 28, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 28, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
Milton L. Williams
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 6002/97
Respondent,

-against- 4423

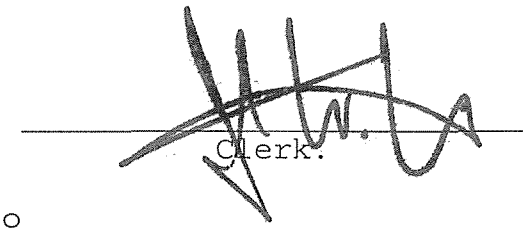
David Sostre,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered on or about March 17, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:



Clerk.

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

Tom, J.P., Williams, Catterson, Moskowitz, JJ.

4425 Nella Manko, Index 113306/06
Plaintiff-Appellant,

-against-

Dana Mannor, et al.,
Defendants-Respondents,

"Anesthesiologist" (a fictitious name), et al.,
Defendants.

Nella Manko, appellant pro se.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliot J. Zucker of counsel), for Dana Mannor, Alan Tikotsky, L.H. Radiologists, P.C. and Matthew Lubin, respondents.

Garson DeCorato & Cohen, LLP, New York (Anna R. Schwartz of counsel), for Lenox Hill Hospital, respondent.

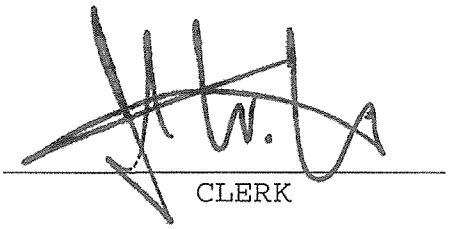
Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered March 22, 2007, which, in an action for medical malpractice, granted defendants' motions to dismiss the complaint as time barred, and dismissed as moot plaintiff's cross motions for, inter alia, further discovery and a stay of the action, unanimously affirmed, without costs.

Dismissal of the complaint was properly granted since the alleged malpractice occurred in 2002 and the action was not commenced until September 2006, which was well beyond the 2½-year statute of limitations (*see* CPLR 214-a).

We have considered plaintiff's remaining arguments, including that the relation back and continuous treatment doctrines preclude dismissal of the complaint, and find them unavailing.

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4426 In re Bogdan Ostrowski, Index 108388/07
Petitioner-Appellant,

-against-

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

Bogdan Ostrowski, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 5, 2007, which denied and dismissed the petition brought pursuant to CPLR article 78 seeking to compel respondents to reinstate and restore petitioner's premises residence pistol license and rifle/shotgun permit, unanimously affirmed, without costs.

The determination to revoke petitioner's pistol license and rifle/shotgun permit was not arbitrary and capricious, and had a rational basis. Petitioner's arrests cast doubt on his character and fitness to possess a firearm (*see Matter of Papaioannou v Kelly*, 14 AD3d 459 [2005]), as did the orders of protection issued against him and his violation of such orders. Although the charges against petitioner were adjourned in contemplation of dismissal, the circumstances surrounding the matters were

appropriately considered (*see Matter of Servedio v Bratton*, 268 AD2d 356 [2000]). Furthermore, the record shows that petitioner failed to report any of these incidents immediately to the License Division (*see* 38 RCNY 5-22[c][1]; 38 RCNY 5-30[c][1], [5]; 38 RCNY 3-05), and his alleged unawareness of the responsibility to do so is no excuse (*see Matter of Cohen v Kelly*, 30 AD3d 170 [2006]).

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: OCTOBER 28, 2008

CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4427 The People of the State of New York, Ind. 6425/98
Respondent,

-against-

Esteban DeJesus,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

Order, Supreme Court, Bronx County (Caesar Cirigliano, J.), entered on or about March 15, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not establish special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The mitigating factors cited by defendant were generally taken into account by the Risk Assessment Guidelines.

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

ENTERED: OCTOBER 28, 2008

CLERK

Tom, J.P., Saxe, Williams, Catterson, JJ.

4428N Matthew Serino, et al., Index 604396/02
Plaintiffs-Appellants,

-against-

Kenneth Lipper,
Defendant-Respondent,

Lipper Holdings, LLC, et al.,
Defendants.

Kirby McInerney LLP, New York (Mark A. Strauss of counsel), for appellants.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Jeremy H. Temkin of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered May 7, 2007, which granted the motion of defendant Kenneth Lipper to compel arbitration of plaintiffs' putative class action suit before the American Arbitration Association (AAA), unanimously affirmed, without costs.

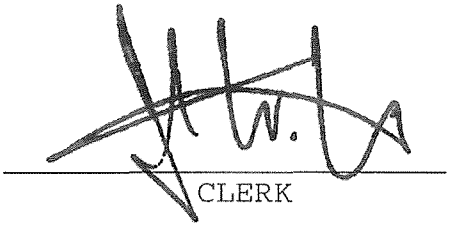
The court properly granted Lipper's motion to compel arbitration before the AAA, where the parties' partnership agreement contained a broad arbitration clause, requiring, among other things, that "[a]ll disputes and questions whatsoever" arising under the agreement should be submitted to arbitration, either before the National Association of Securities Dealers (NASD) or the AAA. The question of whether NASD rules prohibit

class arbitration even before the AAA is a question for the arbitrator (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39 [1997]; *Green Tree Fin. Corp. v Bazzle*, 539 US 444 [2003]; *Vaughn v Leeds, Morelli & Brown, P.C.*, 2005 WL 1949468, 2005 US Dist LEXIS 16792 [SD NY 2005]).

Plaintiffs have failed to demonstrate that Lipper's involvement in other cases related to the factual circumstances of this case constituted a waiver of his right to seek to compel arbitration (*see Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007] [court action must be clearly inconsistent with later claim that the parties must arbitrate claims]; *Flynn v Labor Ready*, 6 AD3d 492 [2004]). Conversely, plaintiffs are not judicially estopped from opposing the motion to compel arbitration merely because they chose not to oppose such motion made by other defendants whom plaintiffs believed were judgment proof (*see e.g. Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [1995]).

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

ENTERED: OCTOBER 28, 2008



CLERK

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4429N Halina Avery, Index 109295/06
Plaintiff-Appellant,

-against-

Molly Caldwell,
Defendant-Respondent.

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

Gibson, Dunn & Crutcher LLP, New York (D. Cameron Moxley of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered June 13, 2007, which granted defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

A reasonable excuse for the default is demonstrated by the affirmations of defendant's attorney and his physician, which together are adequate to show that illness prevented the attorney from preparing an answer over the period of delay (*see Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380 [2007]). Defendant has put forward a meritorious defense in its proposed verified answer and accompanying documents (*see Chase Manhattan Automotive Fin. Corp. v Allstate Ins. Co*, 272 AD2d 772, 774 [2000]). We reject plaintiff's alternative argument that the defendant's attorney's performance of various legal services, including contacting the court's Clerk to request additional time

to submit a proposed counter-default judgment, constituted opposition to the motion for a default judgment requiring an appeal therefrom rather than a motion to vacate (*cf. Achampong v Weigelt*, 240 AD2d 247 [1997]).

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

ENTERED: OCTOBER 28, 2008

CLERK

OCT 28 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Rolando T. Acosta, JJ.

3258-3259
Index 100477/05

x

Clarence Jones,
Plaintiff-Appellant,

-against-

414 Equities LLC, et al.,
Defendants-Respondents.

[And a Third-Party Action]

x

Plaintiff appeals from an order of the Supreme Court, New York County (Karen S. Smith, J.), entered November 1, 2006, which denied plaintiff's motion for partial summary judgment, without prejudice to renew after certain disclosure, and order, same court and Justice, entered December 13, 2006, which denied his motion for a default judgment against defendant Artimus Construction and granted Artimus' cross motion for leave to serve a late answer.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac and Michael H. Zhu of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Shelley R. Halber of counsel), for respondents.

McGUIRE, J.

The principal issue on this appeal is whether plaintiff, a demolition worker who fell approximately 10 to 12 feet when the permanent floor he was walking across collapsed, is entitled to summary judgment on his cause of action premised on Labor Law § 240(1). Although the Court of Appeals has issued numerous decisions that provide important guidance in resolving the question of law on which this appeal turns, no decision of the Court of Appeals is squarely on point. Each of the parties litigating the summary judgment motion, however, can point to authority both in this Department and in the other Departments that squarely supports its position. For the reasons that follow, we conclude that Supreme Court correctly denied plaintiff's motion with leave to renew following disclosure.

Plaintiff worked as a demolition laborer on a renovation project at a five-story apartment building owned by defendant 414 Equities LLC. Defendant Artimus Construction, Inc., was the general contractor of the project and retained plaintiff's employer, third-party defendant Bronxdale Maintenance Corp., as a subcontractor. The project involved major renovations to the interior of the building, including the demolition of all interior walls, and the removal of all debris and bathroom and kitchen fixtures. Essentially, the interior of the building was

being "gutted" and rebuilt. Notably, however, the building's permanent wooden floors were not to be removed in the course of the project.

On November 13, 2003, plaintiff was working on the second floor when the accident giving rise to this litigation occurred. Plaintiff described his accident as follows: "I was picking up [a] piece of the [interior] walls, like an old-fashion wall, it got cement and I was up [*sic*], I heard a loud crack and I just fell through the floor and the floor came from under me. The next thing I know I was screaming and [some co-workers] w[ere] down, came downstairs, I was down on the next [i.e., the first] floor." Plaintiff clarified this testimony, further testifying that he was dragging across the second floor a 50- to 60-pound piece of demolished wall to place it with other debris when the portion of the floor he was walking across collapsed, causing him to fall approximately 10 to 12 feet to the floor below. Plaintiff did not "hear anything or see anything" before the floor collapsed except for the loud cracking noise. There were no holes in the second floor prior to its collapse. At the time of the accident, the only safety devices plaintiff was using were a hard hat, a pair of gloves and a cloth face mask.

On January 12, 2005, plaintiff commenced this action against the owner asserting causes of action under Labor Law § 200,

§ 240(1) and § 241(6) and for common law negligence. The owner answered the complaint in April 2005, and commenced a third-party action against plaintiff's employer in September 2005.

In June 2006 plaintiff moved for summary judgment against the owner on the issue of liability on the Labor Law § 240(1) cause of action. Plaintiff asserted that he was entitled to summary judgment because (1) he was engaged in an activity protected by the statute, i.e., demolition work, (2) he was exposed to an elevation-related risk, i.e., the floor that collapsed was the second floor, and (3) the owner violated the statute by failing to provide him with proper safety devices. Plaintiff stressed that the collapse of a permanent floor, like the floor at issue, constitutes a prima facie violation of Labor Law § 240(1), particularly where there is evidence that the floor was "rotte[d] and decayed." In support of this motion plaintiff submitted, among other things, his deposition testimony and an affidavit. In his affidavit plaintiff averred that "[p]ortions of the second floor were old, rotted and decayed."

In opposition the owner argued that summary judgment was premature because two entities -- plaintiff's employer and the general contractor -- had been or were in the process of being added as parties to the action, and disclosure was needed from those entities to ascertain the condition of the floor prior to

its collapse and the cause of the collapse. The owner also argued that a triable issue of fact existed "as to whether the building was in a state of disrepair and decay such that the conditions created a foreseeable [elevation-related] risk" requiring the owner to provide the plaintiff with proper safety devices.

In August 2006 plaintiff filed a supplemental summons and complaint against the general contractor asserting the same causes of action he asserted against the owner. On September 11, 2006, plaintiff served the general contractor through the Secretary of State pursuant to Business Corporations Law § 306, and on October 20 mailed to the general contractor a notice advising that service of process in the action had been effected on the general contractor under that statute.

On the same day he mailed the notice (and while his motion for summary judgment against the owner was sub judice), plaintiff moved for a default judgment against the general contractor, arguing that the general contractor had failed timely to answer the action. On or about November 3, the general contractor cross-moved for leave to serve a late answer. The general contractor acknowledged that it failed timely to answer the action, but asserted that its brief delay in answering was caused "by the intervening time required for the Secretary of State's

copy to be served upon the defendants, for that copy to be forwarded to [the general contractor's] insurance carrier and for counsel to be appointed." The general contractor noted that its insurer retained the law firm representing the owner to represent the general contractor on October 31. Plaintiff opposed the cross motion on the ground that the general contractor failed to offer both a reasonable excuse for its failure timely to answer and a meritorious defense to the action.

Supreme Court denied plaintiff's motion for summary judgment against the owner on the issue of liability on the Labor Law § 240(1) cause of action, without prejudice to a renewed motion following the completion of certain disclosure, i.e., the depositions of the general contractor, plaintiff's employer and the architect of the project. The court reasoned that the mere collapse of a permanent floor, without more, did not constitute an elevation-related risk; to be actionable, such a risk must "be apparent, or known or with reasonable effort could have been known to those who are held to be statutorily liable" (14 Misc 3d 705, 709 [2006]). The court concluded that plaintiff's averment that "[p]ortions of the second floor were old, rotted and decayed" was insufficient to establish his entitlement to summary judgment because he was not "qualified as an expert" and had offered no other evidence indicating that the floor might

collapse (*id.* at 709-710). In a separate order Supreme Court denied plaintiff's motion for a default judgment against the general contractor and granted the general contractor's cross motion to serve a late answer. Plaintiff appealed both orders.

With respect to his motion against the owner, plaintiff asserts that he is entitled to summary judgment on his Labor Law § 240(1) cause of action because the floor collapsed, exposing him to an elevation-related risk, and the owner failed to provide him with proper safety devices. While plaintiff maintains that the issue of whether the collapse of the floor was foreseeable is irrelevant in determining liability under the statute, he contends that, in any event, the collapse of the floor was foreseeable because it was old, rotted and decayed.

To establish a cause of action under § 240(1),[1] a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

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[1]Labor Law § 240(1) states that: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one (*see Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]; *see generally Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Here, plaintiff established that he was engaged in a protected activity at the time of his accident, i.e., demolition work, and that the owner failed to provided him with adequate safety devices; the owner does not argue to the contrary. Thus, the sole issue on the appeal from the order denying plaintiff's motion for summary judgment against the owner on the § 240(1) cause of action is whether, as a matter of law, plaintiff was exposed to an elevation-related risk when he walked across the permanent floor that collapsed.

In *Rocovich v Consolidated Edison Co.* (*supra*), the Court of Appeals for the first time "fully addressed" the question of "the nature of those occupational hazards which the Legislature intended should warrant the absolute protection that [§ 240(1)]

affords" (78 NY2d at 513 [emphasis omitted]). Noting that § 240(1) does not specify the hazards it was designed to protect against, the Court looked to the "protective means," i.e., the safety devices, listed (*id.* at 513-514), and found a common thread connecting these devices:

> "[Each of] [t]he various tasks in which these devices are customarily needed or employed ... entails a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*id.* at 514).

The Court concluded that the worker in *Rocovich*, who slipped and fell backward, which in turn caused him to step into a 12-inch deep recessed trough containing caustic hot oil, was not subjected to an elevation-related risk (*id.* at 514-515).

The Court of Appeals reexamined *Rocovich* in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]). The plaintiff in *Ross* was assigned to weld a seam near the top of a shaft that was 40 to 50 feet deep. In order to perform the task, plaintiff was required to sit on a temporary platform above the shaft. To complete the task without falling from the platform, the plaintiff was forced to sit in a contorted position, which caused

him to sustain back injuries. The Court rejected the plaintiff's contention that his task posed an elevation-related risk covered by Labor Law § 240(1) because he needed to sit in the contorted position to avoid falling from the platform and down the shaft. Clarifying the special hazards to which § 240(1) is addressed, the Court stated that the gravity-related hazards referred to in *Rocovich*

> "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. In other words, Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501 [internal citation omitted; emphasis omitted]).

Since the platform served the core objective of § 240(1) -- it prevented the worker from falling down the shaft -- the worker's injury was not caused by an elevation-related risk (*id.*; *cf. Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993] [§ 240(1) liability imposed on the owners where the ladder the worker was using did not serve the core objective of the statute since the ladder did not prevent him from falling]).

Several years after it decided *Ross*, the Court again examined the elevation-related risk component of a § 240(1) cause

of action in *Nieves v Five Boro A.C. & Refrig. Corp.* (93 NY2d 914 [1999]). Focusing on the "falling worker" class of hazards, the Court denied recovery under the statute to a worker who tripped while stepping down from the ladder he was standing on to install a sprinkler system. The worker tripped on a portable light concealed by a drop cloth underneath the ladder. Highlighting that the extraordinary protections of § 240(1) cover only "a narrow class of special hazards," the Court stated that

> "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (*id.* at 916).

Since the ladder the worker used prevented him from falling while performing the installation, the "core objective" of the statute was satisfied; the accident resulted not from an elevation-related risk but from the presence of a concealed object on the floor below the ladder, a "usual and ordinary danger[] at a construction site" (*id.*; *see Bond v York Hunter Constr.*, 95 NY2d 883 [2000] [risk of falling while alighting from a construction vehicle was not an elevation-related risk]; *Melber v 6333 Main Street, Inc.*, 91 NY2d 759 [1998] [worker who tripped over conduit while walking in stilts he wore to perform the work at a height

was not exposed to an elevation-related risk; the stilts performed the core objective of the statute since they allowed him safely to perform his task, and the accident occurred as a result of a hazard unrelated to the hazard that brought about the need for the stilts]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995] [collapse of a completed firewall onto the worker is the type of peril usually encountered by a construction worker and not an elevation-related risk covered by § 240(1)]).

The Court of Appeals revisited the issue of elevation-related risks in *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]), which concerned two separate actions involving workers who fell from the surfaces of flatbed trucks. In one of the actions (*Toefer*), the worker fell approximately four feet from the surface of a truck to the ground while unloading beams from the truck. The Court determined that the worker had not been exposed to an elevation-related risk because he "was working on a large and stable surface only four feet from the ground[;] [t]hat is not a situation that calls for the use of a device like those listed in section 240(1) to prevent a worker from falling" (*id.* at 408). Similarly, the Court concluded that the worker in the other action (*Marvin v Korean Air Inc.*) had not been exposed to an elevation-related hazard. That worker climbed up onto the trailer of a truck, which was four to five feet off the ground,

and cut straps that secured materials to the trailer. While completing the task without incident, the worker fell when he tried to step off the truck because one of his feet became tangled in his safety harness. The Court stated that

> "[s]afety devices of the kind listed in the statute are normally associated with more dangerous activity than a worker's getting down from the back of a truck ... [T]he [four to five-foot] distance ... [the worker] had to travel, considering the nature of the platform he was departing from[, i.e., a flat trailer], was not enough to make [the statute] applicable" (*id.* at 408-409).

The Court of Appeals recently reviewed elevation-related risks in *Broggy v Rockefeller Group* (*supra*). The worker in *Broggy* was part of a crew assigned to wash both exterior and interior window panes in a building. While washing the interior pane of one of the windows, the worker fell from the surface of a desk he was standing on to perform the task. He fell approximately four feet to the floor below, sustaining personal injuries. The Court concluded that the worker was not exposed to an elevation-related risk because he was not "obliged to work at an elevation to wash the interior of the windows" (*id.* at 681). Although the worker testified at his deposition that he had to stand on the desk to clean the window, that testimony indicated nothing more than that the desk may have been in his way or that he could perform his task more quickly by climbing on the desk

instead of seeking assistance to move it (*id.*). After all, prior to the accident, the worker had cleaned without incident eight other interior window panes that were exactly the same height as the window he was cleaning when his accident occurred and did so without the use of a ladder or other safety device (*id.* at 682). Finding that, as a matter of law, the worker "did not ... need protection from the effects of gravity" (*id.* at 681-682), the Court affirmed an order of the Appellate Division awarding summary judgment to the landlords, lessors, lessees and managers of the building dismissing the worker's Labor Law § 240(1) cause of action.

At bottom, the Court of Appeals' case law demonstrates that no bright-line test exists for determining whether a worker was exposed to an elevation-related risk. Nevertheless, under that case law, a plaintiff in a § 240(1) action who was injured because he or she fell must establish that (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of the force of gravity, and (3) the protective devices envisioned by the statute, e.g., ladders, scaffolds and similar devices, were designed to prevent the hazard that caused the fall. Plaintiff has made each of these showings. First, plaintiff was required to perform his task on a permanent floor

below which there was another floor. Thus, plaintiff was working at an elevation since he was in a higher position relative to the floor below. Second, plaintiff was exposed to the effects of gravity since the floor collapsed while he was walking across it, causing him to fall, and the fall was the direct result of the effects of gravity. Third, the protective devices envisioned by the statute were designed to prevent a worker from falling through a collapsing floor; plaintiff asserts that harnesses and safety lines attached to a safe structure such as a permanent wall are designed to prevent a fall like the one he experienced, a point that the owner does not contest.[2] The critical inquiries, therefore, are whether plaintiff can recover under § 240(1) for an injury caused by the collapse of a permanent floor, and, if so, whether, in addition to the above showings, plaintiff must establish that the collapse of the floor was foreseeable.

While the Court of Appeals has not had occasion to review whether the collapse of a permanent floor or similar structure entails an elevation-related risk, numerous Appellate Division decisions have tackled that issue.[3] The Second Department has

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[2]While most (if not all) of the interior walls of the building were removed in the course of the project, the exterior walls were not.

[3]It is well established that a fall precipitated by the collapse of a temporary floor or similar structure gives rise to

concluded that the collapse of a permanent floor can, under certain circumstances, pose an elevation-related risk and give rise to liability under § 240(1). In *Richardson v Matarese* (206 AD2d 353 [1994]), the workers were injured while attempting to move an 800-pound radiator across the third floor of a building they were helping to renovate when the floor collapsed, causing the workers to fall to the floor below. The Court determined that the collapse of a permanent floor constituted a prima facie violation of § 240(1), expressly rejecting the contractor's arguments that the statute "is not implicated because the [workers] were injured as the result of the collapse of a permanent, rather than a temporary structure, or as the result of the collapse of the work site itself, rather than a safety device enumerated in [the statute]" (*id.* at 353-354; *see also De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948, 950 [2003] ["The fact that the fire escape [that collapsed, causing the worker to fall,] was a permanent rather than temporary structure does not preclude Labor Law § 240(1) liability"]).

In *Shipkoski v Watch Case Factory Assoc.* (292 AD2d 597

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liability under § 240(1) (*see Gomez v 2355 Eighth Ave., LLC*, 45 AD3d 493 [2007]; *Grigoropoulos v Moshopoulos*, 44 AD3d 1003 [2007]; *Craft v Clark Trading Corp.*, 257 AD2d 886 [1999]; *Robertti v Chang*, 227 AD2d 542 [1996], *lv dismissed* 88 NY2d 1064 [1996]).

[2002]), the Second Department elaborated on its holding in *Richardson*. The worker in *Shipkowski* was injured when the permanent floor he was walking on collapsed, causing him to fall to the floor below. There was evidence in the record on the worker's motion for summary judgment on his § 240(1) cause of action that, prior to the accident, the floor that collapsed was in a deteriorated condition. The Court stated that

> "[t]here must be a foreseeable risk of injury from an elevation-related hazard to impose liability under the statute, as 'defendants are liable for all normal and foreseeable consequences of their acts' (*Gordon v Eastern Ry. Supply*, 82 NY2d [at] 562). Thus, to establish a prima facie case pursuant to Labor Law § 240(1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged (*see Felker*[, *supra*]; *Misseritti*[, *supra*])" (292 AD2d at 588).

Applying these principles, the Court concluded that a triable issue of fact existed regarding "whether the building was in such an advanced state of disrepair and decay from neglect, vandalism, and the elements that the plaintiff's work on the third floor exposed him to a foreseeable risk of injury from an elevation-

related hazard" (*id.* at 589; *see Cavanagh v Mega Contr., Inc.*, 34 AD3d 411 [2d Dept 2006]; *cf. Balladares v Southgate Owners Corp.*, 40 AD3d 667, 669-670 [2d Dept 2007] ["Although injury resulting from the collapse of a floor may give rise to liability under Labor Law § 240(1) where the circumstances are such that there is a foreseeable need for safety devices, the plaintiff failed ... to raise a triable issue of fact in this regard"] [citations omitted]).

The Second Department has also imposed liability on owners and contractors under § 240(1) when a worker has fallen through a roof that collapsed, especially when there was evidence that the roof's collapse was foreseeable (*see Taylor v V.A.W. of Am., Inc.*, 276 AD2d 621 [2000]; *Charles v Eisenberg*, 250 AD2d 801 [1998]; *see also Dyrmyshi v Clifton Place Dev. Group, Inc.*, 7 AD3d 565 [2004]). That Court, however, has also concluded that a worker who fell when the balcony on which he was standing collapsed could not recover under the statute because "the balcony [wa]s not a scaffold, but rather a permanent appurtenance to the building" (*Caruana v Lexington Vil. Condominiums at Bay Shore*, 23 AD3d 509, 510 [2005]). Using the same rationale, the Court affirmed an order dismissing the § 240(1) cause of action of a worker who was injured when the permanent staircase on which

he was walking collapsed (*Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 531-532 [1999]). In neither *Caruana* nor *Norton* did the Court distinguish or cite its precedents allowing recovery under the statute in seemingly analogous situations.

The Third Department generally applies a rule that is at odds with the prevailing rule in the Second Department that the collapse of a permanent floor or similar structure can give rise to liability under § 240(1). The Third Department has often stated that a structure that serves "as a permanent passageway between two parts of [a] building ... [is] not ... a ... device that is employed for the express purpose of gaining access to an elevated worksite," and therefore no cause of action lies under § 240(1) where a permanent structure collapses (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [2007] [internal quotation marks omitted] [permanent staircase]; *see also D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765-766 [2000], *lv denied* 95 NY2d 765 [2000] [permanent floor]; *Avelino v 26 Railroad Ave. Inc.*, 252 AD2d 912, 912-913 [1998] [permanent floor]; *Williams v City of Albany*, 245 AD2d 919, 916-917 [1997] [permanent stairway]; *cf. Craft v Clark Trading Corp.*, 257 AD2d at 887-888 [liability imposed under § 240(1) where the worker fell when the temporary floor on which he was standing collapsed]; *but see Beard v State of New York*, 25 AD3d 989, 991 [2006] [section 240(1) liability imposed where the

worker fell when the bridge he was demolishing collapsed; the Court, citing *Richardson*, rejected the defendant's contention that the worker could not recover under the statute because the bridge was a permanent structure, especially since the bridge was "not structurally sound"]; *Seguin v Massena Aluminum Recovery Co.*, 229 AD2d 839, 840 [1996] [section 240(1) liability imposed where the worker fell through a decayed roof to the floor below; the Court, citing *Richardson*, rejected the defendant's contention that the statute was not implicated because the worker fell as a result of the collapse of a permanent structure]).

For its part, the Fourth Department also has issued decisions on the issue of whether the collapse of a permanent structure may give rise to liability under § 240(1) that cannot easily be reconciled. In *Bradford v State of New York* (17 AD3d 995 [2005]), the Court found that the claimants, one of whom was killed and others who were injured, were exposed to an elevation-related risk when the pedestrian bridge they were helping to erect collapsed. The Court held that the collapse of a work site constitutes a prima facie violation of the statute (*id.* at 997). In dicta, the Court expressly rejected the owner's contention that it had no liability under § 240(1) because the claimants "were injured as a result of the collapse of a permanent, rather than a temporary structure" (*id.* [internal quotation marks

omitted]). In support of that proposition, the Court cited, among other things, *Collins v County of Monroe Indus. Dev. Agency* (167 AD2d 914 [1990], *lv dismissed* 77 NY2d 874 [1991]), in which the concrete floor of the underground parking garage on which the worker was standing collapsed, causing the worker to fall to the floor below.[4] On the other hand, the Fourth Department also has followed the Third Department's rule that the collapse of a permanent structure cannot serve as a basis for a § 240(1) cause of action (*see Sponholz v Benderson Prop. Dev.*, 266 AD2d 815 [1999], *appeal dismissed* 94 NY2d 899 [2000]; *Dombrowski v Schwartz*, 217 AD2d 914 [1995]).

Our precedents regarding whether the collapse of a permanent structure may give rise to liability under § 240(1) are similarly inconsistent. While addressing the different hazard of a fall through a hole in a permanent floor (rather than the collapse of it), we have indicated that the permanency of a structure is irrelevant in determining whether a cause of action lies under the statute. Thus, in *John v Baharestani* (281 AD2d 114, 119 [2001]), in an opinion by Justice Sullivan, we rejected the owner and contractor's contention that the worker, who fell through an

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[4]It is not clear, however, whether the party found liable under Labor Law § 240(1) argued on appeal that it could not be held liable because the concrete floor was a permanent structure.

unguarded opening in the floor on which he was walking, was not entitled to the protections of § 240(1) if, at the time of his accident, the worker was walking on permanent flooring. In so concluding, Justice Sullivan relied on the Second Department's decision in *Richardson* (*supra*) and our prior decision in *Carpio v Tishman Constr. Corp. of N.Y.* (240 AD2d 234 [1997]). Finding that a worker who partially fell through a hole in the permanent floor on which he was walking was entitled to summary judgment on his cause of action under § 240(1), the majority in *Carpio* stated that

> "[the statute] does not apply merely because work is performed at elevated heights, but rather, applies only where the work itself involves risks related to differences in elevation. However, [the dissent] misapplies this principle in concluding that no elevation-related risk existed because the plaintiff was working on a 'permanent concrete floor,' and that this accident was no different from a situation where the plaintiff tripped on a pothole on the ground floor. Indeed, it is the risk posed by elevation differentials at a construction site, not the permanency of the structure, which is determinative of the statute's applicability" (*id.* at 235-236 [internal citation omitted]).

Several of our decisions, however, have indicated that the collapse of a permanent structure cannot serve as a basis for a § 240(1) cause of action (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202 [2005]; *Carrion v Lewmara Realty Corp.*, 222 AD2d 205 [1995], *lv denied* 88 NY2d 896 [1996]; *see also Contrera v Gesher*

Realty Corp., 1 AD3d 111 [2003]).

As this survey of the Appellate Division case law makes plain, the law is unclear on the issue of whether the collapse of a permanent floor or similar structure poses an elevation-related risk giving rise to a cause of action under § 240(1). The Appellate Division case law supports each of the following propositions: (1) the collapse of a permanent structure constitutes a prima facie violation of § 240(1) without regard to the foreseeability of the collapse (*see e.g. Bradford, supra; Collins, supra*), (2) the collapse of a permanent structure may give rise to liability under § 240(1) if there is evidence that the collapse was foreseeable (*see e.g. Balladares, supra; Shipkowski, supra*), and (3) the collapse of a permanent structure cannot give rise to liability under § 240(1) regardless of whether the collapse was foreseeable (*see e.g. Milanes, supra; Caruana, supra; D'Egidio, supra*).

The prevailing rule of the Third Department -- the collapse of a permanent structure cannot give rise to § 240(1) liability -- is, in our view, based on an erroneous premise. The premise of that rule is that a permanent structure, such as a floor or a staircase, is not a safety device, but rather a passageway between two parts of a building and therefore the statute is

inapplicable (*see e.g. Milanese*, 41 AD3d at 1061; *see also Brennan v RCP Assoc.*, 257 AD2d 389, 391 [1st Dept 1999], *lv dismissed* 93 NY2d 889 [1999]). That inquiry, however, misses the mark because it places the emphasis on whether the structure functioned as a safety device rather than on whether the worker was exposed to an elevation-related risk requiring a safety device. As the Court of Appeals has observed, "[t]he crucial consideration under section 240(1) is ... whether a particular ... task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy*, 8 NY3d at 681; *see Carpio*, 240 AD2d at 236 ["it is the risk posed by elevation differentials ..., not the permanency of the structure, which is determinative of the statute's applicability"]). Moreover, determining liability under the statute on the basis of whether the structure from which a worker fell was permanent "would create an arbitrary dividing line unfaithful to [the] legislative intent" of the statute, i.e., protecting workers who are working at heights from falling (*Broggy*, 8 NY3d at 681). Accordingly, plaintiff can recover under § 240(1) even though he was injured as a result of the collapse of a permanent floor.

With respect to whether plaintiff must demonstrate that the collapse of the floor was foreseeable, Justice Sullivan discussed

the issue of foreseeablility as it relates to § 240(1) in *Buckley v Columbia Grammar & Preparatory* (44 AD3d 263 [2007]). The worker in *Buckley* was assisting in the installation of an elevator. The counterweight frame of the elevator was ascending the shaft when a nail-like spike protruding from the wall of the shaft struck the frame. Several of the counterweights housed in the frame were dislodged and fell down the shaft, striking the worker who was standing in the doorway of the shaft on a sub-basement floor. Rejecting the worker's contention that he was exposed to an elevation-related risk, Justice Sullivan wrote that "a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute *only if the application of that force was foreseeable*" (*id.* at 267 [emphasis added]). "Thus, the determination of the type of protective device[, if any,] required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed" (*id.* at 268). Since the dislodging and falling of the counterweights were not foreseeable risks inherent in the worker's task, no obligation arose on the part of the owner or contractor to provide the worker with a protective device contemplated by § 240(1). We have noted in a number of other decisions the requirement that a plaintiff in a § 240(1) action demonstrate that the hazard that caused the plaintiff's

injuries was foreseeable in light of the task the plaintiff was performing (*see Campbell v City of New York*, 32 AD3d 703 [2006]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252 [2004], *lv dismissed* 3 NY3d 737 [2004]; *Cruz v Turner Constr. Co.*, 279 AD2d 322 [2001]; *Arce v 1133 Bldg. Corp.*, 257 AD2d 515 [1999]; *Robinson v NAB Constr. Corp.*, 210 AD2d 86 [1994]). In light of our case law and the prevailing case law of the Second Department (*see Balladares, supra; Shipkowski, supra*), we conclude that plaintiff must establish that the collapse of the floor was foreseeable.

Our conclusion that liability under § 240(1) under these circumstances requires a showing that the collapse of the floor was foreseeable does not effectively consign plaintiff to the remedies he would have in any event under general principles of negligence. The issue of foreseeability in this context is relevant only with respect to whether the plaintiff was exposed to an elevation-related risk, and only where the elevation-related risk was not apparent from the nature of the work such that the defendant would not normally be expected to provide the worker with a safety device to prevent the worker from falling. On his cause of action under the statute, plaintiff is relieved from demonstrating a number of elements he would have to prove in a common law negligence claim, including that defendants breached

a duty of care owed to him and that defendants created or had notice of a defective condition. Moreover, owners and general contractors are liable under the statute regardless of whether they supervised or controlled the work being performed when the plaintiff was injured, and principles of comparative fault are irrelevant under the statute.

Here, plaintiff failed to make a prima facie showing that the collapse of the floor was a foreseeable risk of the task he was performing. Plaintiff was walking across the permanent floor, which was not being removed during the project, while dragging a 50- to 60-pound piece of debris. Plaintiff's deposition testimony sheds little light on the condition of the floor prior to its collapse; he only testified that he "was walking on a clean straight floor" in which there were no holes. Moreover, in his affidavit plaintiff merely averred that "[p]ortions of the second floor were old, rotted and decayed." Plaintiff offered no specifics as to which portions of the second floor were in that condition, and his characterization of the condition of the floor, i.e., "old, rotted and decayed," is unsupported by any factual details. Accordingly, plaintiff failed to demonstrate his entitlement to judgment as a matter of law, and Supreme Court correctly denied the motion without prejudice to a renewed motion following disclosure.

With respect to plaintiff's appeal from the order denying his motion for a default judgment against the general contractor and granting the general contractor's cross motion for leave to serve a late answer, plaintiff argues that neither the affirmation of the general contractor's counsel nor the affidavit of the general contractor's president demonstrated a reasonable excuse for its failure timely to serve an answer. Similarly, plaintiff argues that the president's affidavit failed to demonstrate that the general contractor has a meritorious defense to the action.

On August 30, 2006, plaintiff filed a supplemental summons and complaint naming the general contractor as a party to this action. Plaintiff served the general contractor by delivering two copies of the initiatory papers to the Secretary of State on September 11, 2006 (*see* Business Corporation Law § 306[b]). Service was complete on that date and the general contractor's answer, to be timely, had to be served by October 11 (*see Shah v Wilco Sys., Inc.*, 27 AD3d 169, 173 [2005], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]). On October 20, plaintiff mailed to the general contractor a notice, along with a copy of the initiatory papers, advising it that plaintiff had served the general contractor through the Secretary of State on September 11. Plaintiff sent this notice to comply with CPLR 3215(g)(4),

which requires such a notice to be sent 20 days prior to the entry of a default judgment. Also on October 20, plaintiff moved for a default judgment against the general contractor. On or about November 3, the general contractor cross-moved to serve a late answer.

The general contractor failed timely to serve an answer, and it did not seek to serve a late answer until plaintiff sought a default judgment against it. The general contractor's excuse for its nearly three-week delay in seeking leave to serve a late answer is hardly overwhelming; the general contractor asserted that the "delay was occasioned by the intervening time required for the Secretary of State's copy to be served upon [it], for that copy to be forwarded to [the general contractor's] insurance carrier and for counsel to be appointed." Nevertheless, since the delay was brief and plaintiff was not prejudiced by the delay, we find the excuse to be adequate (*see generally Rodriguez v Dixie N.Y.C., Inc.*, 26 AD3d 199 [2006]; *Heskel's West 38th Street Corp. v Gotham Const. Co.*, 14 AD3d 306 [2005]). While we agree with plaintiff that the conclusory affidavit of the general contractor's president is insufficient to demonstrate a potential meritorious defense to the action, a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012[d]), where, as here, no default

order or judgment has been entered (*see Nason v Fisher*, 309 AD2d 526 [2003]; *DeMarco v Wyndham Intl.*, 299 AD2d 209 [2002]; *Terrones v Morera*, 295 AD2d 254 [2002]). In light of the brevity of the delay, the absence of prejudice to plaintiff and the public policy favoring the resolution of disputes on their merits (*see Hosten v Oladapo*, 52 AD3d 658 [2008]), Supreme Court properly granted the general contractor's cross motion to serve a late answer.

Accordingly, the order of Supreme Court, New York County (Karen S. Smith, J.), entered November 1, 2006, which denied plaintiff's motion for partial summary judgment, without prejudice to renew after certain disclosure, and the order, same court and Justice, entered December 13, 2006, which denied plaintiff's motion for a default judgment against defendant Artimus Construction and granted Artimus' cross motion for leave to serve a late answer, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 28, 2008

CLERK