SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 1, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román JJ.

2970 The People of the State of New York, Ind. 2215/04
Respondent,

-against-

Alexis Gruyair,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel) and Kaye Scholer LLP, New York (Seth A. Skiles of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 16, 2005, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing him to concurrent terms of 12 years, unanimously affirmed.

During the first two days of deliberations, the jury sent eight notes asking for, inter alia, read-back of testimony and legal instructions. Each of those notes was marked as a court exhibit and reviewed by the prosecutor and counsel. On the third day of deliberations, at 11:10 a.m., the jury sent note number IX marked "Confidential," stating: "We the jury request

clarification on what happens after the verdict is read. We would like to be escorted out & be able to leave the building without having contact with any observers in this Court."

At 11:45 a.m., the jury sent out note number X, informing the court it had reached a verdict. Before bringing the jury into the courtroom, the court advised all present - parties and spectators - that the jury was about to render its verdict, and that everyone should "stay silent" and "let them leave the room." After the foreperson read the verdict, the court polled the jurors, and had them retire to the jury room. The court then arranged for court officers to escort them out of the courthouse.

Three years later, in May 2008, defendant moved, pursuant to CPL 440.10, to vacate his conviction, arguing that the trial court committed error by failing to inform his counsel of note number IX and further erred by failing to respond to the note. The court denied the motion without a hearing, acknowledging that it had not shown the note to defendant or counsel. Consistent with the jurors' wishes as expressed in the note, and without comment to anyone, the court allowed the jurors to leave the room and the building, escorted by court officers. The court found defendant's argument on the 440.10 motion to be without merit as the note in question - rather than a "substantive" inquiry - belonged more "to the category of coffee and snack requests." The court stated that the jury's request concerning its mode of

exit from the courthouse after the verdict was "quite common in cases, like this one, which involve a large cast of characters who freely and unashamedly proclaim their violent criminal histories." The court concluded that the note did "not imply improper influence on deliberations; it simply evidences that the jurors are streetwise New Yorkers."

We denied defendant's motion for leave to appeal from the denial of this motion on May 26, 2009.

CPL 310.30 provides that upon a jury's request, during deliberations, "for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case . . . the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper."

The statute imposes two separate duties on the court following a substantive juror inquiry: to notify counsel, and to give a meaningful response (*People v Kisoon*, 8 NY3d 129, 134 [2007]). Procedurally, "whenever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. . . After the

contents of the inquiry are place on the record, counsel should be afforded a full opportunity to suggest appropriate responses. . . Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry" (*People v O'Rama*, 78 NY2d 270, 277-278 [1991]).

On the other hand, a "ministerial communication" that is "wholly unrelated to the substantive legal or factual issues of the trial" may not require such a rigorous procedure (*see People v Harris*, 76 NY2d 810, 812 [1990]).

Instructive in this regard is *People v Ochoa* (14 NY3d 180, [2010]), where the court received two notes on the day of the verdict. The first note, written at 1:25 p.m., stated: "Have reached a verdict" (*id.* at 184). The second, written 55 minutes later, was a personal note from the foreperson, stating, "Your honor, I do not feel comfortable reading this verdict" (*id.*). The court met with the foreperson without informing defense counsel beforehand. Immediately thereafter, in open court, the judge informed the prosecutor and counsel that two notes had been received. It explained that with respect to the second note, the court asked the foreperson to come in and explain why he didn't feel comfortable. The juror told the court that "he didn't want to go through and have to say what the verdict was, never telling me [the court] the verdict. . . I explained to him how it goes

and all he has to do is answer guilty or not guilty. And then he seemed relieved and he said, 'Oh, okay, fine'" (*id.* at 185).

The Court of Appeals, while noting that a more prudent course of action would have been to follow the *O'Rama* procedure, nonetheless found that the note was of a "ministerial nature" as it related only to the foreperson's concern about the manner of the delivery of the verdict. The court determined that the judge "acted within his discretion by seeking clarification of the note's meaning before notifying defense counsel" (*id.* at 188), and affirmed the conviction.

While we emphasize that the better practice here would have been to disclose the note to counsel and follow the procedure outlined in *O'Rama*, reversal is not warranted under the particular facts of this case. The jurors' request to be escorted out of the building after the verdict was delivered did not involve a request for "information or instruction" within the meaning of CPL 310.30 and was unrelated to the substantive legal or factual issues at trial. "Consequently, it cannot be said that defendant's presence during this communication would have borne any relation, let alone any reasonably substantial

relation, to his opportunity to defend against the charges. His presence, therefore, was not constitutionally required" (*Harris*, 76 NY2d at 812).

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

ENTERED: JULY 1, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3101 Madison/Fifth Associates, LLC, Index 603295/05
Plaintiff-Respondent-Appellant,

-against-

1841-1843 Ocean Parkway LLC, et al.,
Defendants-Appellants-Respondents.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants-respondents.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 26, 2010, which denied defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment awarding declaratory relief on its third cause of action and dismissing defendants' counterclaims, unanimously modified, on the law and the facts, to grant plaintiff's cross motion for summary judgment, it is declared that plaintiff effectively exercised its option to renew the subject lease through September 19, 2015, defendants' counterclaims are dismissed, and otherwise affirmed, with costs.

The record establishes that plaintiff tenant renewed its lease with defendants owners' predecessor before defendants bought the building; accordingly, no issues of fact exist

regarding whether defendants are bound by the renewal (*see Matter of Carrano v Castro*, 44 AD3d 1038, 1040 [2007]; *Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269 [1990]). Defendants' contention that plaintiff could not have renewed the lease because it was in violation of the lease at the time that defendants purchased the property is not supported by the record. Any violations that existed at the time that defendants purchased the premises and that were described in defendants' notice to cure were remedied by plaintiff. We reject defendants' position that the notice of renewal was contingent on the state of the premises at the exact expiration of the renewal period in 2005.

Finally, equitable considerations dictate that plaintiff should not forfeit its leasehold, since, despite defendants' contentions to the contrary, the record contains no evidence of plaintiff's unclean hands (*J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392 (1977); *Sy Jack Realty Co. v Pergament Syosett Corp.*, 27 NY2d 449, 452 [1971]). Therefore, summary judgment on plaintiff's third cause of action should have been granted. For the same reasons, defendants' counterclaims for, inter alia, ejectment should have been dismissed.

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

ENTERED: JULY 1, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2126 Hunter Roberts Construction Group, LLC, et al., Plaintiffs-Appellants, -against- Arch Insurance Company, et al., Defendants-Respondents. Index 108954/08

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for appellants.

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 18, 2009, which denied plaintiffs' motion for summary judgment declaring that defendant Arch Insurance Company (Arch) is obligated to defend and indemnify plaintiffs in the underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted, and it is declared that Arch is obligated to defend and indemnify plaintiffs in the underlying personal injury action.

Plaintiffs, Hunter Roberts Construction Group, LLC and Hunter Roberts Construction Group, LLC d/b/a Hunter Roberts Interiors (Hunter), as construction manager for the Bear Stearns Fit Out project at 237 Park Avenue in Manhattan, subcontracted with defendant Petrocelli Electric Company (Petrocelli) to perform electrical work. The subcontract required Petrocelli to defend and indemnify Hunter against all claims "which arise out

of" or "are connected" with Petrocelli's work and to obtain comprehensive general liability coverage naming Hunter as an additional insured.

On or about March 12, 2007, a Petrocelli employee, Robert Chevola, was working on the 7th floor of the building when he was allegedly "caused to trip and fall upon a hole in the floor." An accident report states that "[e]mployee was walking back to field office to get a can of spray paint. Employee was looking towards left at work being done when his left foot went into hole in floor causing him to trip and fall on to floor."

At the time of the accident, Petrocelli had in effect a commercial general liability policy from Arch which included as an additional insured:

> "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of:
>
> "I) 'your work' at the location designated; . . ."

On November 21, 2007, Chevola commenced the underlying suit against Hunter and others. By letter dated January 7, 200[8], Hunter, quoting the indemnity clause of the subcontract, advised Petrocelli and Arch that it had "recently been notified" of Chevola's claim and asked them to "accept this tender as per the terms and conditions of the contract." Hunter added that "[i]f

there is any information that we can provide to assist in the defense of this matter please don't hesitate to call." By letter dated January 8, 2008, Hunter's carrier, Zurich American Insurance Company (Zurich), sent a follow-up letter to Arch and Petrocelli also demanding a defense and indemnification on Hunter's behalf. Zurich asserted that Hunter was the construction manager on the project, whose primary role was to coordinate work schedules and insure the work was being performed according to specifications and plans; that Chevola, a Petrocelli employee, tripped and fell while working on the project; that Petrocelli was obligated to indemnify Hunter and provide primary and non-contributory coverage "for any and all claims . . . arising out of" the subcontract; and that New York courts have required coverage under such a clause where the underlying plaintiff is an employee of the named insured.

By letter dated January 25, 2008, Arch acknowledged receipt of the tender and issued a reservation of rights, stating it would investigate whether Hunter was covered and whether the notice was timely. By letter dated February 6, 2008, Arch requested the subcontract and again stated that it would undertake an investigation into the circumstances surrounding the occurrence and the timeliness of Hunter's notice.

By letter dated April 1, 2008, Zurich responded that it had already supplied the subcontract with its January 8, 2008 letter.

Zurich quoted the subcontract's language requiring Petrocelli to name Hunter as an additional insured and asserted that "since . . . Chevola was an employee of Petrocelli who was allegedly injured in the course of the work for Hunter, the loss plainly arises out of Petrocelli's work." Zurich also stated that it was enclosing a copy of the contract hiring Hunter as construction manager.

By letter dated May 8, 2008, Arch, stating that it had "investigated this matter" and "developed enough information to formulate its final coverage position," disclaimed coverage. The alleged grounds for the disclaimer were that (1) the subcontract was not an "insured contract"; (2) Hunter breached the duty to cooperate by failing to provide statements "that would clarify certain details regarding the timeliness of [Hunter's] notice to Arch and the circumstances of the incident"; (3) Hunter failed to notify Arch "as soon as practicable" of the occurrence in that the accident occurred on March 13, 2007 and notice was given 10 months later; and (4) Chevola's injury did not "arise out of" Petrocelli's work.

By letter dated May 9, 2008, Zurich replied that it had complied with Arch's requests for proof that the subcontract required Petrocelli to name Hunter as additional insured and repeated that since Chevola "was an employee of Petrocelli, who was allegedly injured in the course of work for Hunter, the loss plainly arises out of Petrocelli's work." This action followed.

Hunter moved for summary judgment, asserting, among other things, that Arch's disclaimer was untimely. In opposition, Arch submitted the affirmation of counsel who alleged that the investigation was delayed because plaintiff did not respond to Arch's request for the contracts until April 1, 2008 and because two of the four Petrocelli employees who were either present or employed in a supervisory position on the date of incident were no longer employed by Petrocelli and Arch's investigator had to find them to take statements. Arch also submitted the affidavit of the investigator who averred that after he was retained on January 21, 2008, he contacted Hunter twice in January 2008 and once in February 2008 by telephone to discuss the incident and ascertain when Hunter received notice. The investigator allegedly asked to speak with the Project Manager for the Bear Stearns' project and at some later date was told that he would need to know the individual's name in order to speak to him. The investigator then resumed his investigation with Petrocelli until such time as he was able to find out who the Project Manager was. Arch also submitted the investigator's invoices.

The motion court found that the investigator's affidavit, along with the "invoices detailing his investigatory work and the difficulty he experienced in locating and speaking to Petrocelli employees, raise[] a triable issue of fact as to whether the notice of disclaimer was sent 'as soon as is reasonably

possible.'" We now reverse.

Insofar as Arch's denial of coverage was based upon lack of coverage as an additional insured pursuant to the additional insured endorsement, a timely disclaimer was unnecessary *(see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]; *Perkins v Allstate Ins. Co.*, 51 AD3d 647, 649 [2008]). However, the denial is without merit.

"Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations" *(Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). Rather, the focus of an "arising out of" clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 AD3d 461 [2009], *affd* _ NY3d _, 2010 NY Slip Op 4661 [2010]). As the Court of Appeals explained in *Regal*, "We have interpreted the phrase 'arising out of' in an additional insured clause to mean originating from, incident to or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (2010 NY Slip Op 4661 at *3 [internal quotation marks and citation omitted]).

Where, as here, the loss involves an employee of the named insured, who is injured while performing the named insured's work

under the subcontract, there is a sufficient connection to trigger the additional insured "arising out of" operations' endorsement and fault is immaterial to this determination (*Tishman Constr. Corp. of N.Y. v CNA Ins. Co.*, 236 AD 2d 211 [1997]; *Tishman Interiors Corp. of N.Y. v Fireman's Fund Ins. Co.*, 236 AD2d 385 [1997]; *Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83 [1994]).

Worth Constr. Co. Inc. v Admiral Ins. Co. (10 NY3d 411 [2008], *supra*), does not require otherwise. In *Regal Constr. Corp.*, the Court of Appeals distinguished *Worth*, stating:

> "Here, there was a connection between the accident and Regal's work, as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed. That the underlying complaint alleges negligence on the part of URS and not Regal is of no consequence, as URS's potential liability for LeClair's injury 'ar[ose] out of' Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy" (__ NY3d at __, 2010 NY Slip Op 4661, at *4).

Accordingly, Hunter, which had a written subcontract with Petrocelli that obligated Petrocelli to obtain comprehensive general liability coverage on Hunter's behalf, was an additional insured under the Arch policy's blanket endorsement, which covered the underlying claim.

As to the remaining grounds for Arch's disclaimer, under Insurance Law § 3420(d)(2), an insurer wishing to deny coverage for death or bodily injury must "give written notice as soon as

is reasonably possible of such disclaimer of liability or denial of coverage." When an insurer fails to do so, it is precluded from disclaiming coverage based upon late notice, even where the insured has in the first instance failed to provide the insurer with timely notice of the accident *(see Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]; *Delphi Restoration Corp. v Sunshine Restoration Corp.*, 43 AD3d 851 [2007], *lv dismissed* 9 NY3d 1002 [2007]).

The insurer bears the burden to explain the reasonableness of any delay in disclaiming coverage (*see Moore v Ewing*, 9 AD3d 484, 488 [2004]). The reasonableness of any delay is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer (*see Pawley Interior Contr., Inc. v Harleysville Ins. Cos.*, 11 AD3d 595 [2004]). Although the timeliness of such a disclaimer generally presents a question of fact (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]), where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law *(see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69 [2003]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [2002], *lv denied* 98 NY2d 605 [2002]). Where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as

a matter of law (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88 [2005], citing *First Fin. Ins. Co.*, 1 NY3d at 69). If the delay allegedly results from a need to investigate the facts underlying the proposed disclaimer, the insurer must demonstrate the necessity of conducting a thorough and diligent investigation (*see Quincy Mut. Fire Ins. Co. v Uribe*, 45 AD3d 661 [2007]; *Schulman v Indian Harbor Ins. Co.*, 40 AD3d 957 [2007]).

In disclaiming coverage, Arch asserted that Hunter failed to notify Arch "as soon as practicable" of the occurrence in that the accident occurred on March 13, 2007 and notice was given 10 months later. Such a reason for disclaimer would have been apparent upon examination of Hunter's January 7, 2008 and/or Zurich's January 8, 2008 tenders. While Arch asserts that difficulties in its investigation of the claim caused the delay, it does not explain, given the facts made known to it by Hunter and Zurich's submissions, why anything beyond a cursory investigation was necessary to determine whether Hunter had timely notified it of the claim (*see Scott McLaughlin Truck & Equip. Sales, Inc. v Selective Ins. Co. of Am.*, 68 AD3d 1619 [2009]). Accordingly, the four month delay in disclaiming on

this ground was unreasonable as a matter of law (*see e.g. First Fin. Ins. Co.*, 1 NY3d at 66; *State Ins. Fund v American Hardware Mut. Ins. Co.*, 64 AD3d 581 [2009]; *Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 AD3d 287 [2008]; *Saitta v New York City Tr. Auth.*, 55 AD3d 422, 423 [2008]).

Arch's disclaimer on the ground Hunter failed to cooperate is also untimely. The basis for the claim is that when the investigator contacted Hunter by telephone twice in January 2008 and once in February 2008 and asked to speak with the project manager, he was told he would have to know the project manager's name. The disclaimer on this ground over two months later was not made as soon as reasonably practicable. In any event, the disclaimer was without merit.

An insurer seeking to disclaim for noncooperation has a heavy burden of proof and must demonstrate that "it acted diligently in seeking to bring about the insured's co-operation[,] . . . that the efforts employed by the insurer were reasonably calculated to obtain the insure[d]'s co-operation . . . and that the attitude of the insured, after his co-operation was sought, was one of 'willful and avowed obstruction'" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168 [1967], quoting *Coleman v New Amsterdam Cas. Co.*, 247 NY 271, 276 [1928]; *see also Matter of State Farm Indem. Co. v Moore*, 58 AD3d 429, 430 [2009]). "Strict scrutiny" of facts

supporting the noncooperation defense is required to protect "innocent injured parties from suffering the consequences of a lack of coverage" *(Matter of Liberty Mut. Ins. Co. v Roland-Staine*, 21 AD3d 771, 772 [2005]).

While the parties dispute when the subcontract was provided, the record reflects that Zurich provided Arch with the documentation requested no later than April 1, 2008, more than a month before the disclaimer. While Arch claims that Hunter impeded its investigator's progress, the investigator only alleges that he called Hunter's main telephone number three times and was told he would have to supply the name of the Project Manager if he wanted to speak with him. The investigator does not identify whom he spoke to and the calls are not reflected in his invoices. Nor is there any indication that the investigator ever appeared at Hunter's offices in person or that Arch ever made a specific demand that Hunter produce the Project Manager or any other witness on a date certain or that Arch ever advised Hunter that its alleged lack of cooperation was hindering the investigation. Nor did Arch demonstrate that further reasonable attempts to elicit Hunter's cooperation would be futile (*see Thrasher*, 19 NY2d at 168).

Thus, Arch has not carried its "very heavy burden" of demonstrating that it acted diligently in seeking to bring about the insured's cooperation, that its efforts were reasonably

calculated to obtain the insured's cooperation and that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction (*see State Farm Indem. Co. v Moore*, 58 AD3d at 430-431; *cf. Matter of New York Cent. Mut. Fire Ins. Co. (Salomon)*, 11 AD3d 315 [2004]; *State Ins. Fund v Merchants Ins. Co. of N.H.*, 5 AD3d 449 [2004]).

These deficiencies are not cured by the affirmation of Arch's counsel, which lacks probative value (*see S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]), or by the investigator's invoices. The first invoice shows that during the period of January 23, 2008 through February 19, 2008, the investigator received the assignment and attachments and attempted to contact Ricky Bilig, who allegedly witnessed the accident. There is no detail as to what these attachments were. The second invoice shows that during the period of February 19, 2008 through March 6, 2008, the investigator attempted to interview Bilig and visited Petrocelli, which said it would set up interviews with its employees Farrell and Eager. The third invoice shows that during the period of April 10, 2008 to April 15, 2008, the investigator interviewed Eager. The fourth invoice shows that on April 21, 2008, the investigator spoke with Farrell. The invoices do not reflect a lack of cooperation by Hunter nor do they establish that Arch did not have sufficient

information in its possession to determine that Hunter's notice was untimely upon or shortly after the receipt of Hunter's tender.

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

ENTERED: JULY 1, 2010

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

2777 Sheila Travis, Index 14018/06
Plaintiff-Appellant,

Barry J. Moonan, et al.,
Plaintiffs,

-against-

Nassirou M. Batchi, et al.,
Defendants-Respondents.

Grant & Longworth, LLP, Bronx (Brett R. Hupart of counsel), for appellant.

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

Order, Supreme Court, New York County (Edgar G. Walker, J.), entered April 9, 2009, which granted defendants' motion for summary judgment dismissing the complaint as to plaintiff-appellant (plaintiff) for lack of a serious injury, unanimously affirmed, without costs.

The examination records of plaintiff's own treating physician/expert show that she had full strength and range of motion in the knee both a few weeks and a few months after the accident, after he performed a right knee ACL reconstruction, partial medial and lateral meniscectomy and chrondroplasty. Absent some manner of explanation, the negative findings cannot be reconciled with the physician's affirmation submitted in opposition to the motion prepared a few years after the accident, that plaintiff sustained a permanent injury to the knee as a

result of the accident. Summary judgment in favor of defendants should be granted for this reason alone, at least with respect to the alleged knee injury (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446 [2009]). Also fatal to plaintiff, on the issue of permanence of both the alleged knee and alleged back injuries, is the physician's failure to provide any objective medical test results showing current range-of-motion impairments (*cf. Jimenez v Rojas*, 26 AD3d 256, 257 [2006]). Nor does plaintiff, who concedes that she worked from home beginning two months after the accident through her return to the office five months after the accident, and fails to detail the particular job and other activities that were supposedly curtailed, satisfy the 90/180 test (*see Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]; *Linton v Nawaz*, 62 AD3d 434, 443 [2009], *affd on other grounds* __ NY3d __, 2010 NY Slip Op 2835 [2010]).

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

ENTERED: JULY 1, 2010

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2953
M-2599 Michael Mulgrew, as President of the United Federation of Teachers, Local 2, et al., Petitioners-Respondents, Index 101352/10

-against-

The Board of Education of the City School District of the City of New York, et al., Respondents-Appellants.

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Council for School Supervisors and Administrators, Amicus Curiae.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler and Alan Klinger of counsel), for respondents.

David N. Grandwetter, Brooklyn, for amicus curiae.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about March 26, 2010, which granted the petition to the extent of declaring that respondents failed to comply with the requirements of Education Law § 2590-h and that the votes of the Panel for Educational Policy (PEP) approving the phaseout or grade truncation of 19 schools were null and void, ordered respondents to reissue the Educational Impact Statements (EIS) for the schools in compliance with Education Law § 2590-h, and permanently enjoined respondents from prohibiting enrollment in the schools until they complied with Education Law § 2590-h,

unanimously affirmed, without costs.

Petitioner United Federation of Teachers (UFT), which represents approximately 120,000 educators working in New York City public schools, including 87,000 teachers, has standing to bring this proceeding (through its president) seeking the annulment of respondents' determination to phase out 19 schools on the ground that respondents failed to comply with the pre-phaseout procedures mandated by Education Law § 2590-h. Under the well established test for associational and organizational standing set forth by the Court of Appeals, the UFT must demonstrate (1) that some or all of its members have standing to sue; (2) that the interests advanced in the case are sufficiently related to the UFT's organizational purposes to satisfy the court that the UFT is an appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert the claim or to afford the UFT complete relief (*Matter of Dental Socy. of State of N.Y. v Carey*, 61 NY2d 330, 332-334 [1984] [recognizing standing of unincorporated association]; *see also New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]).[1] The UFT easily satisfies this test as to each of the 19 subject schools. At a minimum,

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[1]In view of the Court of Appeals' decision in *Dental Socy. of State of N.Y.* (*supra*), it is apparent that General Association Law § 12 is not construed to condition an unincorporated association's standing on every individual member's having standing.

the UFT would derive standing from its chapter leader at each school, given that the chapter leader (or his or her designee) is, pursuant to respondents' regulations, a mandatory member of the institution's School Leadership Team, the body constituting the "school-based management team" (SBMT) mandated by section 2590-h to participate in the consideration of a proposed phaseout. In addition, those UFT members who are employed at the schools proposed to be phased out have an interest in the matter that would give them standing to sue. Further, the interests involved -- school closure and the integrity of the school closure process -- are germane to the UFT's organizational purpose, thereby making the union an appropriate representative of those interests. Finally, the participation in the proceeding of all interested individual members of the UFT is not necessary to afford complete relief, since the petition seeks only to nullify the determinations to close the subject schools. Accordingly, based on the UFT's standing to advance the claims asserted in the petition, we may proceed to consider the merits of those claims.[2]

Whether the applicable standard of review is strict compliance or substantial compliance, the court properly

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[2]The determination that the UFT has standing renders it unnecessary to consider the standing of the remaining named petitioners (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813 [2003], *cert denied*, 540 US 1017 [2003]).

determined that respondents' EIS for each school failed to comply with the substantive requirements of Education Law § 2590-h(2-a)(b). In particular, each EIS fails to indicate, as required by Education Law § 2590-h(2-a)(b)(i), the "ramifications of such school closing or significant change in school utilization upon the community" and, as required by § 2590-h(2-a)(b)(ii), "the impacts of the proposed school closing or significant change in school utilization to any affected students." Rather, each EIS merely indicates the number of school seats that will be eliminated as a result of the proposed phaseout, and states that the seats will be recovered through the phase-in of other new schools or through available seats in existing schools in the district or City. While the statute does not specify the information that an EIS should include to portray the impact of a proposed phaseout on the community or the students, respondents do not discharge their obligation by providing nothing more than boilerplate information about seat availability. Granting that the statute affords respondents a considerable measure of discretion in this regard, respondents abused that discretion by limiting the information they provided to the obvious -- that students at phased-out schools would be accommodated at other schools to be determined. Plainly, the Legislature contemplated that the school community would receive more information than this from the EIS (*see* Assembly Mem in Support of L 2009, ch 345,

2009 McKinney's Session Laws of NY, at 1713 ["This process requires the Chancellor to develop and make public (an EIS) that details the impacts of the proposed school closing or significant change in school utilization"]). Even if each EIS provides adequate information regarding the ability of other schools in the affected community district to accommodate affected students, as required by Education Law § 2590-h(2-a)(b)(vi), it fails to provide adequate information regarding the ramifications of the proposed agency action on the community and the students. The discussion of one point does not obviate the need for a discussion of the other.

The court also properly determined that, in the case of each subject school, respondents failed to "hold a joint public hearing with the impacted community council and [SBMT]" as required by Education Law § 2590-h(2-a)(d).[3] As the court found, for the notion of a joint hearing to have any meaning, the members of the community councils and SBMTs must be part of the process of structuring and conducting those hearings. Contrary to respondents' contention, paragraph (d) of subdivision (2-a) requires them to include or consult with the community councils regarding the joint public hearings for all proposed school

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[3]For purposes of article 52-A of the Education Law (which includes section 2590-h), "[t]he term 'community council' is defined to mean the community district education council of a community district established pursuant to section [2590-c] of this article" (Education Law § 2590-a[4]).

phaseouts, with no exception for high schools. Respondents were also required to give the community councils notice of the high school hearings. Moreover, the court properly determined that respondents failed to file a copy of each EIS with the impacted SBMT as required by Education Law § 2590-h(2-a)(c).

Based on the foregoing, the court properly annulled the PEP votes (*see generally Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 369 [1986]). Contrary to respondents' contention, the statutory violations are not "so insignificant as to be totally inconsequential" (*cf. Roosevelt Is. Residents Assn. v Roosevelt Is. Operating Corp.*, 7 Misc 3d 1029[A], 2005 NY Slip Op 50811[U] [2005]).

M-2599 ***Michael Mulgrew, et al. v The Board of Education of the City School District of the City of New York, et al.***

Motion seeking leave to file amicus curiae brief granted.

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

ENTERED: JULY 1, 2010

David Apolony

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3196 The People of the State of New York, Ind. 4421/07
Respondent,

-against-

Shaunda Jones,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered July 21, 2008, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. In addition to reliable lineup identifications by two witnesses, there was extensive corroborating evidence.

While defendant moved to suppress lineup identifications as unduly suggestive and a statement as involuntary, he made no Fourth Amendment claim of any kind. Accordingly, defendant

waived his claim that the court should have suppressed physical evidence and identification testimony as fruits of an allegedly unlawful police pursuit (*see* CPL 710.70[3]), notwithstanding that the codefendants litigated this issue (*see People v Buckley*, 75 NY2d 843 [1990]). While the hearing court ruled on generally similar claims made by the codefendants, it did not "expressly decide[ ]" (CPL 470.05[2]) whether defendant's Fourth Amendment rights were violated; on the contrary, it expressly declined to do so in light of defendant's waiver of the issue. As an alternative holding, we find, based on the hearing evidence, that the police actions were entirely lawful. Similarly, we conclude that counsel's failure to raise defendant's present claim in the suppression motion did not cause defendant any prejudice, and thus did not deprive him of effective assistance.

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3197 In re Joshua Kiess, Index 112221/08
Petitioner-Appellant,

-against-

Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, et al.,
Respondents-Respondents.

Chet Lukaszewski, Lake Success, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered March 26, 2009, which denied petitioner's application to annul respondent's determination that, as framed by the pleadings and argument, had denied petitioner's applications for disability retirement benefits, and dismissed the petition, unanimously reversed, on the law, without costs, the petition granted to the extent of annulling the findings of the Medical Board, and the matter remanded to respondent Board of Trustees for further proceedings consistent herewith.

It does not appear that the Medical Board, following the remand from the Board of Trustees to consider new evidence, considered all of the medical evidence that had been submitted to it. Such evidence included the reports of a spinal surgeon

stating that petitioner was unable to return to work due to severe pain and had limited options for improvement through surgery, and of a board certified neurologist who performed an EMG demonstrating radiculopathy and who opined that petitioner was totally disabled from his injuries. Nor did the Medical Board explain its own findings upon examination that petitioner had "no range of motion to the lower back" and was unable to walk on the left toes and heels because of pain. The Medical Board simply referred to its prior minutes, set forth the results of tests performed on physical examination, and, without further explanation, concluded that, upon review of all materials presented, it was of the opinion that there "are no significant objective findings" preventing petitioner from performing the full duties of a police officer. Nowhere in its second report is the new evidence that the Medical Board was directed to consider expressly mentioned.

While the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Goffred v Kelly*, 13 AD3d 72 [2004]), "fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner's claim to

accident disability retirement may properly be rejected" (*Matter of Kelly v Board of Trustees of Police Pension Fund, Art. II*, 47 AD2d 892, 893 [1975]), and that the Medical Board clearly state the reasons for its recommendations (*Matter of Sailer v McGuire*, 114 AD2d 334, 335 [1985]). As it does not appear that the Medical Board considered all of the submitted medical evidence, and as the reasons for concluding that petitioner is medically fit for police work are not clearly stated in the Medical Board's second report, the matter should be remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees (*see Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562, 563 [2007]; *Matter of Rodriguez v Board of Trustees of N.Y. Fire Dept., Art. 1-B. Pension Fund*, 3 AD3d 501 [2004]).

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

ENTERED: JULY 1, 2010

David Apolony

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3198 Morgan Stanley & Co., Inc., Index 602459/09
Plaintiff-Respondent,

-against-

Michelle Feeley,
Defendant-Appellant.

Karen A. Murphy, Stamford, Ct., for appellant.

Jaffe & Asher LLP, New York (Ira N. Glauber of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered January 12, 2010, which granted plaintiff Morgan Stanley & Co.'s (Morgan) motion to dismiss defendant-former employee's counterclaims, granted Morgan's petition to confirm the arbitration award, and awarded judgment in favor of Morgan, as against defendant, in the amount of $154,349.83, plus interest (from May 5, 2009), costs and attorneys fees, for a total award of $205,991.78, unanimously affirmed, without costs.

Morgan and defendant, a financial advisor, executed two promissory notes whereby Morgan loaned defendant monies which were to be repaid at specified times, with a stated interest. The notes specifically provided that any claim or controversy involving the notes would be resolved in arbitration pursuant to the rules of the National Association of Securities Dealers, Inc. (NASD), a self regulatory organization (SRO) ensuring compliance

by its members (i.e., Morgan) and associates (i.e., defendant) with the rules and regulations under the Securities Exchange Act of 1934. Defendant's argument that Financial Industry Regulatory Authority, Inc. (FINRA), the successor SRO to NASD, which adopted NASD's rules, lacked jurisdiction to hear the parties' dispute regarding the notes because the arbitration clause in the notes limited the arbitration forum to the NASD, is unavailing (*see generally Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 14 n, 16 [2008]). Defendant submitted to the jurisdiction of the FINRA arbitration panel by her counsel's participation in a pre-hearing conference without raising a jurisdictional objection or seeking a stay (*see e.g. Matter of Sims v Siegelson*, 246 AD2d 374 [1998]). The arbitration panel properly considered and decided the threshold issue of jurisdiction before hearing evidence on the merits of Morgan's claims on the notes. Defendant has not demonstrated that the panel's consideration of the jurisdiction issue in the first instance denied her an opportunity to present a defense to Morgan's claims on the notes.

Nothing on the face of the panel's award or the loan agreements suggests, as defendant argues, that the loan monies were, inter alia, actually bonus payments made in violation of public policy (*see generally Matter of Bevtek Corp. [Mr. Natural, Inc.]*, 2 AD3d 157 [2003]). In any event, this argument fails

here since the requisite showing as to the public policies allegedly violated would require extended fact-finding and/or legal analysis (*see Selman v State of N.Y. Dept. of Correctional Servs.*, 5 AD3d 144 [2004]).

Res judicata precludes defendant's counterclaims insofar as the panel's award resolved issues regarding the validity of the notes, and, by inference, the nature of their obligations as loans (*see generally Ziegler v Raskin*, 100 AD2d 814 [1984], *appeal dismissed* 63 NY2d 674 [1984]).

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

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3201 Richard Freedman, et al.,
Plaintiffs,

-against-

Fred Zeigler,
Defendant-Appellant,

Howard B. Weber,
Nonparty Respondent.

Index 110462/06
590898/06
590763/07

Hanly Conray Bierstein Sheridan Fisher & Hayes LLP, New York (Thomas I. Sheridan, III of counsel), for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Daniel M. Maunz of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 26, 2009, inter alia, dismissing the complaint, and bringing up for review an order, same court and Justice, entered March 30, 2009, which, insofar as challenged, denied defendant's motion for sanctions against plaintiffs' attorney for frivolous conduct, unanimously affirmed, with costs.

Sanctions were properly denied as it was reasonable for plaintiffs to sue defendant, whose apartment was undergoing renovation and was initially believed by building personnel to be the source of the leak that damaged plaintiffs' apartment two floors below. Indeed, defendant's commencement of a third-party action against the contractor he had hired shows that defendant himself believed that his contractor may have been responsible. That defendant was ultimately found to be not liable for the acts

of an independent contractor does not make the decision to sue defendant and not the contractor frivolous, particularly where the contractor's independence was only established during discovery (*see Sakow v Columbia Bagel, Inc.*, 32 AD3d 689 [2006]). Although plaintiffs' demand for damages may have been unreasonable, it was not without any basis in fact or law. We have considered defendant's other arguments and find them to be unavailing.

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3202 Caesars Bahamas Investment Corporation,
Plaintiff-Respondent,

-against-

Baha Mar Joint Venture Holdings LTD., et al.,
Defendants-Appellants.

- - - - -

Baha Mar Joint Venture Holdings LTD., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Harrah's Operating Company, Inc.,
Third-Party Defendant-Respondent.

Index 600740/08
590277/08

Davis Polk & Wardwell LLP, New York (Michael P. Carroll of counsel), for appellants.

Latham & Watkins LLP, New York (James V. Kearney of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 11, 2010, which, inter alia, granted plaintiff's and third-party defendant's (herein collectively plaintiff) motion for summary judgment declaring that plaintiff validly exercised its right to terminate the subject subscription agreement, that the subscription agreement has been terminated, and that plaintiff has no obligation to consummate the transactions contemplated in the subscription agreement, unanimously affirmed, with costs.

By the express terms of the parties' integrated joint

venture agreements, plaintiff had the right to terminate at any time prior to closing. The fact that termination might have an impact on subsequent agreements entered into by the joint venture did not render the termination clause unenforceable (*cf. Hocking Val. Ry. Co. v Barbour*, 190 App Div 341, 345-346 [1920]). Plaintiff's continued work toward the fulfillment of the closing conditions cannot be construed as either a waiver of the right to terminate, or an estoppel against asserting the right to terminate. Rather, plaintiffs continued work toward fulfillment of those conditions unless and until it terminated, was consistent with the agreements and was not unequivocally referable to any waiver of the right to terminate (*see Ixe Banco, S.A. v MBNA Am. Bank, N.A.*, 2008 US Dist LEXIS 19806, *21-27, 2008 WL 650403, *7-9 [SD NY 2008]). Nor can defendants' claim be recast as one for fraud, where it simply realleges the breach of the contract (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [2001]; or breach of fiduciary duty, where the contract disclaims such duties and there was no relationship between the parties outside the contract (*cf. Atlantic St. John, LLC v Yeomans*, 26 AD3d 266, 267 [2006]; or negligent misrepresentation, where there is no showing of a special duty (*see 164 Mulberry St. Corp. v. Columbia Univ.*, 4 AD3d 49, 55 [2004] *lv dismissed* 2 NY3d 793 [2004]). The fee shifting provision in the agreement survives

the termination (*cf. Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598-599 [1997]).

We have considered appellants' remaining arguments and find them to be without merit.

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3203 The People of the State of New York, Ind. 2122/07
Respondent,

-against-

Kevin Smith,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered September 11, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, to an aggregate term of 5 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

Defendant failed to demonstrate good cause for the assignment of substitute counsel (*see People v Linares*, 2 NY3d 507, 510-11 [2004]; *People v Sides*, 75 NY2d 822, 824 [1990]). "Defendant's unjustified hostility toward his counsel and his disagreements with counsel's tactics did not require substitution" (*People v Walton*, 14 AD3d 419, 420 [2005], *lv denied* 5 NY3d 796 [2005]). Defendant's complaints about his

counsel's pretrial performance were generalized and conclusory. Even if, as defendant alleged, counsel once chastised him for making demands that counsel viewed as unreasonable, that incident did not amount to a breakdown of communication. Finally, counsel's permissible defense of his own performance did not create a conflict (*see People v Nelson*, 7 NY3d 883 [2006]).

The court's *Sandoval* ruling struck a proper balance between the probative value of defendant's prior convictions on the issue of credibility and the risk of unfair prejudice (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The court properly exercised its discretion when it permitted the People to identify defendant's prior convictions, including drug convictions, and precluded inquiry into their underlying facts.

Defendant did not preserve his claim that the court should have permitted him to cross-examine police witnesses about "substantiated" Civilian Complaint Review Board complaints lodged against them in unrelated cases. While defendant personally expressed some interest in raising this issue, defense counsel never sought to make any such inquiry, and that was a tactical decision normally to be made by counsel (*see People v Ferguson*, 67 NY2d 383, 390 [1986]). In any event, defendant's comments were insufficient to preserve the claims he raises on appeal, particularly with regard to his Sixth Amendment right of

confrontation (*see People v Kello*, 96 NY2d 740, 743 [2001]). We decline to review them in the interest of justice. As an alternative holding, we conclude that defendant was not prejudiced by the absence of cross-examination on the unrelated complaints, since they were not material to the officers' credibility. To the extent defendant is claiming his attorney's handling of this issue was ineffective, we reject that claim on this record (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

As the People concede, defendant is entitled to a new sentencing proceeding because the record does not establish that he made a valid waiver of his right to counsel before representing himself at sentencing (*see People v Arroyo*, 98 NY2d 101, 104 [2002]).

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3204 The People of the State of New York, Ind. 4478/08
Respondent,

-against-

Modibo Doumbia, etc.,
Defendant-Appellant.

Goldberg & Kaplan, LLP, New York (Brian Kaplan of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered July 16, 2009, as amended August 14, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 2 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility. The testimony of the victim and other witnesses clearly established the extent of the victim's injuries, and that they were inflicted by defendant.

Defendant did not preserve his claim that the prosecutor violated the court's *Sandoval* ruling, or his related claim regarding rebuttal evidence, and we decline to review them in the interest of justice. As an alternative holding, we find that

defendant opened the door to the cross-examination and rebuttal evidence at issue (*see People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Melendez*, 55 NY2d 445, 451-452 [1982]).

Since defendant received the minimum sentence permitted by law, and there is no "legally authorized lesser sentence," this Court has no authority to reduce the sentence as a matter of discretion in the interest of justice (CPL 470.20[6]).

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3205 Coastal Sheet Metal Corp., et al., Index 13420/03
Plaintiffs-Appellants,

-against-

Harry Vassallo, et al.,
Respondents-Respondents.

Kaplan & Levenson P.C., New York (Steven M. Kaplan of counsel), for appellants.

Farber, Pappalardo & Carbonari, White Plains (John A. Pappalardo of counsel), for respondents.

Order, Supreme Court, Bronx County (Nelson Román, J.), entered on or about April 24, 2009, after a nonjury trial, which, insofar as appealed from, found against plaintiffs on their causes of action for usurpation of corporate opportunity and breach of fiduciary duty, and for an accounting, a constructive trust and a declaratory judgment, and awarded plaintiffs zero damages on their breach of contract cause of action, and found that plaintiffs breached their employment agreement to pay severance compensation to defendant Harry Vassallo, unanimously modified, on the law and the facts, to find that Vassallo breached his fiduciary duty and that plaintiffs did not breach the employment agreement, and to increase the award of damages to plaintiffs from $1,963.56 to $70,598.56, and to reduce the award of damages to Vassallo from $35,211.76 to $2,211.76, and otherwise affirmed, without costs.

Vassallo's incorporation of Complete Spiral Manufacturing, Inc. (Spiral), a competing business, did not usurp a corporate opportunity belonging to his employer, Coastal Sheet Metal Corporation (Coastal), since the purchase of spiral duct machinery was neither "necessary" for nor "essential" to Coastal's line of business and Coastal had no "interest" or "tangible expectancy" in the opportunity (*see Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 247-248 [1989] [internal quotation marks and citations omitted]). However, by, among other things, running Spiral on Coastal's premises at the same time that he was managing Coastal, converting assets belonging to Coastal in operating Spiral, and executing a sublease of Coastal's space to Spiral on highly favorable terms, Vassallo, as the then president of Coastal, breached his fiduciary duty to the corporation (*see Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 107 [2008], *mod on other grounds* 14 NY3d 774 [2010]). Accordingly, plaintiffs are entitled to a return of the wages they paid to Vassallo during the seven-month period in which he was a disloyal employee (*see Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 91 [1984], *appeal dismissed* 63 NY2d 675 [1984]), i.e., $68,635.

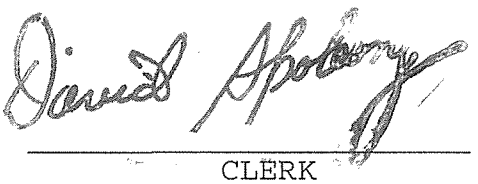
While plaintiffs did not challenge Vassallo's claim that they failed to pay him severance compensation, they challenged his entitlement to severance on the ground that his breach of the

severance agreement rendered the agreement non-binding. In view of the clear language of the agreement, the court's finding that Vassallo breached his employment agreement by "violat[ing] the trust of his position" negates Vassallo's claim for severance, as a matter of law. Accordingly, the award of severance pay is vacated, and the amount of damages awarded to Vassallo fixed at $2,211.76, representing compensation for six earned vacation days and 11 hours of work at $71.00 per hour.

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

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

ENTERED: JULY 1, 2010



CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3206-
3206A Flavio Atiencia, et al., Index 110993/06
Plaintiffs-Appellants,

-against-

MBBCO II, LLC,
Defendant-Appellant,

Farrell Building Company, Inc.,
Defendant-Respondent.

- - - - -

Farrell Building Company, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Bayview Building & Framing Corp.,
Third-Party Defendant-Respondent.

Rosenberg, Minc, Falkoff & Wolff LLP, New York (Daniel Minc of counsel), for Flavio Atiencia and Maria Atiencia, appellants.

Callahan & Fusco LLC, New York (Scott A. Korenbaum of counsel), for MBBCO II, LLC, appellant.

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, Hicksville (Marc D. Sloane of counsel), for Farrell Building Company, Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Bayview Building & Framing Corp., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 24, 2009, which, insofar as appealed from as limited by the briefs, in an action for personal injuries sustained in a fall from a scaffold, denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim as against defendant/third-party plaintiff Farrell

Building Company, Inc. (Farrell), and, upon a search of the record, dismissed plaintiffs' Labor Law § 240(1) and § 241(6) claims as asserted against Farrell, unanimously modified, on the law, to reinstate the Labor Law § 241(6) claim as against Farrell, and otherwise affirmed, without costs. Order, same court and Justice, entered October 28, 2009, which, insofar as appealed from, (1) denied plaintiffs' motion seeking leave to renew their motion for partial summary judgment on the Labor Law § 240(1) claim against Farrell; (2) denied the motion of defendant MBBCO II, LLC pursuant to CPLR 5015(a) to vacate the June 24, 2009 order to the extent that it granted summary judgment on Farrell's behalf; and (3) denied MBBCO's cross motion seeking leave to renew so much of the June 24, 2009 order that dismissed plaintiffs' section 240(1) claim as against Farrell, unanimously modified, on the law, to grant the motions to renew and, upon renewal, to reinstate plaintiffs' section 240(1) claim as against Farrell and to grant plaintiffs' motion for partial summary judgment on that claim, and otherwise affirmed, without costs.

A court, in the course of deciding a motion, is empowered to search the record and award summary judgment to a nonmoving party (*see* CPLR 3212(b); *Lennard v Khan*, 69 AD3d 812, 814 [2010]). However, with respect to the June 2009 order, the motion court erred in dismissing the Labor Law § 241(6) claim against Farrell,

as that claim was not placed before the court on plaintiffs' summary judgment motion (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]).

Regarding the October 2009 order, the motion court should have granted the motions to renew. Although the newly submitted evidence was available at the time of the prior motion, the court "ha[d] discretion to relax this requirement and to grant such a motion in the interest of justice" (*Mejia v Nanni*, 307 AD2d 870, 871 [2003]). Not only did plaintiffs and MBBCO offer reasonable justification for failing to submit the evidence submitted on the motion, but the new facts submitted do, in fact, change the prior determination (CPLR 2221[e][2]).

The record shows that Farrell was hired as the general contractor, and that it had "complete control" and "overall control" of the project, supervised the construction site, and enforced all safety regulations. Thus, the record establishes that Farrell was the general contractor on the project, and, as such, is liable to plaintiffs pursuant to Labor Law § 240(1) (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 155 [2003], *lv dismissed* 100 NY2d 556 [2003]). Accordingly, partial summary

judgment in plaintiffs' favor on the section 240(1) claim as against Farrell is warranted (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]).

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3207 Lorraine Smith, Index 105971/05
Plaintiff-Appellant,

-against-

125th Street Gateway Ventures, LLC,
Defendant-Respondent.

- - - - -

125th Street Gateway Ventures, LLC,
Third-Party Plaintiff,

-against-

The City of New York,
Third Party Defendant-Respondent.

Lester R. Hill, New York, for appellant.

Callan, Koster, Brady & Brennan, LLP, New York (David A. LoRe of counsel), for 125th Street Gateway Ventures, LLC, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for municipal respondent.

Order, Supreme Court, New York County (Karen Smith, J.), entered March 2, 2009, which, inter alia, granted the motion of defendant/third-party plaintiff 125th Street Gateway Ventures, LLC for summary judgment dismissing plaintiff's complaint and all cross claims, unanimously affirmed, without costs.

Supreme Court properly dismissed plaintiff's complaint, since a City sign or signpost is not part of the "sidewalk" for purposes of section 7-210 of the Administrative Code of the City of New York, which imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe

condition (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]; *King v Alltom Props., Inc.*, 16 Misc 3d 1125[A], 2007 NY Slip Op 51570[U] [Kings County 2007]; *Calise v Millennium Partners*, 26 Misc 3d 1222[A], 2010 NY Slip Op 50208[U] [NY County 2010]).

Moreover, defendant established prima facie, through the deposition testimony of plaintiff, its own witness and the City witnesses, that it did not cause or create the metal protrusion from the sidewalk, nor did it participate in the repair and/or removal of same. Plaintiff offered only speculative evidence to the contrary.

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3208-
3209 The People of the State of New York, Ind. 3580/07
Respondent,

-against-

Robert Johnson,
Defendant-Appellant.

Stanley Neustadter, Cardozo Appeals Clinic, New York (Jeremy M. Gutman of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 9, 2008, as amended July 21, 2008, convicting defendant, after a jury trial, of attempted robbery in the second degree, criminal mischief in the fourth degree and two counts of assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 3 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. We do not find the testimony of the prosecution witnesses to be materially inconsistent.

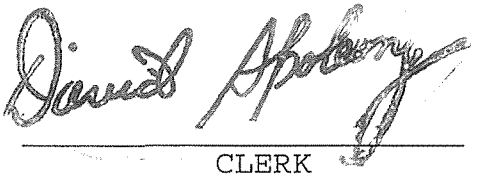
Defendant did not preserve his claim that the court should have instructed the jury on the defense of justification, and we decline to review it in the interest of justice. As an

alternative holding, we reject it on the merits. At the charge conference, defense counsel made it clear that she was not requesting a justification charge. A sua sponte justification charge would have improperly interfered with defense strategy since "a defendant unquestionably has the right to chart his own defense" (*People v DeGina*, 72 NY2d 768, 776 [1988]). The record fails to support defendant's present assertion that trial counsel "pursued" a justification defense; on the contrary, the principal lines of defense were that the incident was a dispute rather than an attempted robbery, and that there was a lack of proof of certain elements of assault and criminal mischief. In any event, a justification charge would not have been supported by a reasonable view of the evidence.

Defendant's claim that his trial counsel rendered ineffective assistance by failing to request a justification instruction is unreviewable on direct appeal because it involves matters of strategy outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

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

ENTERED: JULY 1, 2010



CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3211 In re Stephen Rosenblum, Index 101121/09
Petitioner-Respondent,

-against-

The New York City Conflicts of Interest Board, et al.,
Respondents-Appellants.

- - - -

New York State United Teachers,
Amicus Curiae.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for appellants.

Bruce K. Bryant, Brooklyn, for respondent.

James R. Sandner, New York (Wendy M. Star of counsel), for amicus curiae.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered May 7, 2009, which, in this article 78 proceeding, granted the petition for a judgment prohibiting respondents from proceeding with an administrative trial of petitioner, unanimously affirmed, without costs.

The court properly held that petitioner could seek a judgment prohibiting the enforcement of the conflict of interest law of the City of New York against him as a tenured pedagogue employed by the Board of Education of the City of New York as there is no requirement for exhaustion of administrative remedies in an article 78 proceeding in the nature of a writ of

prohibition (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]) where, as here, the "legality of the [underlying OATH] proceeding itself" was implicated (*Matter of Johnson v Price*, 28 AD3d 79, 82 [2006], quoting *Matter of Hirschfeld v Friedman*, 307 AD2d 856, 858 [2003]).

Here, the court properly held that the exclusive avenue to discipline a tenured pedagogue is Education Law § 3020-a (*see* Education Law § 3020; 53 RCNY 2-02[a]), and thus it would be violative of the Education Law to allow an OATH hearing which does not require the same procedural protections (*compare* Education Law § 3020-a[3][c][i] and *Matter of Board of Educ. of City School Dist. of City of N.Y. v Mills*, 250 AD2d 122 [1998], *lv denied* 93 NY2d 803 [1999], *with* 48 RCNY 1-46[b]).

Further, the fine sought to be imposed by respondents is included in the types of discipline specifically enumerated by the statute as penalties: "a written reprimand, a fine, suspension for a fixed time without pay, or dismissal" (Education Law § 3020-a[4][a]).

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

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3212 In re Gerard Urciuoli, Index 112443/08
Petitioner-Appellant,

-against-

Department of Citywide Administrative Services, et al.,
Respondents-Respondents.

Marschhausen & Fitzpatrick, P.C., Westbury (Kevin P. Fitzpatrick of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 7, 2009, which dismissed this proceeding challenging the termination of petitioner's employment as a police officer, unanimously affirmed, without costs.

The notification of the Department's action retroactively rescinding approval of petitioner's application for employment and decertifying that he was qualified, effectively terminating his employment, further advised that he could appeal the determination to the New York City Civil Service Commission. Petitioner failed to do so, opting instead to bring the instant proceeding. He thus failed to exhaust his administrative remedies, foreclosing judicial review (*Johnson v Markman*, 288 AD2d 165 [2001]).

Petitioner's claimed entitlement to judicial review because the deputy commissioner who issued the challenged notice was not

empowered to do so, such power being reserved exclusively for the commissioner under New York City Charter § 814(a)(6), is unpreserved (*Matter of Kelly v Safir*, 96 NY2d 32 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for concluding that the deputy commissioner did not act pursuant to lawfully delegated authority (City Charter §§ 810, 1101[a]).

Petitioner also failed to preserve his claim that under Civil Service Law § 50(4), respondents were required to rescind his application within three years of the triggering event, and we decline to review that claim in the interest of justice as well. As an alternative holding, we find that this claim also lacks merit. That provision allows such action beyond three years in the event of an applicant's fraudulent misstatement or omission of material facts. Documentary evidence amply established that petitioner deliberately concealed his arrest in Jamaica in connection with charges that he possessed, was dealing in, and tried to export a significant quantity of marijuana. His deliberate concealment and omissions of relevant information were

designed to fraudulently ensure that he obtained, and then retained, his employment as a police officer, and justified his termination.

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

ENTERED: JULY 1, 2010

CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3213-
3213A Charles McCoy, Index 102384/00
Plaintiff-Respondent,

Mary Ann McCoy,
Plaintiff,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants,

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Quirk & Bakalor, P.C., New York (Timothy J. Keane of counsel), for respondent.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about September 22, 2009, which, after a framed-issue hearing, held that the subject piece of equipment that injured plaintiff Charles McCoy was a mobile crane within the meaning of the Industrial Code, 12 NYCRR 23-8.2, unanimously affirmed, without costs. Appeal from order, same court (Michael D. Stallman, J.), entered January 22, 2010, which denied defendants' motion, pursuant to CPLR 2221(a), to vacate or modify the September 22, 2009 order, unanimously dismissed, without costs, as taken from a nonappealable paper.

The court correctly held, based on the evidence adduced at

the framed-issue hearing, that the subject equipment was a mobile crane for purposes of the Industrial Code regulations governing the safe operation of mobile cranes, considering the manner in which the equipment was being used at the time of plaintiff's injury. The term "mobile crane" is undefined in the Industrial Code, and plaintiff's expert witnesses provided persuasive testimony that the Gradall was functioning as a mobile crane at the time of plaintiff's accident, and that the Industrial Code provisions governing mobile cranes could sensibly be applied to the Gradall in light of the manner it was being used at the time (*see Giordano v Forest City Ratner Cos.*, 43 AD3d 1106, 1108 [2007]; *Millard v City of Ogdensburg*, 300 AD2d 1088, 1089 [2002], *lv denied* 303 AD2d 1060 [2003]). Defendants' expert testimony, in contrast, was unpersuasive and merely demonstrated that the Gradall was manufactured, tested, and sold in conformity with industry safety standards applicable to manufacturers governing rough terrain forklift trucks and lacked certain characteristics essential to a particular subset of mobile cranes, but ignored that there are several categories of mobile cranes not all of which possess these characteristics, that the Gradall is a multi-purpose machine capable of functioning as both a forklift and a mobile crane depending on the type of attachment being used, and that the Industrial Code was enacted before multi-purpose machines such as the Gradall were developed and therefore such

machines were not within the contemplation of the drafters.

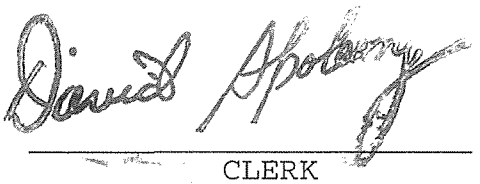
Furthermore, to interpret the Industrial Code provisions governing mobile cranes as applicable to the Gradall at issue here is entirely consistent with the statutory and regulatory purposes behind Labor Law § 241(6) and the Industrial Code - to protect construction workers against hazards in the work place - and whether a regulation applies will depend on how and for what purpose the equipment is used, not on its label or name (*see Copp v City of Elmira*, 31 AD3d 899, 900 [2006]; *see e.g. Borowicz v International Paper Co.*, 245 AD2d 682, 683-84 [1997]; *Smith v Hovnanian Co.*, 218 AD2d 68, 71-72 [1995]).

Defendants' motion pursuant to CPLR 2221(a) to vacate or modify the September 22, 2009 order was in actuality a motion to reargue, the denial of which is not appealable (*see Matter of Goliger*, 72 AD3d 966 [2010]).

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

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

ENTERED: JULY 1, 2010



CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3214-
3215N Elder Debt, LLC, Index 381869/08
Plaintiff-Appellant,

-against-

Anand Realty Corp.,
Defendant-Respondent,

Castle Oil Corporation, et al.,
Defendants.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about December 18, 2009,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated June 4, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 1, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3216 The People of the State of New York, Ind. 3081/07
Respondent,

-against-

Terrance Underwood,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel) and Nadia E. Moore, New York for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 10, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and endangering the welfare of a child (two counts), and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the remarks at issue were permissible responses to the defense summation, and that nothing in the summation deprived defendant of a fair trial

(*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 1, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3218 In re Bertrand Girigorie, Jr., et al., Index 108897/08
Petitioners-Respondents,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Appellants.

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

Order and judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered December 8, 2008, which, insofar as appealed from as limited by the brief, granted that part of the petition seeking to annul respondents' determination to deny petitioner Bertrand Girigorie, Jr. (Bertrand) succession rights to his deceased mother's apartment, to the extent of remanding the matter to respondent Department of Housing Preservation and Development for further proceedings to allow Bertrand to show that he resided in the apartment from June 2004 to June 2006, with particular emphasis on the period from June 2004 until November 2004, for which there was insufficient documentation, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Respondents' determination denying Bertrand succession rights to the subject apartment had a rational basis. The record

establishes that, despite ample opportunity to do so, Bertrand is unable to demonstrate that the apartment was his primary residence "for a period of not less than two years immediately prior to [his mother's] permanent vacating of the apartment" (28 RCNY 3-02[p][3]. Although Bertrand was listed on his mother's income affidavit for 2004, she never filed an affidavit for 2005 (*see e.g. Matter of Callwood v Cabrera*, 49 AD3d 394 [2008]; 28 RCNY 3-02[p][3]). Nor did Bertrand "provide[] proof that he . . . either filed a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding taxable year for which such return should have been filed," or that he was not legally obligated to file such a return (28 RCNY 3-02[n][4][iv]). Accordingly, the petition should be dismissed inasmuch as the remand to provide Bertrand with additional time to produce the required evidence would be futile.

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

ENTERED: JULY 1, 2010

David Spolter

CLERK

Andrias, J.P., Freedman, McGuire, Acosta, DeGrasse, JJ.

3225 In re Chatham Towers Inc., et al., Index 111875/08
Petitioners-Appellants,

-against-

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

Dewey & LeBoeuf LLP, New York (Aaron C. Lang of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondents.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered September 30, 2009, denying the petition to compel respondents to subject a project to construct a New York City Police Department Joint Operations Command Center (JOCC) to review under the State Environmental Quality Review Act (SEQRA), the City of New York's Uniform Land Use Review Procedure (ULURP) and the City Environmental Quality Review (CEQR) rules, denying as moot petitioners' motion for additional discovery, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents did not act arbitrarily and capriciously in determining that the JOCC project involves the "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site" (6 NYCRR 617.5[c][2]), and hence is a "Type II" action that is statutorily exempt from SEQRA and CEQR

(6 NYCRR 617.3[f]; 617.5[a]; 43 RCNY 6-15[b]); *see Manhattan Val. Neighbors for Permanent Hous. for Homeless v Koch*, 168 AD2d 262, 263 [1990], *lv denied* 77 NY2d 806 [1991]). The record establishes that the subject premises previously housed a New York City Fire Department (FDNY) emergency dispatch center, a use of the facility that is substantially similar to a new NYPD JOCC. We reject petitioners' argument that a period of vacancy between the premises' earlier use by FDNY and the construction of the JOCC renders the earlier use a nullity; periods of vacancy are not unusual, and quite often are a practical necessity, during the development and preparation of replacement construction (*see Matter of New York City Coalition for Preserv. of Gardens v Giuliani*, 175 Misc 2d 644, 653-654 [1997], *affd on other grounds* 246 AD2d 399 [1998]).

Because the JOCC project will not effect a change in the preexisting use of the subject premises, it does not constitute a "[s]ite selection for [a] capital project[]" (*see* NY City Charter § 197-c[a][5]) and therefore is not subject to ULURP (*see Matter of Silver v Koch*, 137 AD2d 467, 468 [1988], *lv denied* 73 NY2d 702 [1988]).

Contrary to petitioners' argument, the record does not present an issue of material fact whether FDNY's earlier use of

the subject premises was substantially similar to NYPD's announced new use thereof (*see Manhattan Val. Neighbors*, 168 AD2d at 263).

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

ENTERED: JULY 1, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3226 The People of the State of New York, Respondent, Ind. 63575/07 15219/07

-against-

Simon Duran, Defendant-Appellant.

Elliot H. Fuld, Bronx, for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered November 24, 2008, convicting defendant, after a nonjury trial, of menacing in the third degree, attempted criminal contempt in the second degree, and also convicting him of violation of probation, and sentencing him to an aggregate term of 11 months, unanimously affirmed.

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

The court properly permitted the People to introduce background evidence, including evidence of prior bad acts, relating to the contentious relationship between defendant and the victim and the events leading up to the issuance of the order

of protection that defendant was charged with violating (*see People v Palladino*, 47 AD3d 491, 492 [2008], *lv denied* 10 NY3d 843 [2008]). The court correctly balanced the probative value of this evidence against its prejudicial effect. Moreover, "the court in a nonjury trial [is] presumed to have disregarded the prejudicial aspects of evidence" (*People v Ashley*, 296 AD2d 339, 340 [2002], *lv denied* 99 NY2d 533 [2002]).

The court's rulings on the scope of redirect examination were proper exercises of discretion. Defendant's remaining evidentiary claims are unpreserved and we decline to review them in the interest of justice.

In the interest of judicial economy, the trial court properly adjudicated the probation violation notwithstanding that another judge of the same court had imposed the sentence of probation. CPL 410.60 provides, in pertinent part, that a person who has been taken into custody for violation of probation "must forthwith be brought before the court that imposed the sentence." There is nothing in the statute to suggest that the term court is intended to mean a particular judge.

M-1022 *People v Simon Duran*

Motion for summary reversal denied.

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

ENTERED: JULY 1, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3229 In re Randy Swinson, Index 340521/09
Petitioner,

-against-

Warden, Rikers Island Correctional Facility, et al.,
Respondents.

Percival A. Clarke, Bronx, for petitioner.

Determination of respondent New York State Division of Parole, dated June 24, 2008, which, after a hearing, revoked petitioner's parole and imposed a delinquent time assessment to hold petitioner to the maximum expiration date of his sentence, a total of two years, 11 months and 26 days, based upon a violation of his conditions of release, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Ruth E. Smith, J.], entered November 12, 2009), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner violated conditions of his parole (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]. The day after he was released to parole supervision, petitioner was arrested, refused to cooperate with police and

caused physical injury to a police officer. The imposition of a time assessment to the maximum expiration date of the sentence was not improper.

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

ENTERED: JULY 1, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3230N Barbara Granato, Index 302974/01
Plaintiff,

-against-

Pasquale Fabio Granato,
Defendant-Respondent,

Diahn W. McGrath,
Non-Party Appellant.

Diahn W. McGrath, New York, appellant pro se.

Eaton & Van Winkle LLP, New York (Robert N. Swetnick of counsel), for respondent.

Order, Supreme Court, New York County (Sue Ann Hoahng, Special Referee), entered on or about May 11, 2009, which granted defendant's motion to dismiss his former attorney's motion for additional legal fees and ancillary relief, and denied attorney Diahn W. McGrath's motion for legal fees and ancillary relief, unanimously reversed, on the law, with costs, defendant's motion denied and McGrath's granted, and the matter remanded for determination of the amount of reasonable legal fees recoverable by McGrath.

Defendant opposes his former attorney's application for additional legal fees on the ground that she failed to comply with the rules governing matrimonial retainer agreements (22 NYCRR part 1400). We find that McGrath substantially complied with the rules and therefore is not precluded from recovering

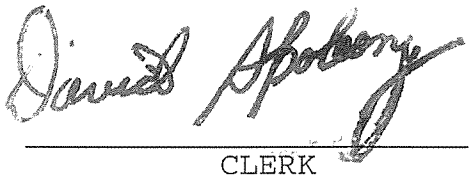
reasonable fees for services rendered (*see Flanagan v Flanagan*, 267 AD2d 80 [1999]). The record establishes that, although McGrath prepared and sent defendant a retainer agreement, defendant, who does not deny that he received the agreement, never signed and returned a copy of it to her. However, it also shows that defendant paid the retainer fee of $7,500 provided for in the agreement, and that, over the course of two years, McGrath rendered services to him, he received numerous billing statements from her and made extensive payments, and he never objected to any of the bills until after he discharged her in July 2008. Under these circumstances, we find that, notwithstanding that he never returned a signed copy to McGrath, defendant ratified the retainer agreement (*see Matter of Edelstein v Greisman*, 67 AD3d 796, 797 [2009]).

Defendant's contention that the retainer agreement did not adequately apprise him of his right to seek arbitration of any fee dispute is belied by the fact that the standardized Statement of Client's Rights and Responsibilities (reproduced from 22 NYCRR 1400.2), which expressly includes this right, was appended to the agreement. His contention that McGrath failed to submit written statements at least every 60 days, as the retainer agreement provided for, is also unavailing, since by failing to object to any of her bills until after he discharged her in July 2008, he

waived his right to be billed at least every 60 days (*see Johnner v Mims*, 48 AD3d 1104 [2008]).

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

ENTERED: JULY 1, 2010



CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3231
[M-3044] In re Cedric Saunders, Ind. 643/07
Petitioner,

-against-

Hon. Steven Barrett, etc., et al.,
Respondents.

Cedric Saunders, petitioner, pro se.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders, of counsel), for Hon. Steven Barrett, respondent.

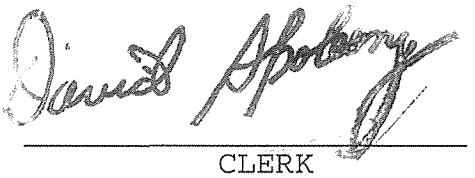
Richard T. Johnson, District Attorney, New York (Cynthia A. Carlson of counsel), for Robert T. Johnson, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JULY 1, 2010



CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3232
[M-3060] In re Michael Bonano, Ind. 2237/09
Petitioner,

-against-

Hon. Richard D. Carruthers, etc., et al.,
Respondents.

Michael Bonano, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Richard D. Carruthers, respondent.

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

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JULY 1, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
James M. Catterson
Rolando T. Acosta, JJ.

Index 600505/07
1728

Pacific Coast Silks, LLC,
Plaintiff-Respondent,

-against-

247 Realty, LLC,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered September 4, 2008, after a nonjury trial, awarding plaintiff tenant a principal sum representing its security deposit and first month's rent, and dismissing its counterclaims.

Smith & Shapiro, New York (Harry Shapiro of counsel), for appellant.

Adam M. Peska, White Plains, and Aibara & Reed, PLLC, New York (Blake W. Reed of counsel), for respondent.

SAXE, J.

The impact of a building-wide renovation and upgrade on the rights of an incoming commercial tenant is the subject of this appeal. Whatever regrets the tenant may have had later about the wisdom of agreeing to a tenancy of seventh-floor premises in a building whose only elevator was then out of service due to substantial renovations should not form a predicate for judicial solicitude, in the face of a commercial lease that delineates the rights and obligations of both landlord and tenant and provides only limited protection of the tenant's interests in the event of a long delay in the completion of the ongoing elevator renovation.

On September 5, 2006, plaintiff tenant and defendant landlord entered into a commercial lease for the seventh-floor premises at 247 West 36th Street in Manhattan, to be used "for silk garment fabric sales." The building is serviced by a single elevator, which opens directly onto the premises; the only other means of access to the premises is through a stairwell. At the time the lease was executed, the elevator was in the midst of a major renovation that had begun in July 2006, leaving the building without elevator service.

The parties' agreement was comprised of a standard lease form, a rider, and an attached work letter. It provided for a

one-year term from October 1, 2006 through September 30, 2007, with options to renew for five additional years. The parties acknowledged the possibility that the elevator would not be in service by the lease's commencement date of October 1, 2006, in rider paragraph 41.02, which provided that "in the event the elevator installation is not completed by October 15, 2006, the Commencement Date [of] the lease shall be adjusted to October 15, 2006." According to the landlord's principal, Shrage Rokosz, at the time the lease was executed both parties expected that the work would be completed by October 15, 2006. In fact, however, the work was not completed and the elevator not functioning until December 4, 2006.

The work letter attached to the lease rider required the landlord to perform certain repairs to the premises, including the installation of new hardwood flooring that the tenant would provide; it expressly provided that "[n]otwithstanding anything to the contrary contained herein, any items in the Lease or in this work letter that require Landlord to do work, the incompletion of any item same [*sic*] shall not toll the Commencement Date and Tenant shall pay the entire Annual Rental Rate and additional rent without any offsets or abatement on the Commencement Date." As agreed in the work letter, the tenant had hardwood flooring materials delivered to the premises in early

November 2006. Rokosz testified that when he had the old flooring removed in preparation for installation of the new flooring, he saw that the subflooring in place was running in the same direction as the tenant wanted the new floor to be installed, and he advised the tenant's principal, Joseph Ricci, that the floor would be stronger if the subfloor ran in a different direction. Ricci instructed Rokosz to hold off on installing the provided flooring, and plywood for new subflooring was subsequently delivered on December 13, 2006.

At the time the lease was executed on September 5, 2006, the tenant paid the first month's rent of $7,500 and a security deposit in the amount of $22,500. However, no further rent payments were made by the tenant after that initial payment. On December 18, 2006, the landlord sent a letter denominated a "Notice of Termination," demanding that the tenant vacate the premises by December 27, 2006 for non-payment of rent, and demanded that the tenant pay the rent arrears. The tenant responded by letter dated December 27, 2006, claiming that possession had never been delivered to it due to the lack of elevator service until December 4, 2006. In addition, the tenant claimed that the lack of elevator service would constitute a constructive eviction if it had been in possession, and that therefore no rent was due and there existed no legitimate basis

for landlord to terminate the lease. It nevertheless agreed to surrender the premises, but demanded return of its security deposit and first month's rent, since it considered the lease to have been cancelled.

By letter dated January 3, 2007, the landlord pointed out that the tenant had been aware that the elevator was out of service when it entered into the lease. The landlord also stated that, even though the tenant had complied with the demand that it surrender possession of the premises, it was not relieved of its obligation to pay the rent, and informed the tenant that it would not return the security deposit and first month's rent and would hold the tenant liable for all rent due under the lease as it accrued. This action followed.

At trial, only two witnesses were offered by the tenant. The first was an attorney, who established that in response to the landlord's December 18, 2006 letter terminating the tenancy, the tenant sent the letter dated December 27, 2006. The second witness was an employee of the elevator company that installed the upgraded elevator in the building, who testified about when the work began and said that it was completed and a certificate for its use obtained on December 4, 2006. Essentially, the tenant's case consisted of proof that the elevator was not in service until December 4th and the contention that this

constituted a constructive eviction. The landlord offered the testimony of its principal, Rokosz, who testified as to the parties' lease negotiations and subsequent events.

The trial court found that the tenant was constructively evicted from the leased premises, based on the landlord's failure to provide elevator service for the first seven weeks of the lease term. It also held, although no such cause of action was pleaded or sought in the context of conforming the pleadings to the proof, that the tenant was subjected to actual partial eviction due to the denial of access to a necessary appurtenance, namely, the elevator as a means of ingress and egress. Further, notwithstanding the rule that once the conditions creating a constructive eviction no longer exist a tenant in possession may not rely on those conditions to avoid its lease obligations, the trial court concluded that the tenant had not been given possession of the premises within a reasonable time and that therefore its obligation to pay rent never arose. It awarded the tenant the return of its security deposit and first month's rent.

Based on our review of the trial record, the parties' written contract and their undisputed conduct, we find insufficient support for the trial court's findings and conclusions, and, accordingly, we reverse. In our view, while it is true that the renovation of the building's elevator was

incomplete on the lease's delayed commencement date of October 15, 2006, and remained so until December 4, 2006, that circumstance did not justify treating the lease as cancelled and relieving the tenant of all its obligations under the lease.

To establish constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts by the landlord that "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). Partial actual eviction requires that the tenant be physically prevented from using a portion of the leased premises (*id.*). For the reasons that follow, neither claim was made out here.

The tenant presented nothing to establish that elevator service was necessary for it to operate its business during that time period; indeed, no one testified as to exactly what the operation of the business entailed or when the tenant had expected to open for business. The trial court seems to have extrapolated from the description of the business as "for silk garment fabric sales" that the tenant had intended to use the premises as a showroom from which to sell silk garment fabric to customers and that for its successful operation the business required personal visits by potential customers who would not visit a seventh-floor showroom without an elevator; it also seems

to have assumed that the tenant had intended to proceed with such operations immediately upon the commencement of the lease term and before its floor was installed. All this may have been true, but no evidentiary showing established these assumptions as facts or permitted their inference. Nor was there any evidence that the tenant lost any expected sales, revenue or customers.

In addition, although the tenant argues that the lack of an elevator necessarily made the premises unusable with respect to freight, furniture, business equipment, merchandise and bulky materials, it offered no evidence of items it was unable to convey to its premises and the way in which any such inability prevented it from proceeding with its operations. It is also worth noting that according to Rokosz's unchallenged testimony, the tenant one floor below had successfully moved in by December 4, 2006.

The tenant therefore failed to establish that the lack of elevator service actually caused it to be deprived of the expected and intended use of the premises during that period, as is required for constructive eviction (*see Barash*, 26 NY2d at 83). We similarly find insufficient support for the trial court's conclusion that the tenant experienced actual partial eviction based on the physical inability to obtain ingress and egress to the premises through the elevator.

The trial court correctly observed that the right to use an expected and usual means of ingress and egress is an appurtenance, the denial of which may constitute a partial actual eviction.

> "If the use of the elevator by the tenant is reasonably necessary and essential to the beneficial enjoyment of the demised premises then the tenant is entitled to the continued use thereof in the manner in which it has heretofore used it, and any interference therewith or disturbance thereof constitutes an actual partial eviction" (*Broadway-Spring St. Corp. v Berens Export Corp.*, 12 Misc 2d 460, 465 [1958]).

Although we recognize that the availability of an elevator for access to a seventh-floor place of business seems important, perhaps critical, our own view that the lack of a working elevator would constitute a substantial or total interference with access cannot substitute for an evidentiary showing by the tenant that it was actually unable to access the premises as it needed to during that seven-week period.

We also disagree with the trial court's holding that the tenant was entitled to rescission of the lease under Real Property Law § 223-a. That statute gives tenants the right to rescind a lease and to recover the consideration paid when the landlord fails to deliver possession at the start of the lease term, *unless* the lease in question contains an express term to the contrary. Even though the lease in question here *does*

contain an express term to the contrary, rendering the statutory right to rescind inapplicable, the trial court, relying on *Hartwig v 6465 Realty Co.* (67 Misc 2d 450 [1971]), reasoned that since the law "engrafts a rule of reason upon such clauses in order that they do not, contrary to the intention of the parties, become arbitrary and unreasonable" (*id.* at 450), if the possession of the premises is not delivered within a reasonable time, then the lease term precluding application of the statutory right to rescission will become inoperative. The trial court concluded that the landlord's delay in delivering possession, i.e., nine weeks after the lease's original commencement date and seven weeks after the extended commencement date, was unreasonable, so it applied the statutory right to rescind.

We conclude, to the contrary, that the inclusion in the lease of an express term declaring Real Property Law § 223-a to be inapplicable takes the lease out of the statute's purview. While the additional protection employed in *Hartwig* may be applicable in appropriate circumstances, such circumstances are not presented here. The present matter, unlike *Hartwig*, does not concern a residential tenant; while residential tenants require protection from non-negotiable form leases containing terms that deprive them of statutory rights, commercial tenants, such as plaintiff, that are able to negotiate the terms of their leases,

require no such protection.

Furthermore, based upon the limited evidence plaintiff presented, we see insufficient basis for the finding that possession of the premises was not delivered within a reasonable time. What is reasonable is always dependent upon the particular circumstances (*Sohayegh v Oberlander*, 155 AD2d 436 [1989]). The trial court found that the situation here was unreasonable by calculating the delay as nine weeks and re-framing that as one-sixth of the one-year lease term; it then analogized the situation to a case in which a residential tenant was granted rescission of a three-year apartment lease and the return of his pre-payments, after he was subjected to a six-month delay in the availability of the apartment (citing *Rein v Metrik Co.*, 200 Misc 231 [1951]). However, the cases are not comparable, and the present situation was somewhat distorted in the comparison.

While there was, unquestionably, a seven-week delay in the availability of elevator service (calculating from the agreed-on delayed lease commencement date), the evidence fails to establish that plaintiff was deprived of any expected use of the premises during that period. On the contrary, it appears that the tenant was given -- and took -- the degree of possession of the property that was contemplated when the lease was signed.

First, the delivery and acceptance of the key to the

premises establishes that the tenant was initially given the contemplated access. Although the elevator was not operational, the undisputed testimony of Rokosz, the landlord's principal, establishes that Ricci, the tenant's principal, and the tenant's employees and contractors, could, and did, gain access to the leased premises from the stairway. Indeed, Rokosz testified that all the other tenants of the building moved in before December 4th, using only the stairs for access. Ricci also physically accepted delivery of the elevator key on December 4th, which reflects that the tenant did not, at that time, take the position that the lease was a nullity due to a failure to deliver possession before then.

Second, the tenant's acts of delivering hardwood flooring to the premises in early November 2006 in accordance with the work letter accompanying the lease and instructing Rokosz to hold off on its installation in view of the subflooring concerns, and then having plywood delivered in December 2006, further reflect that the tenant actively cooperated in the process of readying the place for the contemplated future business operations. Under such circumstances, it is inaccurate to say that the tenant was not given the possession contemplated by the lease.

The trial court further reasoned that rent was not payable for the period between October 15, 2006 and December 4, 2006,

based on the lease and on the undisputed testimony of the landlord's principal that at the time the parties executed the lease, they both knew that installation of the new elevator was not yet complete, and "expected" that the elevator would be ready by October 15th. The trial court found that it was both parties' understanding and intention that rent would not be payable if the elevator was not in service by that date. One ground for this conclusion was that, according to the trial court, the lease "contain[ed] no express provision governing the situation" that the elevator installation would not be completed by October 15, 2006. However, the opposite is true. Rider paragraph 41.02 explicitly contemplated the possibility that the elevator installation would not be completed by October 15th, in providing that "in the event the elevator installation *is not completed by* October 15, 2006, the Commencement Date [of] the lease shall be adjusted to October 15, 2006" (emphasis added). The very language of the provision acknowledged the possibility that the elevator installation would not be completed by October 15, 2006. While it provided only that in such circumstances the lease commencement date would be postponed two weeks, from October 1st to October 15th, that is not the same as neglecting to consider or make any provision for the possibility. Absent any further provision protecting the tenant beyond the two-week delay of the

commencement of the lease term, the lease must be understood to provide that the tenant's obligations thereunder, including the obligations to pay rent and to notify the landlord of any claimed default, began as of October 15, 2006, regardless of the lack of elevator service.

The trial court also reasoned that based on Rokosz's testimony that there was no talk of rent being due and payable when he met with Ricci, on November 10, 2006, it could be inferred that Rokosz's understanding at that time was that, since the elevator was not working yet, the tenant's obligation to pay rent had not been triggered. However, that inference is improper, since, due to the delay of the lease commencement date to October 15, 2006, as of November 10, 2006, the next payment of rent would not yet have been due.

As to the part of paragraph 24 of the standard form portion of the lease entitled "Failure to Give Possession," which provides for a rent abatement in the event the landlord's failure to complete contemplated work prevents the landlord from giving possession of the premises to the tenant, we perceive, for the reasons stated above, insufficient support for a finding that the landlord failed to give the tenant the contemplated possession of the premises so as to warrant a rent abatement.

We have rejected the contention that the extended lack of elevator service in itself entitled the tenant to avoid its obligations under the lease. Further, even if the long delay in the completion of the elevator work could have supported a claim for breach of the lease, such a claim was precluded by the tenant's failure to comply with lease paragraph 46.02, which required it to send written notice of a claimed default in order to give the landlord the opportunity to cure. Because no such notice was served, the tenant is not entitled to relief based on a claim that the landlord was in default of the lease.

A question remains as to whether the landlord is entitled to the relief it seeks on its counterclaims. Our rejection of the trial court's findings of actual or constructive eviction does not necessarily entitle the landlord to the judgment it seeks for rent due through March 31, 2007, the broker's fee reimbursement, and attorney's fees. To be entitled to rent accruing after the tenant agreed to vacate the premises, the landlord must establish that it properly terminated the lease in accordance with its terms, in particular, by its December 18, 2006 notice demanding that the tenant vacate the premises by December 27, 2006, which the landlord now refers to as a "Conditional Limitation Notice," although it was actually called a "Notice of Termination," and which did not include the conditional notice containing a cure

period required by lease paragraph 48.02. The trial court declined to reach the issue of whether defects in the notice would affect the landlord's rights.

Because this issue, and the question of entitlement to attorney's fees, if any, were not addressed by the trial court, we remand the matter for further proceedings.

Accordingly, the judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered September 4, 2008, after a nonjury trial, awarding plaintiff tenant the principal sum of $30,000, representing its security deposit and first month's rent, and dismissing defendant's counterclaims, should be reversed, on the law and the facts, without costs, the award vacated, defendant's counterclaims reinstated, and the matter remanded for further proceedings consistent herewith.

All concur.

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

ENTERED: JULY 1, 2010

CLERK