SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 12, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5048 In re Heidi Higgins, Index 106107/09
Petitioner-Appellant,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, Lake Success, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen J. Seemen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 4, 2009, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to, among other things, annul the determination of respondent Board of Trustees denying petitioner police officer's application for accident disability retirement benefits, unanimously affirmed, without costs.

The determination that petitioner's condition was not job-related had a rational basis. The statutory presumption set forth in General Municipal Law § 207-k (as amended by L 2006, ch 654, § 1) was sufficiently rebutted by competent evidence that

petitioner's condition was caused by her cardiac arrhythmia, not a stroke (*see Matter of DeMonico v Kelly*, 49 AD3d 265, 266 [2008]). It was the sole province of the Medical Board and the Board of Trustees to resolve the conflicts in evidence (*see Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art.1-B Pension Fund*, 217 AD2d 660, 660 [1995]).

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

ENTERED: MAY 12, 2011

CLERK

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

5050 Emiliano Zapata, Index 21439/06
Plaintiff-Appellant, 23466/06
300051/08

-against-

Ayanna Sutton, et al.,
Defendants,

Michael P. Giachinta, et al.,
Defendants-Respondents.

[And Another Action]
- - - - -
Jorge Adrian Bernal Cuapio, et al.,
Plaintiffs-Appellants,

-against-

Michael P. Giachinta, et al.,
Defendants-Respondents,

Shirley J. Jackson, et al.,
Defendants.

_____

Sullivan, Papain, Block, McGrath & Cannavo, P.C., New York (Susan M. Jaffe of counsel), for Emiliano Zapata, appellant.

Bornstein & Emanuel, P.C., Garden City (Mitchell Dranow of counsel), for Jorge Adrian Bernal Cuapio and Louis Gerstman, etc., appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered January 8, 2010, which, insofar as appealed from as limited by the briefs, granted defendants Michael Giachinta and

Putnam Tire Co., Inc.'s motion for summary judgment dismissing the complaints and all cross claims asserted against them in Actions Nos. 1 and 3, unanimously affirmed, without costs.

Giachinta, who was driving in his proper lane, was "presented . . . with an emergency situation not of his own making" and almost no time to react when defendant Ayanna Sutton's vehicle crossed over double yellow lines into his lane from the opposite direction and collided with his vehicle, and therefore he cannot be found "negligently responsible for any part of the accident" (*Williams v Simpson*, 36 AD3d 507 [2007]; *Gonzalez v City of New York*, 295 AD2d 122 [2002]; *Caban v Vega*, 226 AD2d 109, 111 [1996]).

Contrary to plaintiffs' contention, nothing in the record indicates that Giachinta was driving inattentively, at excessive speed, or in slippery road conditions. Nor does the record support the contention that Giachinta unreasonably steered his wheel towards the northbound lane in response to the emergency created by Sutton. The affidavit by plaintiffs' expert stating otherwise provides "nothing more than pure speculation, unsupported by reference to any facts in the record or personal observations" and therefore is insufficient to raise a triable issue of fact as

to the reasonableness of Giachinta's actions (*Saborido-Calvo v New York City Tr. Auth.*, 11 AD3d 216 [2004]).

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

ENTERED: MAY 12, 2011

CLERK

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

5054 In re Reeva A.C.,
Petitioner-Appellant,

-against-

Richard C.,
Respondent-Appellant,

Angelique C.,
Respondent-Respondent.

_____

Dora M. Lassinger, East Rockaway, for Reeva A-C., appellant.

Anne Reiniger, New York, for Richard C., appellant.

David M. Shapiro, Bronx, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Naomi Buchman of counsel), attorney for the children.

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Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about April 30, 2009, which, after a hearing, granted a final order of custody to respondent mother, with visitation to petitioner grandmother and respondent father, unanimously affirmed, without costs.

The court's determination that it was in the best interests of the children to grant custody to respondent mother has a sound and substantial basis in the record. The court clearly examined and weighed numerous factors, relying on no single factor, including the quality of the home environment, the ability of each party to provide for the children's emotional and

intellectual growth, and the relative fitness of each parent (*see Matter of China S.(Tonia J.- Levon S.)*, 77 AD3d 568 [2010]).

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

ENTERED: MAY 12, 2011

CLERK

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

5057 GPH Partners, LLC, Index 111186/07
Plaintiff-Appellant,

-against-

American Home Assurance Company, et al.,
Defendants,

Admiral Insurance Company,
Defendant-Respondent.

_____

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellant.

Coughlin Duffy, LLP, New York (Justin N. Kinney of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 26, 2010, which granted defendant Admiral Insurance Company's (Admiral) motion for summary judgment declaring that it has no duty to defend or indemnify plaintiff with regard to the underlying personal injury action, unanimously reversed, on the law, with costs, the motion denied, and it is declared that defendant Admiral has a duty to defend and indemnify plaintiff in the underlying action.

Supreme Court erred by considering only the language of the subject policy's wrap-up exclusion, without also examining whether Admiral timely asserted such exclusion as a basis for its disclaimer. "A disclaimer is unnecessary when a claim does not

fall within the coverage terms of an insurance policy . . . [but] a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion" (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001] [citations omitted]; *A. Serdivone, Inc. v Commercial Underwriter's Ins. Co.*, 7 AD3d 942, 943-44 [2004], *lv dismissed* 3 NY3d 701 [2004]).

"[T]imeliness of disclaimer is measured from the time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]). Thus, where an insurer "becomes sufficiently aware of facts which would support a disclaimer," the time to disclaim begins to run, and the insurer bears the burden of explaining any delay in disclaiming coverage (*see Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [2010]). Where the basis for the disclaimer was, or should have been, readily apparent before onset of the delay, the insurer's explanation for its delay fails as a matter of law (*id.*). Even where the basis for disclaimer is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim (*see Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 3 [2007]; *City of New York v Welsbach Elec. Corp.*, 49 AD3d 322, 323 [2008]).

Admiral's May 1 and May 15, 2007 disclaimers were untimely as a matter of law. Via January 2007 emails, Admiral was on notice of plaintiff's claim for coverage. Grounds for disclaimer based on either delay in notice of the occurrence or the wrap-up exclusion should have been readily apparent to Admiral in January 2007, and, even if they were not, at a minimum, Admiral should have started an investigation at that time. Admiral's position that it only learned that plaintiff was making a coverage request via its attorney's April 23, 2007 letter requesting "confirmation" of coverage, and that it could not have known about the existence of the wrap-up policy until May 10, 2007, is not borne out by the record.

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

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

ENTERED: MAY 12, 2011

CLERK

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

5060 Rose Marie Lopez, Index 25478/04
Plaintiff-Respondent,

-against-

Allen Eades,
Defendant-Appellant.

_____

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellant.

Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 8, 2010, which denied defendant's motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

Defendant met his initial burden of establishing prima facie that plaintiff did not sustain a serious injury, by submitting the affirmed report of an orthopedic surgeon detailing the objective tests he performed on examination, his finding that plaintiff had full range of motion in her right wrist and right ankle, and his conclusion that plaintiff had no ongoing impairment resulting from the accident (*see Christian v Waite*, 61

AD3d 581 [2009]). Defendant also submitted the affirmed reports of a radiologist who reviewed MRIs taken within months after the accident and found no evidence of traumatic injury.

Plaintiff failed to proffer an adequate explanation for the six-year cessation of treatment following two physical therapy sessions (*see Antonio v Gear Trans Corp.*, 65 AD3d 869, 870-871 [2009]; *Eichinger v Jone Cab Corp.*, 55 AD3d 364, 364-365 [2008]).

Plaintiff's 90/180-day claim is refuted by admissions in her verified bill of particulars and deposition testimony that she was confined to bed for only one day and missed less than 45 days of work (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]). She offered no competent medical proof to substantiate this claim.

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

ENTERED: MAY 12, 2011

CLERK

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

5062 Peta-Gaye Blackstock, Index 17180/02
Plaintiff-Appellant,

-against-

Board of Education of the
City of New York,
Defendant-Respondent.

_____

Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 7, 2009, which granted defendant's motion insofar as it sought summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a former special education speech therapist employed by defendant Board of Education, alleges that she suffered personal injuries as the result of an assault by one of her students. Plaintiff further alleges that defendant failed to, among other things, properly supervise its students.

Under these circumstances, in order to impose liability, plaintiff had to show that defendant owed her a special duty of protection (*see Bonner v City of New York*, 73 NY2d 930, 932 [1989]; *see also Vitale v City of New York*, 60 NY2d 861, 863

[1983]). Plaintiff's failure to allege or provide the factual predicate for the special relationship theory in her notice of claim or complaint is fatal to maintenance of this action (*see Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541 [2009]). Moreover, the record shows that plaintiff could not prove all of the necessary elements of that theory (*see Cuffy v City of New York*, 69 NY2d 255 [1987]). Accordingly, there are no material issues of fact, and summary judgment was properly granted.

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

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

ENTERED: MAY 12, 2011

CLERK

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

5064 Clorinda Rivera, Index 115385/05
Plaintiff-Appellant,

-against-

Merrill Lynch/WFC/L/Inc., et al.,
Defendants-Respondents,

Olympia & York Tower B Company, et al.,
Defendants.

_____

McCallion & Associates, LLP, New York (Kenneth F. McCallion of counsel), for appellant.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for Merrill Lynch respondents.

MacKay, Wrynn & Brady, LLP, Douglaston (Christine Brennan of counsel), for Fugitec respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 10, 2009, which, insofar as appealed from as limited by the briefs, in an action for personal injuries sustained when the escalator on which plaintiff was riding suddenly began to shake, causing her to fall, granted defendants' motions for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Defendants owners, managers and lessees established their entitlement to judgment as a matter of law by showing that there was no evidence that they created or had actual or constructive

notice of the allegedly hazardous condition (*see Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [2004], *lv denied* 4 NY3d 705 [2005]). There was no evidence that the escalator at issue was in a defective condition at the time of plaintiff's fall (*see Cortes v Central El., Inc.*, 45 AD3d 323, 324 [2007]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). Moreover, with respect to the Fujitec defendants, charged with maintaining the escalator in a safe operating condition, the record demonstrates that there was no defective condition that Fujitec could have discovered through the exercise of reasonable care (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]).

In opposition, plaintiff failed to raise a triable issue of fact. She did not submit any expert testimony or other evidence supporting her contention that the escalator was defective and that such defect caused the accident. Indeed, she testified that she had ridden on the subject escalator on numerous occasions without incident, and knew of no complaints. Furthermore, there was no "visible and apparent" defect prior to the accident so as

to constitute constructive notice (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Plaintiff's allegations of constructive notice were entirely speculative (*see Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337 [2008]).

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

ENTERED: MAY 12, 2011

CLERK

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

5065 The People of the State of New York, Respondent, Ind. 3986/06

-against-

Jamel Brown, Defendant-Appellant.

_____

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

Jamel Brown, appellant pro se.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about December 15, 2009, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 12, 2011

CLERK

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

5066 In re Tony Zimmerman, Index 401408/09
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Tony Zimmerman, petitioner pro se.

Sonya M. Kaloyanides, New York (Kimberly W. Wong of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated April 22, 2009, which terminated petitioner's tenancy on the ground of nondesirability, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered February 19, 2010), dismissed, without costs.

The finding of nondesirability is supported by substantial evidence, including that 56 bags of crack cocaine, drug paraphernalia, a loaded handgun and four boxes of ammunition containing more than 150 rounds were recovered from petitioner's apartment pursuant to a search warrant of which petitioner was the target. Although petitioner's stepbrother, but not petitioner, was present in the apartment at the time the police

executed the warrant, the evidence supported the conclusion that the drugs, drug paraphernalia, gun and ammunition were all in plain view in the apartment, and that petitioner violated the terms of the lease by allowing such activity in the apartment (*see Harris v Hernandez*, 30 AD3d 269 [2006]; *Matter of Satterwhite v Hernandez*, 16 AD3d 131 [2005]). Furthermore, while petitioner substantially caught up with the payment of arrears in rent, his chronic delinquency also provided grounds for the determination, notwithstanding his claim that public assistance was untimely in paying his rent (*see Davis v Hernandez*, 13 AD3d 90 [2004]).

Under the circumstances presented, the penalty of termination does not shock our conscience (*see Harris* at 269).

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

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

ENTERED: MAY 12, 2011

CLERK

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

5067N- Index 108917/07
5068N- 590958/07
5069N- 400595/08
5070N Stanimar Nenadovic,
Plaintiff,

-against-

P.T. Tenants Corp., now known
as Park Terrace Gardens, Inc., et al.,
Defendants,

Liberty Architectural Products Co., Inc.
Defendant-Appellant,

Tractel, Inc.,
Defendant-Respondent.

- - - - -

Park Terrace Gardens, Inc.,
sued herein as P.T. Tenants
Corp., etc., et al.,
Third-Party Plaintiffs,

-against-

A-Tech Environmental Restoration, Inc.,
Third-Party Defendant-Appellant.

[And Other Third-Party Actions]

_____

Babchik & Young, LLP, White Plains (Ephraim J. Fink of counsel), for Liberty Architectural Products Co., Inc., appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Aoife Reid of counsel), for A-Tech Environmental Restoration, Inc., appellant.

McCarter & English, LLP, New York (Reneé A. Gallagher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling,

J.), entered August 5, 2010, which granted defendant Tractel's motion for a protective order, unanimously reversed, on the law and in the exercise of discretion, without costs, the motion denied, and the destructive testing set forth in the protocol permitted, with defendant Tractel permitted to have a representative present during the testing at the expense of Liberty and A-Tech jointly, including reasonable travel and hotel expenses, and to receive a copy of the report of the test results. Appeal from order, same court and Justice, entered January 11, 2011, which granted the motions for reargument of defendant Liberty and third-party defendant A-Tech, and upon reargument adhered to its prior determination, unanimously dismissed, without costs, as academic.

Liberty and A-Tech made a sufficient showing that the destructive testing set forth in the protocol was material and necessary to their defense of the actions, as well as the cross claims for contribution and indemnification asserted by Tractel, and that they would be prejudiced if they were not permitted to perform the tests (*see Castro v Alden Leeds, Inc.*, 116 AD2d 549, 550 [1986]). The protocol specified the precise tests to be performed and the affidavits of their experts indicated the extent to which each test would alter or destroy the scaffold, whose failure caused the injuries to plaintiffs. The experts

noted the specific observations which suggested that the scaffold's failure might be attributed to improper design or fabrication of the scaffold. The fact that the condition of the scaffold may have been altered by the passage of time or exposure to the elements may be considered by the fact-finder in assessing the weight to accord the test results. From the record, it appears that Liberty and A-Tech will be unable to properly defend themselves without the proposed testing. There is no dispute that numerous photographs of the scaffold exist which will enable the fact-finder to assess its condition prior to the testing.

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

ENTERED: MAY 12, 2011

CLERK

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

5071N Louis Lasky Memorial Medical and Dental Center LLC, Plaintiff-Appellant, Index 603739/08

-against-

63 West 38th LLC, et al., Defendants,

63 West 38th Street Development LLC, Defendant-Respondent.

_____

Law Offices of Lisa M. Solomon, New York (Lisa M. Solomon of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 21, 2010, which denied plaintiff tenant's motion for a preliminary injunction to enjoin defendant landlord 63 West 38th Street Development LLC from, among other things, terminating the parties' lease pending the determination of this action for declaratory relief and damages, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion for a preliminary injunction (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Even if plaintiff could show that it was likely to succeed on the merits of its claim for declaratory relief, it failed to

demonstrate that its potential damages are not compensable in money and capable of calculation, and thus, that it will suffer irreparable harm in the absence of the requested injunction (*see Credit Index v RiskWise Intl.*, 282 AD2d 246, 247 [2001]). Plaintiff has also failed to show that the equities tip in its favor (*id.*). As the court found, the 12-month period provided in the notice of termination gives plaintiff ample time to ameliorate any "disruption and anxiety" caused by plaintiff's relocation.

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

ENTERED: MAY 12, 2011

CLERK

Tom, J.P., Sweeny, McGuire, DeGrasse, Freedman, JJ.

1058 The People of the State of New York, Respondent, Ind. 40165C/05

-against-

Freddy Rodriguez, Defendant-Appellant.

_____

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (__ NY3d __ [2011], 2011 NY Slip Op 02074), judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered March 15, 2007, convicting defendant, after a jury trial, of manslaughter in the second degree, assault in the second degree (two counts), vehicular manslaughter in the second degree, vehicular assault in the second degree (two counts) and operating a motor vehicle while under the influence of alcohol (two counts), and sentencing him to an aggregate term of 6 to 15 years imprisonment, unanimously affirmed.

This Court previously reversed the judgment of conviction and ordered a new trial upon the trial court's denial of defendant's request for a justification charge (72 AD3d 238 [2010]). The Court of Appeals reversed this Court's order and

remitted the matter to us for consideration of the remaining undetermined issues. Accordingly, we reject defendant's challenge to the prosecutor's summation. The remarks at issue constituted fair comment on the evidence and did not deprive defendant of a fair trial (*see People v Ashwal,* 39 NY2d 105, 109 [1976]). Defendant's remaining contention that his sentence was excessive lacks merit. Defendant's conviction stems from a senseless act that caused the death of a child and serious injury to two other persons. That he had no prior conflicts with the law does not negate the magnitude of his crimes or justify a reduction of his sentence (*see e.g. People v Motter,* 235 AD2d 582, 589 [1997], *lv denied* 89 NY2d 1038 [1997]).

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

ENTERED: MAY 12, 2011

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3087 Magwitch, L.L.C., Index 600238/08
Plaintiff-Appellant,

-against-

Pusser's Inc., etc., et al.,
Defendants-Respondents.

_____

De Vos & Co., PLLC, New York (Lloyd De Vos of counsel), for appellant.

Venable LLP, Baltimore, MD (John A. McCauley of the bar of the State of Maryland admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 1, 2009, which granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, affirmed, without costs.

This action seeks to enforce payment of a promissory note made by Pusser's Ltd., a company incorporated in the British Virgin Islands (BVI), in favor of a bank in the BVI, which plaintiff, a New York corporation, purchased at a discounted price. Plaintiff is solely owned and managed by an attorney who resides in New Jersey and is licensed to practice in New York, New Jersey and the United States Virgin Islands.

On May 9, 2002, plaintiff entered into an assignment agreement with Barclays Bank PLC, whereby plaintiff purchased

$3,300,000 of the debt owed by Pusser's Ltd. to Barclays in exchange for $1,500,000. Plaintiff was assigned the note and all security held by Barclays in Pusser's Ltd.'s assets. The agreement was governed by BVI law, and was signed by all parties in the BVI except plaintiff, which executed the agreement in New Jersey. The assignment of the security agreements, which provided for the collateral in the United States that secured the note, was executed by defendant Charles S. Tobias in the BVI and was governed by BVI law.

Following Pusser's Ltd.'s default on the note, plaintiff commenced an action in New Jersey federal court to recover on the note against the same defendants sued herein, namely, Pusser's Ltd., two entities affiliated with Pusser's Ltd. (one incorporated in Florida and the other in the BVI), and Tobias, a resident of the BVI who controls the corporate defendants. After the New Jersey action was dismissed for lack of personal jurisdiction, plaintiff commenced this action in Supreme Court, New York County. Defendants timely removed the action to federal court, based on the alleged existence of federal diversity jurisdiction; the removal was effected before the expiration of defendants' time to respond to the complaint by answer or motion. Plaintiff moved to remand the action to New York Supreme Court for lack of diversity, and defendants moved to dismiss for lack

of personal jurisdiction. The federal court granted plaintiff's motion and directed that the entire matter, including defendants' pending motion to dismiss, be remanded to state court. Upon remand, Supreme Court granted the motion to dismiss. We affirm.

Contrary to the argument of plaintiff and the dissent, defendants did not waive any defenses based on lack of personal jurisdiction by removing the action to federal court. We agree with the view of the Third Department, expressed in a decision issued after this appeal was argued, that *Farmer v National Life Assn. of Hartford, Conn.* (138 NY 265 [1893]), relied on by plaintiff and the dissent, is no longer binding because it was "based on the outdated distinction between special and general appearances . . . and also on the removal procedure applicable at that time, long since superseded by the CPLR, the Federal Rules of Civil Procedure and 28 USC § 1446" (*Benifits by Design Corp. v Contractor Mgt. Servs., LLC*, 75 AD3d 826, 828 [2010]; *see also* Siegel, NY Prac § 109 [4th ed] [under prior law "(a) special appearance was used by the defendant for the sole purpose of objecting to the court's jurisdiction of his person," but "(t)he CPLR abolished the 'special' appearance, and since the 'general' appearance was used only to differentiate it from the special one, both categories have disappeared under the CPLR"]). "Moreover, though not controlling, we note that removal does not

waive the defense of lack of personal jurisdiction in federal court" (*Benifits by Design*, 75 AD3d at 828 [citations omitted]). While this Court rejected a similar argument against *Farmer*'s continuing viability in *Quinn v Booth Mem. Hosp.* (239 AD2d 266 [1997]), we find the reasoning of the Third Department in the more recent *Benifits by Design* case persuasive and, given the desirability of uniform construction of the CPLR throughout the state, follow the latter decision.

The motion court properly dismissed the action for lack of personal jurisdiction. Although CPLR 302(a)(1) permits a court to exercise personal jurisdiction over any non-domiciliary who, in person or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state," defendants' actions here did not amount to purposeful activity by which they availed themselves of the privilege of conducting business in New York. The acts of sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff's principal, who also was defendants' legal advisor while he was in New York, were not a sufficient basis to satisfy the statutory requirements (*see Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2006], *lv denied* 9 NY3d 803 [2007]).

The court also properly found that it could not exercise

personal jurisdiction over defendants pursuant to CPLR 302(a)(3). That section provides for jurisdiction over a defendant who (1) commits a tortious act outside New York (2) that causes injury within New York (3) where the defendant either (i) does or solicits business, or engages in any other course of conduct, or derives substantial revenue from activities in New York, or (ii) expects or should expect that its tortious act will have consequences in New York, and derives substantial revenue from interstate or international commerce (*see* CPLR 302[a][3]; *see generally Cooperstein v Pan-Oceanic Mar.*, 124 AD2d 632, 633 [1986], *lv denied* 69 NY2d 611 [1987]). The determination of whether a tortious act committed outside New York causes injury inside the state is governed by the "situs-of-injury" test, requiring determination of the location of the original event that caused the injury (*see Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 791 [2d Cir 1999]; *see also Kramer v Hotel Los Monteros S.A.*, 57 AD2d 756 [1977], *lv denied* 43 NY2d 649 [1978]).

Here, the original event that caused the injury was not, as plaintiff maintains, the disbursement of funds from New York to purchase the note from Barclays, since there would not have been any injury if payment had been made when due. Rather, the injury was caused by misrepresentations about the transfer of assets and

the transfer and diversion of funds, which occurred in the BVI and locations other than New York, and resulted in the unavailability of funds to pay plaintiff the amounts due on the note. The second part of the test also cannot be satisfied, since defendants do not either: regularly do or solicit business, or engage in any other persistent course of conduct, or derive substantial revenue for goods or services used or rendered in New York; or reasonably expect the alleged tortious act to have consequences in the state, and derive substantial revenue from interstate or international commerce (*see* CPLR 302[a][3]).

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

McGUIRE, J. (dissenting)

This appeal is controlled by *Farmer v National Life Assn. of Hartford Conn.* (138 NY 265 [1893]) and our decision in *Quinn v Booth Mem. Hosp.* (239 AD2d 266 [1997]). In *Farmer*, the plaintiff commenced an action in state Supreme Court, the defendant removed it to federal court, and the federal court remanded it to Supreme Court. The defendant then moved to dismiss on the grounds that it had not been properly served and that the admission of service was defective. On the defendant's appeal to the Court of Appeals from the denial of its motion, the Court held that the defendant had waived this objection when it removed the action to federal court:

> "It is unnecessary to consider what force, if any, the objections to the mode of service of process in this case and to the sufficiency of the admission of service might have had, if they had been seasonably made, for we think it must be held that the defendant necessarily submitted itself to the jurisdiction of the state court and waived any defect there may have been in the procedure to acquire jurisdiction of its person, by the proceeding which it initiated and consummated for the removal of the action into the United States Circuit Court. There could be no transfer of the cause from the state to the federal jurisdiction, unless there was an action pending. The federal statute required it, and the petition must so allege, and must also aver that the petitioner is a party to the action . . . [The rule recognizing the right of a defendant to challenge service after certain

> special appearances] has no application where the defendant becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he must be a party. He thereby submits himself to the jurisdiction of the court" (138 NY at 269-70).

As is evident, the Court concluded both that the act of removing the case necessarily entailed a concession by the defendant that jurisdiction of its person had been properly acquired by the state court, and that the concession was conclusive. The Court reiterated this rationale in the course of discussing with approval a federal case in which, following the removal of an action commenced in state court, the court denied the defendant's motion to dismiss on the ground of defective service, reasoning that, "[b]y bringing it here, he voluntarily treats it as properly commenced and actually pending in the state court, and he cannot, after it is entered here, treat it otherwise" (*id.* at 271 [quoting *Sayles v North Western Ins. Co.*, 2 Curtis C.C. 212 [1856]). The Court stated:

> "The principle thus formulated, is, we think, sound, reasonable and just. It cannot be tolerated that a defendant shall question the jurisdiction of a state tribunal over his person, after he has effected a transfer of the cause to another court, by placing upon its records an affirmation under oath of the pendency of the action, and of his relation to it as a party, and obtained the approval of the court of the bond required as a condition of its removal. If the cause is

> subsequently remanded, he cannot be heard to say that his own proceedings have in effect been *coram non judice*" (*id*. at 271-272).

We followed *Farmer* in *Quinn*, holding that the defendants' "filing of a removal petition to Federal court effected a general appearance precluding their objections to defective service under CPLR 308(1) or (2) after the case was remanded to State court" (*Quinn*, 239 AD2d at 266). Moreover, we rejected the "suggest[ion] that *Farmer* is no longer valid" (*id*.).

Defendants argue that *Farmer* and *Quinn* are not controlling because "both cases involv[e] a challenge to [personal jurisdiction based on] service of process only," not a "challenge to personal jurisdiction under the long-arm statute or the due process clause." They cite no authority in support of this effort to create different classes of challenges to personal jurisdiction. Nor do they explain why an objection to personal jurisdiction based on improper (or even a complete lack of) service of process is of lesser moment than or otherwise stands on a different footing from objections to personal jurisdiction based on either the inapplicability of a long-arm statute or the want of sufficient contacts to satisfy due process.[1] Aside from

[1]Similarly, in specifying when an appearance confers personal jurisdiction, CPLR 320(b) does not recognize different categories of objections to personal jurisdiction. Moreover, in contrast to Rule 12(b)(2), (4) and (5) of the Federal Rules of

these difficulties with defendants' argument, nothing in *Farmer* suggests that its waiver analysis turned on the specific reason personal jurisdiction allegedly was lacking. The insurmountable difficulty, however, flows from the rationale of *Farmer* -- removal to federal court entails a concession that personal jurisdiction properly was obtained by the state court -- and our obligation to accept its validity. That rationale applies with the same force to all objections to personal jurisdiction, be they based on the inapplicability of a long-arm statute, the insufficiency of contacts or improper service.

Defendants also argue that: (1) "a combined reading of CPLR 320 . . . and 3211 . . . establishes that removal does not constitute an appearance which . . . waives jurisdictional objections" and (2) "[c]onsistent with [federal precedents], the Federal Rules of Civil Procedure plainly allow objection to personal jurisdiction once a case is removed from state to federal court." The latter argument was raised unsuccessfully in *Quinn* (Reply Brief at 7, *Quinn v Booth Mem. Hosp.*, 239 AD2d 266 [1997], *supra*). Moreover, both arguments apply with equal force to the waiver analysis in *Farmer*. Whatever their force,

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Civil Procedure, CPLR 3211 "centers all objections going to personal jurisdiction under the single caption of paragraph 8" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:30).

acceptance of either of these arguments would require us either to refuse to follow *Farmer* or to limit its holding to its particular facts without identifying a basis for doing so that does not equally undermine that holding.

At least implicitly, the majority rejects defendants' attempt to distinguish *Farmer* and *Quinn*. The majority, however, chooses to follow the recent decision of a panel of the Third Department *in Benifits by Design Corp. v Contractor Mgt. Servs., LLC* (75 AD3d 826 [2010]), because its reasoning is persuasive and a "uniform construction of the CPLR throughout the state" is desirable. The rationale of *Farmer* certainly is open to question, its inconsistency with federal law is clear, and it arguably unduly burdens the exercise of a federal right. But it has not been overruled by the Court of Appeals, and *Quinn* and *Benifits by Design* come to different conclusions on the question of whether *Farmer* was superseded by the CPLR. Moreover, defendants do not contend that *Farmer* is no longer good law but seek only to distinguish it, and thus the majority decides this appeal on a ground not raised by defendants (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["to decide this appeal on a distinct ground that we winkled out wholly on our own would pose

an obvious problem of fair play"]). For these reasons, I would follow *Farmer* despite my reservations about its rationale.

Accordingly, I would reverse and deny defendant's motion to dismiss for lack of personal jurisdiction.

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

ENTERED: MAY 12, 2011

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3664 Juan Portillo, Index 103803/07
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Steve S. Efron, New York, for respondent.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered August 10, 2009, which granted defendant's motion to dismiss the complaint on the ground of a deficient notice of claim, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff was injured when his leg got caught in the gap between a subway car and the platform at the Union Square Station. Allegedly, the press of passengers exiting the car caused him to release his grip on the pole he had been holding, and be pushed out the door. Although plaintiff filed a timely notice of claim, defendant moved to dismiss the complaint on the ground, in part, that the notice of claim was defective for failing to specify the exact location of the accident.

A notice of claim must set forth, among other things, the

time and place of an accident and the manner in which it occurred (General Municipal Law § 50-e[2]). This statutory requirement is designed to enable the governmental entity involved to obtain sufficient information to promptly investigate, collect evidence, evaluate the merit of the claim, and assess the municipality's exposure to liability (*Brown v City of New York*, 95 NY2d 389 [2000]). In considering the sufficiency of a notice of claim in the context of a motion to dismiss, a court is not confined to the notice of claim itself, but may also look to evidence adduced at a § 50-h hearing, and to such other evidence that is properly before the court (*D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891 [1994]).

Plaintiff reported his accident to defendant on the day it occurred, providing the train line that he was on, the station where the accident occurred, and the time at which the accident took place. He provided enough information for defendant to identify the train in which he was a passenger and to inspect the train on the same day as the accident. In addition, based on plaintiff's testimony at the § 50-h hearing, defendant was able to determine that plaintiff was riding in one of 3 cars out of 10 cars on that particular train. Thus, even if the information provided in the notice of claim was not sufficient, the additional evidence provided by plaintiff satisfied the

requirements of the notice of claim and permitted defendant to promptly investigate, collect evidence and evaluate the claim.

Defendant also moved for dismissal of the complaint pursuant to CPLR 3212, arguing that the gap between the train and the platform was within permissible limits. In support of its motion, defendant submitted an internal memorandum which states that the tolerance for platform gaps on "tangent track" or straight track is six inches. The memorandum further states that this "do[es] not apply to curves which must be large enough to assure adequate moving car clearance." Defendant also submitted gap measurements routinely taken in October 2006, approximately three months prior to plaintiff's accident, as well as testimony from a civil engineer employed by defendant who stated that the measurements would not have changed in those three months. The measurements establish that the gap was greater than six inches in certain areas where the track is curved. Defendant argues that based on the information provided by plaintiff, he was riding in car four, five or six. According to the measurements taken prior to the accident, none of those cars stop on the curved part of the track at the station. Noticeably absent from defendant's submission is any information regarding whether the trains always stop at the same position. In opposition to defendant's motion, plaintiff asserted in a sworn affidavit that

the gap was "well over one foot wide" and was large enough to accommodate his "entire foot" and "leg up to the thigh." This factual assertion also creates a material issue of fact on the question of whether the car plaintiff was riding in stopped on curved or tangent track. Moreover, assuming it stopped on curved track, there is no evidence regarding the size of the gap that is permissible.

Also absent from the record are any measurements taken after the accident which could establish that there was no change in the size of the gap between October 2006 and January 2007. For this reason and because of plaintiff's assertions regarding the size of the gap, there is a question of fact regarding its size at the time of plaintiff's accident even assuming the car stopped on tangent track.

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

ENTERED: MAY 12, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3690- Index 350257/02
3691 Lynn Lucka Bergman,
Plaintiff-Respondent,

-against-

Franklin Bergman,
Defendant-Appellant.

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Aaron Weitz, New York, for appellant.

David J. Aronstam, New York, for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about July 29, 2009, which granted plaintiff's motion to hold defendant in contempt for failure to pay obligations contained in the parties' judgment of divorce entered April 4, 2008, and order, same court and Justice, entered November 10, 2009, which denied defendant's cross motion for a downward modification of his support obligations, unanimously reversed, on the law, without costs, and the matter remanded for an evidentiary hearing on defendant's stated financial inability to comply with the court's judgment of divorce.

The record reflects the following facts: the parties were married in 1988, and had one son born in 1989. Plaintiff wife commenced an action for divorce in 2002. The court held a trial on financial issues in 2006, and issued a trial decision and

order on June 26, 2007. In December 2007, defendant husband moved to reopen the trial, alleging a drastic decline in business income, and submitted evidence in the reopened divorce trial. As a result, the court rendered a second decision in February 2008 reducing the original award of maintenance from $7,500 to $5,000 per month, but leaving the other provisions of the divorce judgment unchanged.

On April 4, 2008, the court signed a judgment of divorce dissolving the marriage and awarding the parties joint custody of their child. The judgment directs defendant to pay, inter alia, child support, 100% of the child's tuition, room and board, and books and supplies. Defendant must also pay spousal maintenance and is required to maintain life insurance in the amount of $1.5 million.

The court awarded plaintiff her former residence and the marital residence, both of which are located in Manhattan. She was also awarded 40% of defendant's business, then valued at $700,000, and 60% of her own business valued at $10,000, for a net award of $221,925. The court directed the parties to sell their home in Sagaponack, and ordered plaintiff to use the proceeds to repay a bank loan of $200,000.

In June 2008, plaintiff brought the first contempt motion against defendant who, five days later, cross-moved for a

downward modification of his support obligations. A hearing was held in September 2008. The record reflects that the court issued a decision on the contempt motion after that hearing, dated October 31, 2008, in which it found defendant "willfully failed to make payments required" and that "[h]is failure to pay the sum due the wife was not a result of an inability to pay, but rather [was] because he chose to spend his money on other things."

Subsequently, the Justice recused herself for reasons having nothing to do with the parties, and the matter was transferred to another Justice. On March 6, 2009, the court denied defendant's application for downward modification without holding a hearing. The court stated that the "financial information appended . . . is incomplete and reveals greater income than that which he claims to have received."

On June 19, 2009, plaintiff moved for the second time for an order holding defendant in contempt. She alleged that defendant had missed some maintenance and support payments, and underpaid on others. By order dated July 1, 2009, the court directed defendant to pay child support arrears, and more than $14,000 to plaintiff representing interest on the equitable distribution award.

By notice of cross motion dated July 10, 2009, defendant

sought downward modification of his obligations for the second time. Defendant annexed an affidavit asserting that sales at his company had declined since 2006 and had plummeted by 50% in the past year. He also attached an affidavit and report, sworn to July 10, 2009, by forensic accountant Martin Randisi, CPA, of Holtz Rubenstein Reminick.

The Randisi affidavit stated that the firm had made a forensic accounting analysis of defendant's income, as well as an accounting analysis of the financial circumstances of his company. The affidavit attached an accounting of all cash disbursements from the company and all cash receipts and disbursements in defendant's personal bank account through April 2009, as well as a statement of net worth dated May 31, 2009 and defendant's 2008 tax return. After third-party verification, it was Randisi's opinion that there had been a significant decrease in compensation and profit to the company's owners between 2005 and 2009.

On July 27, 2009, in an oral decision on the record, the court summarily granted plaintiff's motion to hold defendant in contempt for failure to pay support obligations. The court did not allow defendant to present any of his financial expert's documentation and did not hold a hearing. According to the court, defendant "has had several hearings on this matter and . .

. repeated hearings are not necessary, if in fact there has been a recent hearing."

On October 29, 2009, the court issued an order, entered November 10, 2009, denying defendant's cross motion for downward modification of his support obligations. Defendant appealed from both the July 27, 2009 decision granting plaintiff's contempt motion and the October 29, 2009 order denying defendant's cross motion for downward modification.

On appeal, defendant contends that he made a strong prima facie showing, supported by an affidavit and a forensic report, of a substantial change in his financial circumstances, and raised a legitimate issue as to his ability to pay. Therefore, he asserts, he was entitled to, at least, a hearing on his application for downward modification.

For the reasons set forth below, we agree. A hearing is required on a contempt motion when the party opposing the motion asserts a defense of financial inability to comply. Domestic Relations Law § 246(3) in pertinent part states:

> "Any person may assert his financial inability to comply with . . . an order or judgment . . . as a defense in a proceeding instituted against him . . . to punish him for his failure to comply . . . and if the court, upon the hearing of such contempt proceeding is satisfied from the proofs and evidence offered . . . that the defendant is financially unable to comply . . . it may, in its discretion, until further order of the

> court, make an order modifying such order or judgment. . . .”

Further, Domestic Relations Law § 236(B)(9)(b) provides that a party may seek downward modification if he or she has experienced a “substantial change in circumstances:”

> “Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship.”

There is no limit to the number of times a party may seek downward modification. The party must demonstrate that there has been a substantial change in circumstances to merit any downward modification. There is no right to a hearing absent a prima facie showing of entitlement to downward modification (*see Lloyd v Lloyd*, 226 AD2d 816 [1996]).

However, well-established precedent overwhelmingly supports a party’s right to an evidentiary hearing before a finding of contempt (*Boritzer v Boritzer*, 137 AD2d 477 [1988]; *Comerford v Comerford*, 49 AD2d 818 [1975]; *Singer v Singer*, 52 AD2d 774 [1976]; *see also Gifford v Gifford*, 223 AD2d 669 [1996]). In *Singer*, this Court held that “[d]ue process requires that a hearing be held before one can be adjudged in contempt” (*id.* at

774), undoubtably because a finding of contempt may result in incarceration as, indeed, it did in this case.

Here, defendant has not had any opportunity to offer "proofs [or] evidence" at a hearing on either plaintiff's contempt motion or defendant's cross motion for downward modification.[1] The court entirely ignored the affidavits prepared by a reputable forensic accountant, and the voluminous documentation defendant presented. In the court's opinion, defendant had had "repeated days in court."

However, on this motion, defendant clearly presented new financial information and an expert affidavit explaining that defendant's circumstances had changed, and not for the better. Accordingly, defendant should have had a hearing to assess the new financial information and new expert affidavit (*see Comerford*, 49 AD2d at 818 [court reversed an adjudication for contempt, while observing that defendant's affidavit was

[1]At oral argument, plaintiff's appellate counsel eventually conceded that defendant had not been afforded a hearing on the motions at issue in this appeal.

"somewhat factually deficient," and remanded for a hearing, stating, "[I]t is clear that no one will suffer by virtue of the hearing directed and that the interests of justice will be served thereby"]).

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

ENTERED: MAY 12, 2011

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3832 The People of the State of New York, Ind. 805/08
Respondent,

-against-

Keith Greene,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at hearing; Thomas Farber, J. at plea and sentence), rendered April 23, 2009, convicting defendant of criminal possession of a controlled substance in the second degree and attempted criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 3½ years, affirmed.

The court properly denied defendant's suppression motion. We see no basis for disturbing the court's credibility determinations, including its evaluation of inconsistencies in testimony (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). While the dissent reaches a different conclusion, the determination of the hearing court, which actually saw and heard the witnesses testify, is entitled to deference, and it is not our practice to substitute our own fact-findings for those under

review unless the latter are "plainly unjustified or clearly erroneous" (*People v Corbin*, 201 AD2d 359 [1994] [internal quotation marks and citation omitted]). We note that, in addition to the drugs recovered from defendant's pants pocket, the police recovered $8,025 in cash from the same pocket.

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

McGUIRE, J. (dissenting)

The arresting officer saw a bulge in defendant's left front pants pocket and when he "felt" (or "patted . . . a little bit," "touched" or "tapped") it, defendant turned the left side of his body away from the officer. What the officer had felt was "something hard"; it "wasn't fat but it was shaped like a little rectangle." The officer "thought it was a knife." The officer turned defendant back toward him, reached into the pants pocket and took out a small bag of crack cocaine. From a photograph admitted into evidence at the suppression hearing, it appears that the bag was about 2 to 2 ½ inches by 3 inches and shaped like Africa. During arrest processing at the precinct, the officer recovered from the same pants pocket $8,025 in bills of virtually all denominations, including hundred-dollar and fifty-dollar bills.

Contrary to the motion court's written findings of fact, the arresting officer did not testify that defendant had turned his body "in a manner that made [the officer] suspect that the defendant had a weapon secreted somewhere on the left side of his body." I do not take issue, however, with the court's determination that the officer lawfully touched or patted down the bulge in defendant's pants pocket. When a police officer touches a bulging pocket and feels a hard object he reasonably

fears is a weapon, he does not act unlawfully in reaching into the pocket and taking the object out (*see People v Davenport*, 9 AD3d 316 [2004], *lv denied* 3 NY3d 705 [2004]; *see also People v Williams*, 287 AD2d 396 [2001], *lv denied* 97 NY2d 734 [2002] [bulge resembling a weapon]; *People v Thomas*, 176 AD2d 539 [1991], *lv denied* 79 NY2d 833 [1991] [officer felt outline of gun]). Based principally on the photograph and the large amount of cash in the pocket, I would reject as incredible the officer's claim that he thought the small bag of crack was a knife, and I would find that even if he did believe the object he felt was a knife, his belief was not reasonable. My view that we should reject that testimony also is based on the numerous inconsistencies between the testimony of the arresting officer and that of his supervisor at the suppression hearing, which was held some six months after the arrest, including striking inconsistencies concerning defendant's demeanor and conduct while he was in the car and when he was directed to get out of it.

For these reasons, I would not defer to the credibility findings of the suppression court. Needless to say, I agree with the majority that "it is not our practice to substitute our own fact-findings for those under review unless the latter are 'plainly unjustified or clearly erroneous.'" But, regardless of how impressive the officer's demeanor was, his testimony that he

thought the small bag of crack was a knife is too much at war with common sense to be credited. Just as I cannot understand how the officer reasonably could have thought such a small, irregularly shaped bag of crack was a knife, I cannot understand how the majority can defer to the suppression court's implicit finding that he did. Although the majority suggests that the presence of such a large sum of money in the same pocket supports its position, it does not explain how the presence of the wad of money renders more plausible the officer's claim that he thought the small bag of crack was a knife. As the lawfulness of the subsequent recovery of both more cocaine and a gun from defendant's person and other contraband from the car depends on the validity of the initial search of the pants pocket, I would grant the motion to suppress and dismiss the indictment.

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

ENTERED: MAY 12, 2011

CLERK

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

4076 Rudy Ortega, Index 13845/07
Plaintiff-Appellant,

-against-

Everest Realty LLC, et al.,
Defendants-Respondents,

GAB PLG Serv. Contractors, Inc.,
Defendant.

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

Nicoletti Gonson Spinner & Owen LLP, New York (Pauline E. Glaser of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 23, 2009, which, to the extent appealed from as limited by the briefs, granted the motion by defendants Everest Realty LLC and Sindrome Construction Inc. for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) causes of action as against them, modified, on the law, to deny the motion as to the Labor Law § 241(6) cause of action and to grant plaintiff leave to amend his bill of particulars to assert violations of 12 NYCRR 23-3.3(b)(3) and 23-3.3(c), and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries he suffered while demolishing a shed on property owned by Everest in the course of

a project on which Sindrome was the general contractor. Plaintiff testified that the unshored aluminum 12-foot wall of the shed fell onto him and caused him to cut his leg with the gas powered demolition saw he was using to cut through the aluminum. Plaintiff testified that before the accident occurred, he had told his supervisor he was afraid of cutting any further because "when I was cutting, the wall was like shaking and going to the side." His supervisor told him that he must continue the work. As the injury was brought about by the manner in which plaintiff performed his work and neither Everest nor Sindrome supervised or controlled plaintiff's work, plaintiff cannot recover from either of these defendants on his common-law negligence and Labor Law § 200 claims (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 162-163 [2004]). Plaintiff contends that the cause of his accident was a workplace condition, to wit, an unshored or unbraced shed wall, rather than the method he used to demolish the wall. However, based on his testimony that, while he was cutting, the wall was shaking and moving sideways, it can be inferred that the existing condition necessitated a different method of demolishing the wall. Hence, the failure to alter plaintiff's method of performing his work was his employer's (*see Brown v VJB Constr. Corp.*, 50 AD3d 373, 377 [2008]).

The court erred, however, by dismissing the Labor Law § 241(6) cause of action. Labor Law § 241(6) requires that contractors and owners "provide reasonable and adequate protection and safety to the persons employed" in construction, excavation and demolition work. In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-504 [1993]). There is no dispute that the Industrial Code sections upon which plaintiff relies here are sufficiently specific to support a Labor Law § 241(6) claim. Further, there is an issue of fact as to whether defendants violated Industrial Code (12 NYCRR) 23-1.12(c)(1), cited by plaintiff in his bill of particulars, so as to render them liable under Labor Law § 241(6). Section 23-1.12(c)(1) requires that a power saw be equipped "with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut." Notwithstanding defendants' argument, plaintiff's deposition testimony that the saw had very little cover on the bottom does not address the question of whether the saw was equipped in compliance with the Industrial Code.

Summary judgment was also improperly granted insofar as

plaintiff sought to base his Labor Law 241(6) cause of action on alleged violations of two Industrial Code provisions not cited in his bill of particulars. Those sections are Industrial Code (12 NYCRR) § 23-3.3(b)(3), which provides that "[w]alls, chimneys and other parts of any . . . structure shall not be left unguarded in such condition that such parts may fall, collapse, or be weakened by wind pressure or vibration," and Industrial Code (12 NYCRR) § 23-3.3[c]), which provides:

> "*Inspection*. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Preliminarily, while plaintiff identified these Code provisions only after filing the note of issue and in response to defendants' motion, defendants were not prejudiced by the delay. This is because the theory that the accident would not have occurred had the shed been properly inspected and shored was consistent with plaintiff's testimony and the allegations in the bill of particulars (*see Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340-341 [2004]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [2000]). Accordingly, we grant leave to

plaintiff to amend his bill of particulars to allege the provisions.

Contrary to the dissent's view, an issue of fact exists as to whether these sections apply to the facts of this case. Plaintiff clearly testified that the aluminum wall was "shaking" before it fell. While the dissent apparently infers that this vibration was a direct effect of the saw cutting through the metal, the record also permits the alternative inference that the cutting had weakened the structure, causing it to vibrate and then fall. On a motion for summary judgment, we are required to draw all favorable inferences in favor of the nonmoving party (*see Liberty Ins. Underwriters Inc. v Corpina Piergrossi Overzat & Klar LLP*, 78 AD3d 602, 605 [2010]). If the latter scenario occurred, defendants violated the cited sections because there is no dispute that the wall was left "unguarded" during the demolition process (12 NYCRR 23-3.3[b][3]) and that defendants failed to make any inspections of the demolition work for the purpose of "detect[ing] any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material" (12 NYCRR 23-3.3[c]). Defendants' reliance on *Smith v New York City Hous. Auth.* (71 AD3d 985 [2010]) is misplaced because in that case the record was clear that the hazard rose from the plaintiff's demolition work itself, not the structural

instability caused by the progress of the demolition.

Finally, we note that reinstatement of the 241(6) claim, to the extent it relies on Industrial Code (12 NYCRR) §§ 23-3.3(b)(3) and 23-3.3(c), would not be inconsistent with dismissal of plaintiff's Labor Law § 200 claim. For the latter section to apply in a case, such as this, arising out of the means and methods of the work, the defendants must have exercised their authority to control the work in which the plaintiff was engaged (*see Mitchell v New York Univ.*, 12 AD3d 200 [2004]). There is no evidence that defendants directed plaintiff's work in such a way that it met that standard. However, liability pursuant to Labor Law § 241(6) can attach regardless of such control (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300 [1978]).

All concur except Tom, J.P. and DeGrasse, J. who dissent in part in a memorandum by DeGrasse, J. as follows:

DeGRASSE, J. (dissenting in part)

I respectfully dissent because I disagree with the majority's conclusion that plaintiff's Labor Law § 241(6) cause of action can be premised on violations of Industrial Code (12 NYCRR) §§ 23-3.3(b)(3) and 23-3.3(c). Plaintiff was injured while using a power saw to cut down the 12 foot aluminum wall of a shed. The wall collapsed while plaintiff was cutting it, causing him to cut his leg with the saw. As found by the majority, plaintiff's Labor Law § 200 and common-law claims were properly dismissed because the accident was brought about by the manner in which plaintiff performed his work, a matter beyond the control of the moving defendants, which are the owner and general contractor of the project (*see Lombardi v Stout,* 80 NY2d 290, 295 [1992]).

There is however an issue of fact as to whether the moving defendants violated Industrial Code (12 NYCRR) § 23-1.12(c)(1) so as to render them liable under Labor Law § 241(6). Section 23-1.12(c)(1) requires that a power saw be equipped "with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut." Notwithstanding defendants' argument, plaintiff's deposition testimony that the saw had very little cover on the bottom does not address the question of whether the

saw was compliant with the Industrial Code.

Summary judgment was properly granted insofar as plaintiff sought to base his Labor Law § 241(6) cause of action on alleged violations of Industrial Code (12 NYCRR) §§ 23-3.3(b)(3) and 23-3.3(c), which apply to hand demolition operations. Section 23-3.3(b)(3) provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration" (*id.*). Section 23-3.3(b)(2) is not implicated because the rule does not require the guarding of a wall while a worker is in the very act of cutting it down.

Moreover, section 23-3.3(c) requires " 'continuing inspections against hazards which are created by the progress of the demolition work itself' rather than inspections of how demolitions would be performed" (*Campoverde v Bruckner Plaza Assoc. L.P.*, 50 AD3d 836, 837 [2008] [citation omitted]). Plaintiff testified that " . . . *when* [he] was cutting, the wall was like shaking and going to the side [*sic*] [emphasis added]." This testimony makes it clear that, as in *Campoverde*, the "hazard which injured the plaintiff was the actual performance of the demolition work, not structural instability caused by the progress of the demolition" (*id.* at 837). Accordingly, I disagree with the majority insofar as it posits that the record

permits an alternative inference.

Accordingly, I would modify the court's order to the extent of denying defendants' motion for summary judgment on the Labor Law § 241(6) cause of action except insofar as it is premised upon Industrial Code (12 NYCRR) § 23-1.12(c)(1).

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

ENTERED: MAY 12, 2011

CLERK

Mazzarelli, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

4783 Martha Mendoza, Index 305108/08
Plaintiff-Appellant,

-against-

One Fordham Plaza, LLC, et al.,
Defendants-Respondents.

_____

Steve S. Efron, New York, for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered February 17, 2010, which, in this action for personal injuries, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed on the law, without costs.

Plaintiff has raised questions of fact regarding whether the defective condition involves more than just a height differential between the sidewalk flags, namely an overly and improperly sloped sidewalk, and thus we cannot conclude that the defect is trivial as a matter of law (*Cela v Goodyear Tire & Rubber Co.*, 286 AD2d 640, 641 [2001]; *Nin v Bernard*, 257 AD2d 417, 417-418 [1999]).

The evidence also raised an issue of fact as to whether the defective condition existed for a sufficient length of time prior

to the accident so as to permit defendants to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836,837 [1986]).

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

ENTERED: MAY 12, 2011

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3855- Index 112444/07
3855A Lorelle Saretsky, et al.,
Plaintiffs-Appellants,

-against-

85 Kenmare Realty Corp., et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Picciano & Scahill, P.C., Westbury (Gilbert J. Hardy of counsel), for appellants.

Callahan & Fusco, LLC, New York (William A. Sicheri of counsel), for 85 Kenmare Realty Corp., respondent.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for Sheryl Shoe Incorporated, respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 19, 2010, reversed, on the law, without costs, the motions denied and the complaint reinstated. Appeal from order, same court and Justice, entered September 18, 2009, dismissed, without costs, as superseded by the appeal from the later order.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
James M. Catterson
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

3855-3855A
Index 112444/07

_____x

Lorelle Saretsky, et al.,
Plaintiffs-Appellants,

-against-

85 Kenmare Realty Corp., et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____x

Plaintiffs appeal from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered April 19, 2010, which, upon renewal and reargument, adhered to a prior order granting the defendants 85 Kenmare Realty Corp.'s and Sheryl Shoe Incorporated's motions for summary judgment dismissing the complaint, and from an order, same court and Justice, entered September 18, 2009, which granted defendants' motions for summary judgment.

Picciano & Scahill, P.C., Westbury (Gilbert J. Hardy of counsel), for appellants.

Callahan & Fusco, LLC, New York (William A. Sicheri of counsel), for 85 Kenmare Realty Corp., respondent.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for Sheryl Shoe Incorporated, respondent.

CATTERSON, J.

In this personal injury action, we reiterate the well established principle that a finding of "open and obvious" as to a hazardous condition is never fatal to a plaintiff's negligence claim. It is relevant only to plaintiff's comparative fault. Therefore, we unanimously reverse the grant of summary judgment in favor of defendants 85 Kenmare Realty Corp. and Sheryl Shoe Incorporated and reinstate the complaint.

On May 21, 2007, the plaintiff was injured when she fell off a raised walkway in front of the defendant's building after exiting the codefendant store-owner's shop. Photographs in the record indicate that the platform-like raised walkway runs approximately the length of the building on Mulberry Street abutting several storefronts. The plaintiff described the walkway as extending about 4½ feet out from the face of the building and ending at a transition step approximately five inches high in the center of the sidewalk.

The plaintiff initiated this personal injury action claiming that the transition step from the walkway to the lower level constituting the sidewalk was dangerous and "trap-like." The plaintiff alleged that the defendants were negligent in failing to make repairs to a hazardous condition, and in failing to provide any warning, visual cues, barriers, handrails or other

devices. The defendants argued that the transition step from the walkway to the sidewalk is open and obvious and that plaintiff's inattention was the sole proximate cause of her fall.

During the General Municipal Law § 50-h hearing held on October 10, 2007, the plaintiff explained that she approached the store from Spring Street by walking on the sidewalk parallel to the storefronts. She testified that coming from that direction, she did not see that she had entered onto a raised walkway nor did she step up onto the walkway before entering the store. The plaintiff further testified that when she exited the building, she walked perpendicular to the storefronts while transiting the walkway towards the curb. She fell on the transition step from the walkway to the sidewalk, injuring her left shoulder, left arm, neck and head. The plaintiff described her fall in the following colloquy during the hearing:

> "Q: The question was, what caused your accident, if you know?
> A: I just fell.
> Q: Was there anything that caused you to fall?
> *****
> A: There was a step in the middle of the sidewalk.
> *****
> Q: Did the accident occur from when you stepped down from the step?
> A: I didn't see the step, so I fell down. That's where the fall took place.
> Q: Was that while you were stepping off the step?
> A: I didn't see that there was a step. I didn't even trip, I just went down."

After the hearing, the defendants moved, inter alia, for summary judgment dismissing the complaint against them. By order dated September 11, 2009, the motion court granted the defendants' motions and dismissed the complaint on the grounds that the plaintiff failed to rebut her sworn testimony "that she fell because she wasn't looking." The plaintiff moved to renew and reargue and offered, inter alia, the affidavit of her expert engineer in support. Upon granting the plaintiff's motion, the motion court adhered to its prior decision.

This was error. Not only did the motion court mischaracterize plaintiff's testimony, but its implicit conclusion, that had plaintiff been looking she would have seen the hazard and avoided injury, was premised on a finding that the transition step to the sidewalk was open and obvious. As such, the precedent of this Court mandates reversal. In Westbrook v. WR Activities-Cabrera Mkts. (5 A.D.3d 69, 72-73, 773 N.Y.S.2d 38, 42 (1st Dept. 2004)(Saxe, J.)), we held that finding a hazardous condition to be open and obvious is not fatal to a plaintiff's negligence claim, but rather is relevant to plaintiff's comparative fault, and hence summary judgment dismissal is not appropriate. More significantly, for the plaintiff in this case, we held in that case that "even visible hazards do not

necessarily qualify as open and obvious" because the "nature or location of some hazards, while they are technically visible, make them likely to be overlooked." Westbrook, 5 A.D.3d at 72, 773 N.Y.S.2d at 41, citing Thornhill v. Toys R Us NYTEX, 183 A.D.2d 1071, 583 N.Y.S.2d 644 (3d Dept. 1992).

In the instant case, the plaintiff contends that the walkway in front of defendants' premises created "optical confusion"[1] and testified that she "did not see" the five-inch step down to the sidewalk. Nowhere in the plaintiff's 50-h testimony does she suggest that she was "not looking." Thus, it is clear that the motion court erred in its interpretation of the plaintiff's testimony. This Court considered a similar mischaracterization in Chafoulias v. 240 E. 55th Street Tenants Corp. 141 A.D.2d 207, 533 N.Y.S.2d 440 (1st Dept. 1988). In that case, the motion

[1]"Optical confusion" occurs when conditions in an area create the illusion of a flat surface, visually obscuring any steps. Brooks v. Bergdorf-Goodman Co., 5 A.D.2d 162, 163, 170 N.Y.S.2d 687, 689 (1958); see also Cloke v. Hotel Roosevelt Corp., 16 A.D.2d 771, 227 N.Y.S.2d 974 (1st Dept. 1962). "[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition." Schreiber v. Philip & Morris Rest. Corp., 25 A.D.2d 262, 263, 268 N.Y.S.2d 510, 511 (1st Dept. 1966), aff'd, 19 N.Y.2d 786, 279 N.Y.S.2d 730, 226 N.E.2d 537 (1967).

court interpreted the plaintiff's testimony that she never saw the steps as testimony that she "was not looking where she was going." 141 A.D.2d at 210, 533 N.Y.S.2d at 442. In reversing and reinstating the complaint, we found that a reasonable interpretation of her testimony, consistent with her negligence theory, was that the steps could not be seen. 141 A.D.2d at 211, 533 N.Y.S.2d at 442.

We make the same finding here, particularly since the plaintiff's theory of "optical confusion" is supported by the record. The affidavit of plaintiff's expert engineer states that the concrete on the sidewalk and the walkway were similar shades of gray. He also noted that although the edge of the walkway was painted with a red line on the surface of the transition riser and upper horizontal edge, the paint in front of the defendant's store was "very worn." He opined that the failure to maintain the red stripe on the walkway was a predominant factor in the plaintiff's fall. It is further undisputed that there were no warning signs, handrails or barricades in the area indicating a change in elevation. Hence, the plaintiff raises a triable issue of fact as to the open and obvious condition of the step.

The defendants' argument that the plaintiff would have had to step up onto the walkway in order to enter the store, thereby

alerting her to the transition step, is unavailing. The photographs clearly show that the walkway increases in height from one end to the other. Therefore, the plaintiff, who testified that she approached from the Spring Street end, would have entered onto the walkway where the height differential was negligible. This would have provided no occasion for her to step up before going into the store.

In any event, even had the plaintiff seen the transition step going into the store, evidence that the transition step was less visible coming out of the store is sufficient to raise a triable issue of fact precluding summary judgment. See e.g. Westbrook, 5 A.D.3d at 72, 773 N.Y.S.2d at 41, citing Thornhill v. Toys R Us NYTEX, 183 A.D.2d at 1073, 583 N.Y.S.2d at 645 (noting that even though the plaintiff initially noticed and avoided the platform, an issue of fact was raised by photographs showing that the platform was "not as clearly discernible from the rear as it was from the front").

Accordingly, the order of Supreme Court, New York County (Milton A. Tingling, J.), entered April 19, 2010, which, upon renewal and reargument, adhered to a prior order granting the defendants 85 Kenmare Realty Corp.'s and Sheryl Shoe Incorporated's motions for summary judgment dismissing the

complaint, should be reversed, on the law, without costs, and the motions denied and the complaint reinstated. The appeal from the order, same court and Justice, entered September 18, 2009, which granted the defendants' motions for summary judgment, should be dismissed, without costs, as superseded by the appeal from the later order.

All concur

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

ENTERED: MAY 12, 2011

CLERK

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

4624N 1234 Broadway LLC, Index 116414/09
Plaintiff-Appellant,

-against-

West Side SRO Law Project, Goddard Riverside Community Center,
Defendant-Respondent.

_____

Law Office of Santo Golino, New York (Santo Golino of counsel), for appellant.

West Side SRO Law Project, New York (Martha A. Weithman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered September 30, 2010, reversed, on the law and the facts, without costs, and the matter remanded for further proceedings in accordance herewith.

Opinion by Román, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
James M. Catterson
Roslyn H. Richter
Sheila Abdus-Salaam
Nelson S. Román, JJ.

4624N
Index 116414/09

_____x

1234 Broadway LLC,
Plaintiff-Appellant,

-against-

West Side SRO Law Project, Goddard Riverside Community Center,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Joan A. Madden, J.), entered September 30, 2010, which denied its motion for a preliminary injunction enjoining defendant from, among other things, holding meetings in the building's eighth floor hallway.

Law Office of Santo Golino, New York (Santo Golino and Hollis B. Vandamme of counsel), for appellant.

West Side SRO Law Project, New York (Martha A. Weithman of counsel), for respondent.

ROMÁN, J.

In this appeal, we address the limits of the right to assemble conferred by Real Property Law (RPL) § 230(2) and determine whether the right to assemble prescribed by statute is limited by relevant provisions of the New York City Building Code (Administrative Code of the City of NY § 27-101 *et seq.*) and Fire Code (Administrative Code § 29-101 *et seq.*).

This action is for declaratory and injunctive relief. Plaintiff is the owner of a building containing 325 Single Occupancy Room (SRO) apartments, within which approximately 1,000 tenants reside. Defendant is a not-for-profit organization that provides legal assistance to SRO tenants. On or about November 4, 2009, defendant distributed flyers indicating its intention to hold a meeting at plaintiff's premises. According to the flyers, defendant intended to hold a tenants' meeting, on November 21, 2009, at 6 P.M., in the eighth floor hallway.

In its complaint, plaintiff alleges that the corridors on the eighth floor of plaintiff's premises are only three to four feet wide, the ceilings are only seven feet high, a large crowd would obstruct access to the community bathrooms/showers, and the meeting could draw as many as 1,000 tenants. Thus, plaintiff seeks a declaration that defendant cannot "form, plan, organize,

and/or conduct meetings and/or gatherings anywhere at the subject [plaintiff's] building," and an injunction enjoining defendant from conducting any meetings within plaintiff's premises. Alternatively, plaintiff seeks a declaration that defendant cannot "form, plan, organize, and/or conduct meetings and/or gatherings consisting of more than 20 people anywhere at the subject [plaintiff's] building," and to permanently enjoin defendant from holding meetings within its premises to the extent that they are attended by more than 20 people. Plaintiff alleges that the meetings would violate RPL 230(2), Administrative Code (Fire Code) §§ 29-403.2, 29-403.3.3, and 29-1027.3.4, and the Rules of City of New York Fire Department (3 RCNY) § 109-02.

On November 19, 2009, plaintiff moved by order to show cause seeking a temporary restraining order and a preliminary injunction enjoining defendant from proceeding with the meeting at plaintiff's premises or, in the alternative, to allow the meeting to proceed provided attendance not exceed 20 people. In addition to a violation of RPL 230(2), the Fire Code, and the Rules of City of New York, plaintiff also argued that defendant's meeting violated Administrative Code (Building Code) § 27-361 and § 27-369. In support of its application plaintiff submitted an affidavit from Alfred Sabetfard, one of its members, who

reiterating the allegations in the complaint, based on his personal knowledge of the building, added that the meeting in question would violate both the RPL and the Fire Code because plaintiff's building is home to approximately 1,000 occupants and "there is [thus] the potential that anywhere from 325 to over 1,000 persons [would] gather to meet on the 8th Floor hallway of the subject building at 6:00pm on November 21, 2009." Reiterating the dimensions of the eighth floor hallway, Sabetfard added that while the area in front of the showers is 11 feet wide, it could only accommodate 15 to 20 people, and a group of that size would obstruct access to the showers, with 6P.M., the time slated for the meeting, being peak time for use of the showers.

Plaintiff also submitted several photographs of the eighth floor hallway showing that it was narrow in places and wider in others. Lastly, plaintiff submitted a diagram of the eighth-floor hallway which indicated that it was "I" shaped, that the areas of the hallway which housed the showers were over 45 feet in length and approximately 11-feet wide, and that the areas of the hallway which housed the elevator and exits, were four feet wide and at least 46 feet in length.

During the pendency of the motion, the motion court granted

a TRO, enjoining defendant from conducting any meetings at the building attended by more than 60 people. Defendant ultimately opposed plaintiff's motion, submitting no evidence in opposition, but averring, through counsel, that during the pendency of the motion defendant held three meetings at the location, none of which were attended by more than 40 people, and at which no exits were blocked. On May 14, 2010, the motion court issued a decision denying plaintiff's application for a preliminary injunction and vacating the TRO. The motion court concluded that plaintiff failed to establish that the Fire and Building Code sections were applicable to the eighth floor hallway and that plaintiff failed to establish that the meetings would actually obstruct any of the exits or would constitute an unsafe condition. Thus, the motion court, concluded, inter alia, that plaintiff failed to establish a likelihood of success on the merits.

RPL 230(2) confers upon tenants' groups, tenant committees, or other tenant organizations, the right to meet and assemble within a landlord's premises. Specifically, RPL 230(2) states:

> "Tenants' groups, committees or other tenants' organizations shall have the right to meet without being required to pay a fee in any location on the premises including a community or social

> room where use is normally subject to a fee which is devoted to the common use of all tenants in a peaceful manner, at reasonable hours and without obstructing access to the premises or facilities. No landlord shall deny such right."

While it is clear that the right to meet conferred upon tenants by RPL 230(2) is broad, allowing a meeting "in any location on the premises," the statute itself does not confer an unbridled right to meet, instead requiring that meetings be held in "a peaceful manner," held at "reasonable hours," and held "without obstructing access to the premises or facilities." Meetings pursuant to RPL 230(2) can thus be proscribed, but only if it is established that the meeting is "likely to be unpeaceful, obstructive of access to the building or its facilities, or otherwise unsafe" (*Jemrock Realty Co. v 210 W. 101st St. Tenants Assn.*, 257 AD2d 477, 478 [1999]). Moreover, to the extent that RPL 230(2) proscribes the right to meet if such meeting would obstruct access to the building or its facilities by virtue of overcrowding, it must necessarily be read in pari materia with any Building or Fire Code sections prohibiting the obstruction of areas within and around a premises (*BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 93 [2002], *lv dismissed* 100 NY2d 535 [2003] ["[s]tatutes in pari materia are to be construed

together and as intended to fit into existing laws on the same subject unless a different purpose is clearly shown] [internal quotation marks and citation omitted]; *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 132 AD2d 409, 414 [1987], *mod on other grounds* 72 NY2d 174 [1988] ["statutes are to be construed in such a manner as to render them effective, and in pari materia with other enactments concerning the same subject matter"]).

Accordingly, section 27-361 of the Building Code, requiring that "[a]ll exits and access facilities shall . . . be kept readily accessible and unobstructed at all times," and section 27-369 requiring that "[c]orridors shall be kept readily accessible and unobstructed at all times," proscribe obstruction within a premises. Thus, any violation of these two sections of the Building Code would also violate RPL 230(2) and would in turn negate the right to hold a meeting pursuant thereto. Any holding to the contrary, as posited by defendant, would allow meetings pursuant to RPL 230(2) irrespective of any obstruction of the facilities or premises, in violation of the statute's express language and in contravention of Building Code § 27-361 and § 27-369. Similarly, insofar as section 29-1027.3.4 of the Fire Code states that "[p]remises shall not be caused, allowed or

maintained in such a manner as to become overcrowded, such that the number of persons present on the premises and/or their location thereon obstructs or impedes access to any means of egress," it also bars obstruction within a premises and thus any violation of this section of the Fire Code would therefore also violate RPL 230(2) and would in turn bar any meeting pursuant thereto.

We now turn to whether plaintiff proffered the requisite quantum of proof with regard to these violations to support the grant of a preliminary injunction. A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing (*Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]). Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [2010], *mod* 16 NY3d 822 [2011]; *Stockley v Gorelik*, 24 AD3d 535, 536 [2005]).

With respect to likelihood of success on the merits, the

threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (*Doe* at 750-751). While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 187 [1993], *lv dismissed* 83 NY2d 847 [1994]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2004]), "[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co., Inc. v Vallo Transp., Ltd.* 13 AD3d 334, 335 [2004]). Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction (*Village of Honeoye Falls v Elmer*, 69 AD2d 1010, 1010 [1979]). Furthermore, CPLR 6312(c) requires that the court hold a hearing when "the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers," and the defendant raises issues of fact with respect to such elements (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [2000]).

Here, plaintiff averred that defendant's meeting,

irrespective of its size, would violate[1] RPL 230(2), Building Code § 27-361 and § 27-369, and Fire Code § 29-1027.3.4 by creating an obstruction. Plaintiff's photographs and diagram depict an area which is wide in some places and narrow in others, and Sabetfard, in his affidavit, alleges that the widest portion of the eighth floor, can only accommodate 15 to 20 people and that this number would obstruct access to the community bathrooms/showers. Accordingly, contrary to the motion court's holding, plaintiff establishes that its premises, and in particular the location where this meeting is to occur, is of limited size such that a meeting attended by a large number of people could obstruct access to the premises or the facilities (RPL 230[2]) and could obstruct the exits and corridors at plaintiff's building (Building Code § 27-361, § 27-369 and Fire Code § 29-1027.3.4). Plaintiff establishes a likelihood of

[1] Plaintiff alleges that the proposed meeting would violate a host of other codes such as Building Code § 27-362 and Fire Code § 29-403.3.3. However, we find these statutes inapplicable in that they do not address the same subject matter discussed in RPL 230(2). For example, we agree with the motion court, albeit for different reasons, that Fire Code § 29-403.3.3 is inapplicable here. This section sets forth rules for standing in passageways at performing arts or other events at which seating is provided for the audience, and it is patently inapplicable here. Accordingly, any argument made in support of the applicability of any other statute beyond those discussed in this opinion has been considered and rejected.

success on the merits, irreparable harm if such a meeting is not enjoined, and, to the extent that it offers to pay for the meeting to be held elsewhere, that the equities tip in its favor. Thus, plaintiff demonstrates prima facie entitlement to a preliminary injunction.

However, insofar as defendant established that during the pendency of plaintiff's motion, it had 3 meetings, none of which were attended by more than 40 people and which, according to defendant, resulted in no obstruction, questions of fact exist precluding the grant of a preliminary injunction absent a hearing. Accordingly, the motion court erred insofar as it failed to conduct a hearing before deciding whether to grant or, as it did here, deny plaintiff's application for a preliminary injunction.

Accordingly, the order of the Supreme Court, New York County (Joan A. Madden, J.), entered September 30, 2010, denying plaintiff's motion for a preliminary injunction enjoining defendant from, among other things, holding meetings in plaintiff's building's eighth floor hallway, should be reversed,

on the law and the facts, without costs, and the matter remanded for further proceedings in accordance herewith.

All concur.

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

ENTERED: MAY 12, 2011

CLERK