SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 12, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6170 The People of the State of New York, Ind. 4390/08
Respondent,

-against-

Alberto Tineo,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered December 10, 2009, convicting defendant, after a jury trial, of robbery in the first and second degrees, attempted robbery in the first and second degrees, and burglary in the first degree, and sentencing him to an aggregate term of 17 years, unanimously modified, on the law, and as a matter of discretion in the interest of justice, to reduce the sentences on the robbery in the first degree, robbery in the second degree,

attempted robbery in the second degree and burglary in the second degree convictions to concurrent sentences of 13 years, and to reduce the conviction for attempted robbery in the first degree to attempted robbery in the third degree and to reduce the sentence on that conviction to a concurrent term of 1 1/3 to 4 years, and otherwise affirmed.

Subdivision 4 of Penal Law § 160.15 defines robbery in the first degree so as to require that in the course of forcibly stealing property the perpetrator "[d]isplays what appears to be a pistol, revolver . . . or other firearm." Such "display must actually be witnessed in some manner by the victim" of the crime (*People v Baskerville*, 60 NY2d 374, 381 [1983]). The evidence supporting the attempted robbery in the first degree count is legally insufficient because it was not established that the victim under that count witnessed the display of a weapon. In fact, the victim testified that she did not see any weapons. We are not persuaded by the People's argument that the victim's testimony left open the possibility that she saw a gun at some point during the home invasion. Speculation is insufficient to meet the People's burden to prove each element of the crime charged (*see People v Brown*, 25 NY2d 374, 377 [1969]).

Defendant's challenges to the sufficiency of the evidence

are unpreserved and we decline to grant any further review in the interest of justice. In the alternative, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Further, there is no basis for disturbing the jury's credibility determinations, particularly with respect to the conflict between the People's evidence and the defendant's testimony as to how his palm prints came to be found on duct tape that was used to bind the hands of one of the robbery victims (*see People v Mendez*, 89 AD3d 496 [2011]). We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 12, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6987 In re Develop Don't Destroy (Brooklyn), Inc., et al., Petitioners-Respondents,

-against-

Empire State Development Corporation, et al., Respondents-Appellants.

- - - - - -

In re Prospect Heights Neighborhood Development Council, Inc., et al., Petitioners-Respondents,

-against-

Empire State Development Corporation, et al., Respondents-Appellants.

Index 114631/09
116323/09

Bryan Cave LLP, New York (Philip E. Karmel of counsel), for Empire State Development Corporation, appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun of counsel), for Forest City Ratner Companies, LLC, appellant.

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, Albany (Jeffrey S. Baker of counsel), and Urban Environmental Law Center, New York (Albert K. Butzel of counsel), for respondents.

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 19, 2011, insofar as appealed from, granting the supplemental petitions to the extent of remanding the matter to respondent Empire State Development Corporation (ESDC) to prepare a Supplemental Environmental Impact Statement (SEIS) assessing the environmental impact of delay in Phase II

construction of the Atlantic Yards Arena Redevelopment Project and to make further findings on whether to approve the 2009 Modified General Project Plan for Phase II of the project, unanimously affirmed, without costs.

The Atlantic Yards Arena and Redevelopment Project is to be constructed in two phases. Phase I encompasses the construction of a sports arena, a new MTA/Long Island Rail Road rail yard, and improvements in transit access, including a new subway entrance. Phase II encompasses the construction of 11 of the Project's 16 high-rise commercial and residential buildings. In 2006, ESDC prepared a Final Environmental Impact Statement (FEIS) based on the 2006 Project Plan, using a 2016 build year (the year by which Phase II is predicted to be "substantially operational" [*see Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 318 (2009), *lv denied* 13 NY3d 713 (2009)]). The 2009 Modified General Project Plan (MGPP) for the Project was written after the downturn in the real estate market and the related unavailability of bank financing left respondent Forest City Ratner Companies (FCRC), the Project developer, unable to meet its obligation under the 2006 Plan to acquire the entire 22-acre site at the inception of the Project.

Pursuant to the MGPP, FCRC is required to acquire at the

inception of the Project only the portion of the site needed for the construction of the arena. It has until 2030 to obtain all the property interests necessary for Phase II construction. Moreover, in a Development Agreement executed after the MGPP was approved by ESDC, FCRC was given until 2035 to substantially complete Phase II construction. The Development Agreement sets forth no specific commencement dates for the construction, other than for the construction of the platform on which 6 of the 11 Phase II buildings will be built, which is not required to be commenced until 2025, and the construction of one Phase II building on Block 1129, which is not required to be "initiated" until 2020.

However, in assessing the potential environmental impacts of the changes to the Project wrought by the MGPP, ESDC used a build date based on the same 10–year completion schedule for the Project as was used in the 2006 Plan, and determined that it was not required to prepare a SEIS before approving the MGPP.

We agree with Supreme Court that ESDC's use of a 10-year build date under these circumstances lacks a rational basis and is arbitrary and capricious.

When it approved the MGPP, ESDC was aware that, under a new agreement with the MTA, FCRC had until 2030 to acquire the air

rights necessary for the Phase II construction. ESDC knew that the then forthcoming Development Agreement would provide for a significantly extended substantial completion date of 2035, 25 years from then, for the Phase II construction. Moreover, ESDC has acknowledged that it is unlikely that the Project will be constructed on a 10-year schedule because the construction lagged behind the schedule provided in 2009 and because of continuing weak general economic conditions. When it approved the MGPP, ESDC certainly was aware that the same economic downturn that necessitated the negotiation of new agreements would prevent a 10-year build-out.

Nevertheless, ESDC relied on a provision in the MGPP and, later, in the Development Agreement that required FCRC to use "commercially reasonable efforts" to meet the 10-year deadline and complete the Project by 2019 (there had been a shift in the 10-year estimated construction schedule from 2016 to 2019). ESDC also maintained that FCRC had a financial incentive to complete the Project by 2019. However, the term "commercially reasonable efforts" is not defined in either the MGPP or the Development Agreement. While the Development Agreement provides specific dates for the construction of the arena and Phase I buildings, it does not provide specific commencement dates for Phase II

construction, other than those noted above, and, while it provides for damages for delays in Phase I construction, it does not provide for significant financial penalties for delays in Phase II construction. Moreover, respondents failed to show that FCRC had the financial ability to complete the Project in 10 years.

Contrary to FCRC's contention, Supreme Court properly considered the Development Agreement, although the Agreement did not yet exist when ESDC approved the MGPP (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). ESDC repeatedly informed the court that it relied on the terms of the Development Agreement in approving the MGPP. Thus, it was necessary that the court review the Development Agreement to conduct a meaningful review of ESDC's determination. Indeed, the court found that the Development Agreement made meaningful review possible by "correct[ing] ESDC's incomplete representations concerning the Agreement's terms regarding construction deadlines and their enforcement."

We further agree with Supreme Court that ESDC failed to take a "hard look" at the relevant areas of environmental concern and failed to make a "reasoned elaboration" of the basis for its determination that it was not required to prepare an SEIS before

approving the MGPP (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [citation omitted]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

ESDC relied on its 2009 Technical Memorandum, which used a build date of 2019, based on a shift in the 10-year estimated construction schedule from 2016 to 2019, and analyzed certain environmental impacts beyond that only until 2024. Despite ESDC's cognizance of the essential new terms in the Development Agreement, the Technical Memorandum did not consider the changes in the Project schedule, which provided for construction beyond 2019 – indeed, potentially to 2035. Thus, the Technical Memorandum failed to consider the "Reasonable Worst Case Development Scenario," as required by the City Environmental Quality Review (CEQR) Technical Manual (at Chapter 2). Moreover, ESDC maintained that the construction impacts of a 10-year build-out would be the same as or even more severe than the construction impacts of a 25-year build-out because the construction would be less "intense" if it were delayed. However, the Technical Memorandum contained no comparison of the

environmental impacts of “intense” construction over a 10-year period with the environmental impacts of construction that continues for 25 years.

In 2010, in response to a prior court order in these proceedings, ESDC prepared a “Technical Analysis of an Extended Build-Out of the Atlantic Yards Arena and Redevelopment Project,” which concluded that a 2035 build-out would have no significant adverse environmental impacts that were not addressed in the Final Environmental Impact Statement (FEIS) for the 2019 build-out. The Technical Analysis provides no more support for ESDC’s determination than the Technical Memorandum did. Its conclusion is not based on any technical studies of the environmental impacts of protracted construction. It is supported by the mere assertion that the build-out will result in prolonged but less “intense” construction and that most environmental impacts are driven by intensity rather than duration.

Moreover, the Technical Analysis assumed that Phase II construction would not be stalled or deferred for years and that it would proceed continuously on a parcel-by-parcel basis. Thus, it failed to consider an alternative scenario in which years go by before any Phase II construction is commenced – a scenario in which area residents must tolerate vacant lots, above-ground

arena parking, and Phase II construction staging for decades.

ESDC relies on mitigation measures adopted to address the impacts found in the FEIS in 2006. However, the Technical Analysis did not consider whether those measures were adequate in the case of a protracted period of construction.

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

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Freedman, Manzanet-Daniels, JJ.

7065 Shirley Harrison, Ind. 110214/09
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Zuller Law Offices, New York (Michael E. Zuller of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 5, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell back as she approached the turnstile in the subway station at 125th Street and Lexington Avenue on her way to work at about 9 a.m. on a weekday. At a deposition, she testified as follows:

"Q. Do you know what caused you to slip?

"A. Well, as I was being helped up, I saw MetroCards and debris on the floor?

"Q. Did you see the MetroCards and debris on the floor before you slipped?

"A. No I did not.

"Q. Did one or both of your feet come into contact with anything when you slipped?

"A. I am not sure. It happened so fast. As I was being helped up, I looked and I saw wrappers and MetroCards on the floor."

In an affidavit prepared later, plaintiff stated, "When I was helped up, I looked at the floor to see what caused me to slip. There, in front of and underneath the turnstile, was a thick pile of spent, discarded MetroCards, spread out in different directions, together with some package wrappings." She said she gave the MetroCards as a reason for her accident.

Defendant's witness, Sandra McLaurin, the New York City Transit Authority employee who had been responsible for cleaning the 125th Street Station for 10 years, described her work routine based on an established schedule. She arrived at 6 a.m. and proceeded to sweep clean the stairs and mezzanine where the turnstiles were located. She then cleaned other parts of the station including the restrooms, finishing at about 10 a.m. She repeated the routine starting at 10:30 a.m., sweeping the MetroCards and debris that accumulated during the rush hour. The second sweeping took 15 to 20 minutes longer because of an even

greater amount of debris. Trash receptacles were placed near the MetroCard dispensing machine and inside the station, through the turnstiles. McLaurin remembered cleaning the station completely pursuant to her usual routine on the day of the accident, as well as having been called to fill out the report after the accident occurred.

The motion court granted summary judgment to defendant dismissing the claim on the ground that plaintiff failed to raise a triable issue of fact as to notice. Plaintiff claims that she established that defendant had constructive notice of a recurrent slippery condition, namely the presence of debris and discarded MetroCards on the subway platform during the heart of rush hour. However, her claim must be dismissed for three reasons.

First, plaintiff only speculated as to what caused her fall. At best, after she fell, she looked around and saw MetroCards and wrappers on the floor near the turnstile where she had fallen. (See *Edwards v New York City Tr. Auth.*, 72 AD3d 534, 535 [2010] ["Plaintiff's inability to identify the 'hard' object on the steps that caused her to fall, along with the deposition testimony of defendants' bus driver that he inspected the steps both at the start of his shift and shortly after the accident . . . established defendants' prima facie entitlement to summary

judgment"]; *Acunia v New York City Dept. of Educ.*, 68 AD3d 631 [2009] [speculation as to cause of fall was insufficient]).

Second, even if it were a MetroCard that plaintiff slipped on, it could have been dropped a minute before. The fact that subway users dropped cards near turnstiles does not constitute notice of the particular cause of her fall. In *Gordon v American Museum of Natural History* (67 NY2d 836, 838 [1986]) involving paper on the museum steps, the Court of Appeals specifically stated, "the piece of paper that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation" (*see also Torres v New York City Hous. Auth.*, 85 AD3d 469 [2011] ["Evidence of a general awareness of debris and spills in the stairway does not require a finding that defendant is deemed to have notice of the condition that caused plaintiff to fall"]).

We have held that evidence of an unremedied condition that recurred and caused prior accidents because it was not addressed could constitute constructive notice (*Modzelewska v City of New York*, 31 AD3d 314 [2006] [slippery substance causing earlier fall]; *Talavera v New York City Tr. Auth.*, 41 AD3d 135 [2007] [leaky pipe]). However, that was not the case here. In those cases, the identical defect existed for a long period of time or

recurred because of a failure to remedy a longstanding de physical defect.

While strewn MetroCards constitute a recurrent condition, defendant demonstrated that it had a rational means of dealing with the problem. The court cannot impose a duty upon a municipal authority to alter its cleaning schedule or hire additional cleaners without a showing that the established scheduled is manifestly unreasonable. Where as here, a reasonable cleaning routine was established and followed, liability can not be imposed (*see Torres,* 85 AD3d 469; *Raghu v New York City Hous. Auth.*, 72 AD3d 480 [2010] [evidence that janitorial staff swept stairway prior to plaintiffs' falls was sufficient to grant summary judgment to defendants]; *Vilomar v 490 E. 181st Hous. Dev. Fund Corp.,* 50 AD3d 469 [2008] [evidence that stairway was cleaned twice a day warranted summary judgment]). The photographs of the station taken by and furnished by plaintiff demonstrate that the platform was clean at the particular time they were taken. Moreover, even if additional cleaners were hired, or more frequent sweeping occurred, maintaining a litter-free station at rush hour would be

impossible. The fact that subway users dropped cards near turnstiles does not constitute notice of the particular cause of her fall.

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

ENTERED: APRIL 12, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, Román, JJ.

7296-
7297 Index 651055/10

Wilshire Westwood Plaza LLC,
Plaintiff-Appellant-Respondent,

-against-

UBS Real Estate Securities, Inc.,
Defendant-Respondent-Appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen R. Neuwirth of counsel), for appellant-respondent.

Kaye Scholer LLP, New York (H. Peter Haveles, Jr. of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 19, 2011, dismissing the complaint and counterclaims pursuant to an order, same court and Justice, entered June 13, 2011, which granted defendant UBS Real Estate Securities, Inc.'s (UBS) motion for summary judgment and granted plaintiff Wilshire Westwood Plaza LLC's (Wilshire) motion to dismiss UBS's counterclaims for attorney's fees, unanimously modified, on the law, to reinstate the counterclaim for attorney's fees sought under the Loan Agreement, and grant UBS's motion for partial summary judgment to recover such fees, and otherwise affirmed, without costs. Appeals from the aforementioned order, unanimously dismissed, without costs, as

subsumed in the appeals from the judgment.

Defendant UBS loaned plaintiff Wilshire $68.75 million (the loan) under a Loan Agreement, which also granted Wilshire a one-time "right of first refusal" (ROFR) to purchase the loan if UBS were to contemplate selling the loan to a third party. When UBS later announced an intention to transfer the loan to StabFund Sub NCA AG (StabFund), a "stabilisation fund" that was set up as a special purpose vehicle by the Swiss National Bank for the Swiss government's bailout of UBS during the credit crisis, Wilshire initially questioned whether such a transaction constituted a “sale” so as to invoke the ROFR, but ultimately declined to exercise the ROFR. Months after the transfer of the loan to StabFund, Wilshire and UBS met, during which UBS asked Wilshire if Wilshire would like to extend or refinance the loan with UBS. Wishire responded in the affirmative. Before UBS began the underwriting process, it forwarded Wilshire a “Pre-Negotiation Agreement” (PNA), stating that such agreement must be executed before the parties could proceed with further discussions regarding a potential modification of the loan. Wilshire signed the PNA, which contained a provision stating that Wilshire, as the borrower of the loan, agreed to release UBS “of and from all damage, loss, claims, demands, liabilities,

obligations, actions and causes of action whatsoever that Borrower . . . may now have or claim to have against them, whether presently known or unknown . . on account of or in any way touching, concerning, relating to, arising out of or founded upon the Loan or any of the Loan Documents."

Wilshire alleges that for months after it executed the PNA, it tried to schedule a meeting with UBS to discuss a loan modification, but UBS repeatedly canceled and rescheduled the meetings. The parties ultimately never met. Rather, UBS, as StabFund's agent, later announced a proposed sale of the loan to a "vulture fund" called Garrison Investment Group. Wilshire objected and commenced an action to bar the transfer, claiming that the prior transfer of the loan to StabFund was not a "sale" that could invoke the ROFR, and sought to exercise the ROFR to block the sale to Garrison Investment Group. Wilshire, however, withdrew that action after StabFund decided to hold the loan until maturity.

Wilshire then commenced this action, alleging that UBS breached the Loan Agreement by failing to apprise it of all the "material terms" of the proposed transfer to StabFund so as to enable it to make a fully informed decision about whether or not to exercise the ROFR. Specifically, Wilshire alleges that, under

the StabFund transaction, UBS had agreed to fund 10% of the price of the loan, effectively giving StabFund a 10% discount on the loan, and that such discount was not offered to Wilshire. Wilshire also alleges that UBS fraudulently induced it to sign the PNA, which embodies the release.

The court properly dismissed Wilshire's fraudulent inducement claim on the ground that it was essentially a breach of contract claim. Wilshire's allegation that UBS promised to commence negotiations regarding an extension or refinancing of the loan, while never intending to do so, is essentially that UBS never intended to honor its obligation to negotiate under the PNA (*see MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571, 573 [2010]; *Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [2008]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]). Contrary to Wilshire's contention, UBS's oral promises of commencing discussions were not collateral to the PNA, as the agreement contemplated negotiations (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *Glanzer v Keilin & Bloom*, 281 AD2d 371 [2001]).

Further, the PNA's provision stating that either party may terminate negotiations "at any time and for any reason," contradicted UBS's promise to undertake negotiations and

precluded Wilshire from reasonably relying on that promise (*see Sanyo Elec. v Pinros & Gar Corp.*, 174 AD2d 452, 453 [1991]).

California Civil Code Section 1542, applicable here pursuant to the parties' choice of law agreement, does not bar the enforceability of the release insofar as it releases "unknown" claims in a commercial dispute where the parties are sophisticated business entities, and represented by counsel (*Larsen v Johannes*, 7 Cal App 3d 491, 505-506 [1970]; *see also Petro-Ventures Inc. v Takessian*, 967 F2d 1337, 1342 [9th Cir 1992]; *Brae Transp., Inc. v Coopers & Lybrand*, 790 F2d 1439, 1444-1445 [9th Cir 1986]). In any event, the breach of contract claims here were not "unknown," as public information concerning transfers of UBS assets to StabFund under the bailout package were available before Wilshire signed the PNA (*see Brae Transp.*, 790 F2d at 1444).

The court improperly dismissed UBS's claim for attorney's fees under the Loan Agreement. A reasonable reading of Section 10.13 of the Agreement indicates that it contemplates award of costs and attorney's fee to UBS where, as here, UBS defends an action against Wilshire that arises from the Loan Agreement (*see International Billing Servs., Inc. v Emigh*, 84 Cal App 4th 1175, 1183 [2000]; *cf. Campbell v Scripps Bank*, 78 Cal App 4th 1328,

1337 [2000]). However, the court properly dismissed UBS's claim for attorney's fees under the PNA. That agreement contemplates reimbursement of fees incurred only during negotiations of or under the PNA.

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

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

ENTERED: APRIL 12, 2012

CLERK

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

7335 The People of the State of New York, Docket 65148C/08
Respondent,

-against-

Pablo Figueroa,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 11, 2009, convicting defendant, after a nonjury trial, of attempted criminal mischief in the fourth degree and harassment in the second degree, and sentencing him to a term of 30 days, concurrent with a conditional discharge, unanimously affirmed.

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

The evidence supports the conclusion that defendant attempted to break the seatbelt buckle in the police van or that

he indeed did deliberately break the seatbelt buckle in order to free himself and lunge at one of the officers. This established the element of intent to damage property (*see* Penal Law § 145.00[1]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7336 In re Guy D. Chilson, Jr., Index 103454/10
Petitioner-Respondent,

-against-

James Hein, etc., et al.,
Respondents-Appellants.

_____

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

La Reddola, Lester & Associates, LLP, Garden City (Robert La Reddola of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered March 22, 2011, granting the petition seeking to annul respondents' determination dated November 25, 2009, which denied petitioner's application for a Hoisting Machine Operator (Class A) License, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

In this Article 78 proceeding, petitioner challenges respondents' denial of his application for a hoisting machine operator's license on the ground that the determination was arbitrary and capricious. Contrary to the motion court's finding, respondents' determination should have been upheld because it is not arbitrary and capricious, is rationally based

and supported by the record (*see* CPLR 7803; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Section 28-405.3.1 of the Construction Code requires all applicants for a class A basic hoisting machine operator license to have at least three years experience in the five years preceding the application under the direct and continuing supervision of a licensed hoisting machine operator. It was reasonable and rational for respondents to deny petitioner's application on the ground that he failed to meet the burden of verifying that he satisfied this criteria (*see* 55 RCNY 11-02 [d]; Administrative Code of the City of NY § 28-101.2). The fact that some of his employers are no longer in business or failed to respond to respondents' inquiry does not negate the fact that petitioner did not demonstrate that he had the requisite experience to obtain the license. The motion court should not have substituted its own judgment for that of respondents (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]). Moreover, it should be noted that a number of petitioner's references gave negative reports of his competence.

Petitioner's argument that respondents' method of crediting his part-time work was irrational lacks merit. We find that respondents employed a method of quantifying part-time experience without inflating its value. This calculation of part-time work was necessary for respondents to fulfill their duty to promote the policy underlying the Code, namely "public safety" (Administrative Code of the City of NY § 28-101.2). Contrary to petitioner's contentions, the method employed here was rational and fair. Indeed, this method has previously been validated by this Court (*see e.g. Matter of Auringer v Department of Bldgs. of City of N.Y.*, 24 AD3d 162 [2005]).

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

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

ENTERED: APRIL 12, 2012

CLERK

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

7337 Aristone Realty Capital, LLC, Index 651302/11
Plaintiff-Respondent,

-against-

9 E. 16th Street LLC, et al.,
Defendants-Appellants,

Crowell & Moring, et al.,
Defendants.

_____

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellants.

Dunnington, Bartholow & Miller LLP, New York (Luke McGrath of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 6, 2011, which denied the motion of defendants 9 E. 16th Street LLC, Regal Real Estate, LLC d/b/a Regal Investments Inc., Maurice Laboz and William Punch for, inter alia, summary judgment dismissing plaintiff's claim for specific performance, unanimously affirmed, with costs.

In this action arising out of a failed real estate transaction, purchaser and seller met with their counsel and allegedly agreed upon the terms and conditions of the sale. Thereafter, the attorneys exchanged e-mail communications, culminating in seller's counsel's transmittal of an "execution

version" of the contract that allegedly contained the previously agreed upon terms and provided the purchaser with wiring instructions for payment of the deposit. Unlike an earlier e-mail that transmitted a "proposed contract" subject to his client's "review and modification," the latter e-mail was not so qualified. In response to the offer e-mail, purchaser's counsel exchanged a signature page executed by his client and purchaser tendered payment of the deposit. Under these circumstances, triable issues of fact exist as to the viability of plaintiff's claim for specific performance, despite the lack of a fully executed contract (*see Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty* LLC, 80 AD3d 476 [2011]; *cf. Naldi v Grunberg*, 80 AD3d 1, 6 [2010], *lv denied* 16 NY3d 711 [2011]).

Further, a triable issue of fact exists as to whether seller's attorney, who copied his client on the relevant e-mail communications without any protest, had apparent authority to act on seller's behalf (*see Korin Group v Emar Bldg. Corp.*, 291 AD2d 270 [2002]). Plaintiff's demand for, and acceptance of, a return of the deposit, in response to, inter alia, concerns about the

integrity of the escrowed deposit, while allegedly reserving its right to enforce the contract and pursuing a countersigned contract, did not evidence, as a matter of law, an intent to cancel any contract formed.

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

ENTERED: APRIL 12, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Mazanet-Daniels, Román, JJ.

7338 In re Brandon M., and Another,

Children Under the Age
of Eighteen Years, etc.,

Luis M.
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Assigned Counsel for the Children, New York (Tennille M. Tatum-Evans of counsel), attorney for the children.

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Appeal from order, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about March 7, 2011, which directed respondent father to stay away from and not communicate with the subject children, except for agency-supervised visits if requested by the children, until March 6, 2012, unanimously dismissed, without costs, as moot.

Because the order of protection has expired, this appeal is moot (*see Matter of Diallo v Diallo*, 68 AD3d 411 [2009], *lv dismissed* 14 NY3d 854 [2010]).

Contrary to respondent's contentions, the order of

disposition is not properly before this Court since the notice of appeal makes no reference to that order and only attached the order of protection (*see* CPLR 5515(1)*; Matter of Peter GG.*, 36 AD3d 1004, 1005 [2007]).

Were we to reach the merits, we would find that a preponderance of the evidence establishes that respondent sexually abused his stepgranddaughter (Family Ct Act § 1012[e][iii]; § 1046[b][i]). The stepgranddaughter's out-of-court statements to the social worker and in medical records were admitted without objection in the joint proceedings against respondent and the girl's parents. These statements sufficiently corroborated the out-of-court statement of one of the subject children that he saw respondent with his hand down the front of his stepgranddaughter's pants, while respondent's pants were open (*see Matter of Anahys V. [John V.]*, 68 AD3d 485, 486 [2009], *lv denied* 14 NY3d 705 [2010]).

The derivative finding that respondent abused and neglected his biological children based on the finding that he sexually abused his stepgrandchild is also supported by a preponderance of the evidence (*see* Family Ct Act § 1046[a][i]). One of the subject children witnessed the sexual abuse and the other child was present in the apartment at the time the abuse took place.

Respondent's actions demonstrated that he has a fundamental defect in his understanding of his parental obligations (*see Matter of Marino S.*, 100 NY2d 361, 373-375 [2003]).

Contrary to respondent's contention, the court was entitled to draw a negative inference against him based on his failure to testify in the proceedings (*see Matter of Dashawn W. [Antoine N.]*, 73 AD3d 574, 575 [2010], *lv dismissed* 16 NY3d 767 [2011]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7339 In re The State of New York, Petitioner-Respondent, Index 30034/08

-against-

Gary M., Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Marion R. Buchbinder of counsel), for respondent.

Order of confinement, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about June 17, 2010, which, upon a jury finding of mental abnormality, and upon a finding, after a dispositional hearing, that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, unanimously affirmed, without costs.

Respondent's claims regarding hearsay contained in testimony about his criminal history are largely unpreserved (*see e.g. Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1142 [2010]), and we decline to review them in the interest of justice. Were we to review them, we would find that the court did not err in allowing the State's psychiatric expert, who examined respondent, to testify to details of some of

respondent's criminal history. The purpose of the testimony was to explain the basis for the expert's opinion (*see* Mental Hygiene Law § 10.08[b]; *Matter of State of New York v Anonymous*, 82 AD3d 1250, 1251 [2011], *lv denied* 17 NY3d 702 [2011]). In any event, respondent provided no reason to question the reliability of the information contained in the criminal complaints. Moreover, the facts underlying respondent's sexual offenses provided ample support for the jury's finding that he suffers from a mental abnormality.

The court did not commit error by allowing into evidence certain redacted medical records used by the parties' experts in forming their opinions (*see* Mental Hygiene Law § 10.08[c]). Even assuming that the admission of the records constituted error, such error was harmless since the records were not published to the jury.

The evidence adduced at the dispositional hearing was clear and convincing that respondent's level of risk of reoffending required that he be confined rather than be subject to strict and

intense supervision (*see* Mental Hygiene Law § 10.07[f]).

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

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

ENTERED: APRIL 12, 2012

CLERK

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

7340-
7341 Joanne Noel Higgins, Index 101704/06
Plaintiff-Respondent,

-against-

West 50th St. Associates, LLC, et al.,
Defendants-Appellants,

Vlad Restoration Ltd.,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellants.

Kramer & Dunleavy, L.L.P., New York (Lenore Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 11, 2011, which awarded plaintiff damages for past and future pain and suffering in the respective principal amounts of $1,500,000 and $1,000,000; awarded plaintiff damages for past and future lost earnings in the respective amounts of $129,004 and $2,000,000; and awarded plaintiff damages for past and future medical expenses in the respective amounts of $14,000 and $2,113,559, unanimously modified, on the law, to reduce the award for future lost earnings to $1,500,000, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 22, 2011, unanimously dismissed, without

costs, as subsumed in the appeal from the judgment.

Sufficient evidence of constructive notice was adduced at trial to support the jury's finding of liability against defendants. It was uncontested that the roof drain did not have a strainer cover, as required by New York City Building Code Reference Standard RS 16 § P110.9 (Adminstrative Code of City of NY, tit 27, ch 1, Appendix), and plaintiff's expert testified that the absence of the cover caused the roof drain to become clogged. It was also uncontested that the clog resulted in the water flowing down the stairs, causing plaintiff to slip and fall. Since defendants' porter admitted knowing that the roof drain did not have a strainer cover, defendants were on notice of the defect which was a substantial factor in bringing about the plaintiff's accident (*cf. Avila v Rahman NY*, 275 AD2d 271, 272 [2000]).

Nor were there errors at trial warranting vacatur of the verdict and remand for a new trial. No evidence was adduced that juror number 5 could not "communicate in "English" (Judiciary Law § 510), and it was not an abuse of discretion for the trial court to release another impaneled juror due to financial hardship (*see* CPLR 4106; *Holmes v Weissman*, 251 AD2d 1078 [1998]), or to permit plaintiff to call a number of lay witnesses to testify concerning

the impact of the accident upon her life. While plaintiff counsel's reference to Social Security disability in her opening statement was improper, it did not require a mistrial, as the court's curative instruction was sufficient (*see e.g. Smith v Vohrer*, 62 AD3d 528 [2009]).

We reduce plaintiff's award for future earnings, as indicated, to conform to the evidence.

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

ENTERED: APRIL 12, 2012

CLERK

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

7342 In re Osriel L.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 30, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1), nunc pro tunc to August 30, 2011.

The court improvidently exercised its discretion when it

adjudicated appellant a juvenile delinquent and imposed probation. This was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]). An adjournment in contemplation of dismissal would have sufficed to serve the needs of appellant and society (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [2011]).

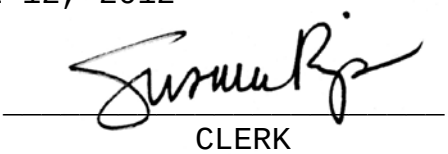
Appellant, who was 12 years old at the time of the underlying offense and adjudication, had no prior record. Appellant also had no background of serious trouble at home, at school, or in the community. There are no indications that appellant ever used drugs or alcohol, or was affiliated with a gang. Appellant accepted responsibility for his nonviolent theft of property.

Under the terms and conditions of an ACD, the court could have required the probation department to monitor appellant's

school attendance and observance of a curfew (*see e.g. Matter of Justin Charles H.*, 9 AD3d 316, 317 [2004]). We also note that appellant's mother voluntarily enrolled him in community counseling services while the case was pending.

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

ENTERED: APRIL 12, 2012



CLERK

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

7343-7344 The People of the State of New York, Respondent,

-against-

Tracy Durden, Defendant-Appellant.

Ind. 6283/01

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

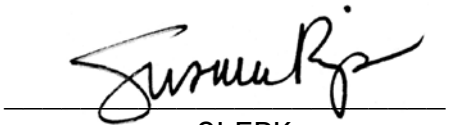
Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 24, 2011, resentencing defendant, as a second violent felony offender, to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: APRIL 12, 2012



CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Manazanet-Daniels, Román, JJ.

7345 Diane Fisher, Index 104149/07
Plaintiff-Respondent,

-against-

Teresita Mascardo,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Leslie D. Kelmachter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered February 24, 2011, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered February 9, 2011, which determined, following a collateral source hearing, that the verdict of the jury in favor of plaintiff totaling $358,480.00 was to be offset by a total of $8,210.00, resulting in an award for damages in the amount of $350,270.00 plus statutory interest from the date of loss, unanimously affirmed, with costs.

In this action for recovery of damages to plaintiff's vintage and antique clothing collection, defendant failed to demonstrate by clear and convincing evidence that there was a direct, close correspondence, i.e., a match, between the

collateral source payments and the items of loss to be replaced (*Johnson v New York City Tr. Auth.*, 88 AD3d 321, 327-328 [2011]). Defendant failed to show a "match" on the actual value of the items lost, the value of the items as awarded by the jury, and the amount paid by the insurance company. Under these circumstances, there was simply insufficient evidence to show that plaintiff had received a windfall or double recovery.

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

ENTERED: APRIL 12, 2012

CLERK

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

7346-
7347- Sung Hwan Co., Ltd., Index 112444/01
7347A Plaintiff-Appellant,

-against-

Rite Aid Corporation,
Defendant-Respondent.

_____

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellant.

Morgan, Lewis & Bockius LLP, New York (Thomas A. Schmutz, of the District of Columbia Bar, admitted pro hac vice, of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 22, 2011, dismissing the complaint and awarding costs to defendant in the amount of $66,677.52, and bringing up for review an order, same court (Richard B. Lowe III, J.), entered February 3, 2011, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's motion for recognition and enforcement of a default judgment entered in its favor against defendant by the District Court of Seoul, Republic of Korea, unanimously reversed, on the law, with costs, and the judgment vacated. Appeal from judgment, same court (Richard B. Lowe III, J.), entered March 21, 2011, dismissing the complaint and

awarding costs to defendant in the amount of $450, unanimously dismissed, without costs, as superseded by the appeal from the amended judgment. Appeal from order, same court (Shirley Werner Kornreich, J.), entered May 31, 2011, which granted defendant's motion to tax plaintiff with costs, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment.

The record presents a triable issue of fact whether defendant owned the ice cream plant that manufactured and sold listeria-tainted ice cream to the plaintiff, which would provide a basis for Korea's exercise of personal jurisdiction over defendant (*see* 7 NY3d 78, 81 n 1, 84 [2006]). Defendant submitted evidence in support of its claims that the plant was owned by its subsidiary Thrifty Payless, Inc. (TPI). Plaintiff submitted evidence that defendant owned the plant directly. Plaintiff's evidence included the following: defendant's 10-K forms for the years following its merger with TPI, which stated that defendant itself - not a subsidiary - owned the ice cream plant; a Los Angeles Tax Assessor's form identifying defendant as an owner of the plant; that defendant had designated the plant as its ice cream division and as distribution center #61 and that the signs on the ice cream plant and its trucks stated that the

plant was a division of defendant; the plant general manager's testimony that, among other things, he reported to defendant's senior vice president following the merger and never again reported to anyone at TPI; that in 1997 the senior vice president began being paid by defendant; that he was designated as "Director/Plant Manager, Dist Center - 00061, Rite Aid Corporation"; and finally that, when he learned of the claim of listeria contamination, he contacted defendant's executives.

Although we are vacating the judgment, we note that the court correctly granted defendant's application to tax plaintiff with the expenses defendant incurred in securing an undertaking to stay enforcement of the judgment entered in this case in 2007, which we reversed (*see* CPLR 8301[a][11]; 46 AD3d 288 [2007]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7348 The People of the State of New York, Respondent, Ind. 4247/03

-against-

Anthony Brown, Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 27, 2010, resentencing defendant, as a second felony offender, to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: APRIL 12, 2012

CLERK

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

7349-
7350 In re Essence S., and Another,

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

Abbott House,
Petitioner-Appellant,

Jacobie S.
Respondent-Respondent,

Jeffrey H.,
Respondent.

_____

John R. Eyerman, New York, for appellant.

The Bronx Defenders, Bronx (Stacy Charland of counsel), and Covington & Burling LLP, New York (Megan A. Crowley of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), attorney for the children.

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Order, Family Court, Bronx County (Sidney H. Gribetz, J.), entered on or about July 19, 2010, which dismissed the termination of parental rights petitions against respondent mother, Jacobie S., and respondent father, Jeffrey H., unanimously affirmed, without costs.

Petitioner agency failed to meet its burden of establishing by clear and convincing evidence that diligent efforts were made to strengthen the parental bond between the children and

respondent mother (SSL § 384-b[7][a]), since it failed to develop a plan that was tailored to fit her individual circumstances (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). The agency submitted referral letters not addressed to the mother's home address and its sole witness testified regarding events that occurred over two years prior to the proceedings, without benefit of any records of these events, and as to matters outside her personal knowledge. The court was entitled to resolve the conflicting testimony in favor of respondent mother and its credibility determination is entitled to deference (*see In re Frantrae W.*, 45 AD3d 412, 413 [2007]).

Moreover, the agency was without authority to unilaterally suspend respondent mother's visitation rights (*see* 18 NYCRR § 431.14), and then fault her for not complying with the service plan which included, *inter alia*, visitation (*see Matter of Jesus JJ.,* 232 AD2d 752, 753 [1996], *lv denied* 89 NY2d 809 [1997] [plan must be realistic and tailored to fit a parent's individual situation]).

The court also properly found that the agency failed to meet

its burden with respect to respondent father. The record establishes that the agency met with him on only one occasion (*see Matter of Charmaine T.*, 173 AD2d 625 [1991]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7352-
7353 Underbruckner Realty Corp., et al., Index 102192/07
Petitioners-Respondents,

-against-

Tax Commission of the City of
New York, et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Amy R. Kirshner of counsel), for appellants.

Marshall G. Kaplan, Brooklyn, for respondents.

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered May 31, 2011, after a nonjury trial, reducing the assessed valuation of petitioners' skilled nursing facility for the tax years 1999-2007, unanimously affirmed, without costs. Appeal from order, same court (Howard R. Silver, J.), entered November 15, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Petitioners rebutted the presumption of validity as to the existing tax assessments by presenting "substantial evidence" demonstrating "the existence of a valid and credible dispute regarding valuation" (*see Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187-188 [1998]). The trial court's

determination that petitioners' property has been overvalued is supported by a preponderance of the evidence (*see id.* at 188). Looking to the Medicaid reimbursement rate as a means to assess the value of a nursing home has been judicially recognized (*see e.g. Tarrytown Hall Care Ctr. v Board of Assessors*, Sup Ct, Westchester County, Mar. 4, 2004, Rosato, J., Index No. 14267/98).

Respondents' expert's assertion that the methodology he employed is the only way to assess the value of a nursing home's real estate runs afoul of the principle that "there is no fixed method for determining that value" (*see Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992]). Courts are "under no compunction to . . . confine[] assessors to any one course" (*see Matter of Merrick Holding Corp. v Board of Assessors of County of Nassau*, 45 NY2d 538, 541 [1978]). Furthermore, both the experts used the income capitalization approach, which calls for "the exercise of judgment by the appraiser," because the approach yields, "at best, no more than an estimate of the present worth of the benefits to be reaped from the property at issue" (*id.*, 45 NY2d at 542). In addition, whether the apartment buildings relied upon by petitioners were valid "comparables" was a question of fact to be resolved by the trial court (*see Matter of*

Miriam Osborn Mem. Home Assn. v Assessor of City of Rye, 80 AD3d 118, 144 [2010]).

It is true that respondents presented evidence upon which the court could reasonably have found that the Medicaid reimbursement rate (even as amended upward by non-Medicaid patient data) was not an accurate measure of market rent. However, in reducing the existing assessments in half, the court implicitly found that the market value numbers proffered by petitioners were below market and partially credited respondents' methodology, finding, however, that it produced above-market values for the respective tax years. Contrary to respondents' contention, the court did not improperly "split the difference." The court's valuations were "within the range of the trial evidence" (*see Matter of Kips Bays Towers Condominium v Commissioner of Fin.*, 66 AD3d 506, 506-507 [2009], *lv denied* 14 NY3d 708 [2010]).

We also reject respondents' contention that the court failed to set forth "the essential facts found upon which the ultimate finding of facts [was] made" (RPTL 720[2]). While the court might have addressed the respective methodologies and calculations of the parties more specifically, it did state the essential fact: that both sides presented cogent arguments and

that “the true valuation of the property is greater than that proposed by the Petitioner[s] and less than that proposed by the Respondents” (*cf. Matter of Trinity Place Co. v Finance Adm’r of City of N.Y.*, 72 AD2d 274, 275 [1980], *affd* 51 NY2d 890 [1980]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7354 David H. Brooks, Index 107884/09
Petitioner-Appellant,

–against–

BDO Seidman, LLP,
Respondent-Respondent.

_____

Garvey Schubert Barer, New York (Malcolm Seymour III of counsel), for appellant.

DLA Piper LLP (US), New York (Anthony P. Ashton, of the bars of the State of Maryland and the State of Virginia, admitted pro hac vice, and John Vukelj of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Martin Schoenfeld, J.), entered March 1, 2011, which granted respondent's motion to confirm an arbitration award in the total amount of $383,545.04, and denied petitioner's cross motion to vacate the award, unanimously affirmed, with costs.

The arbitration award was properly confirmed since the arbitration panel did not engage in any misconduct to warrant vacatur of the award (*see* CPLR 7511[b][1][i]). There is no indication that the panel precluded or restricted the parties from submitting any evidence on the motion. Indeed, the record shows that the parties submitted extensive briefs and documentary evidence in support of their respective positions. Although the

panel made a determination of the proceeding on respondent's motion for summary judgment, this was not improper since arbitrators are not compelled to conduct hearings, and may decide a case on summary judgment (*see e.g. TIG Ins. Co. v Global Intl. Reins. Co., Ltd.*, 640 F Supp 2d 519, 523 [SD NY 2009]; *see also Griffin Indus., Inc. v Petrojam, Ltd.*, 58 F Supp 2d 212, 219-220 [SD NY 1999]). Moreover, the arbitration clause of the parties' Engagement Letter did not prohibit the arbitrators from using this type of disposition (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]; *cf. Barnes v Washington Mut. Bank, FA*, 40 AD3d 357 [2007], *lv denied* 9 NY3d 815 [2007], *cert denied* 553 US 1057 [2008]).

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

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

ENTERED: APRIL 12, 2012

CLERK

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

7355 Inter Metal Fabricators, Inc., Index 604137/04
Plaintiff-Appellant,

-against-

HRH Construction LLC, et al.,
Defendants-Respondents.

[And Other Actions]

Goldberg & Connolly, Rockville Centre (Mitchell B. Reiter of counsel), for appellant.

Wasserman Grubin & Rogers LLP, New York (Samuel A. Gunsburg of counsel), for HRH Construction LLC, Vesta 24, LLC and BBL Partners, LLC, respondents.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Eric M. Eusanio of counsel), for Vigilant Insurance Company, respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 10, 2010, which, to the extent appealed from as limited by the briefs, granted defendants HRH Construction LLC's and Vigilant Insurance Company's motions for summary judgment dismissing the second and third causes of action for foreclosure of mechanic's liens and HRH's motion for summary judgment as to liability on its counterclaim for willful exaggeration of the liens, unanimously affirmed, with costs.

Defendants demonstrated conclusively that the amount of the

lien was willfully exaggerated (*see* Lien Law § 39; *Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [2011]; *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393 [2006]). The evidence includes documents, created by plaintiff and submitted to its surety, that tend to show that plaintiff knowingly marked up its costs and expenses, as well as the testimony of plaintiff's vice president and chief operating officer admitting to the overcharges and stating that he was "entitled to mark it up to whatever number I want," and, "You know what? People do a lot of things."

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

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

ENTERED: APRIL 12, 2012

CLERK

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

7356 The People of the State of New York, Ind. 5396/08
Respondent,

-against-

Frank Carusso,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 5, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the conviction, adjudicating defendant a youthful offender and reducing the sentence to a term of 1⅓ to 4 years, and otherwise affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the People belatedly disclosed an alleged prior inconsistent statement by the victim.

The court provided a suitable remedy for any violation of the People's disclosure obligations under *Brady v Maryland* (373 US 83, 87-88 [1963]).

The victim testified at trial that defendant demanded money during the robbery. However, after the victim completed his testimony, the People disclosed a report of a detective's conversation with the victim. In that report, the detective indicated that the victim attributed the demand for money to the codefendant instead of defendant. By this time, the victim had returned to his native country and was not available to be recalled. Defendant requested a mistrial, asserting that the identity of the person who demanded the victim's money was material to defendant's intoxication defense.

We find that the court fashioned a remedy that was sufficient to prevent any prejudice (*see People v Jackson*, 264 AD2d 683, 684 [1999], *lv denied* 94 NY2d 881 [2000]). The court permitted defendant to elicit the prior inconsistent statement through the detective's testimony. Furthermore, the court added conditions that were highly favorable to defendant. The detective was prepared to testify that he had incorrectly recorded the victim's oral statement, and that the victim had made his own written statement attributing the demand for money

to defendant. Nevertheless, the court precluded the prosecutor from eliciting these facts, or that the detective's report was inaccurate. Thus, we find that defendant was in a better position than if he had been able to use the statement to cross-examine the victim, because defendant was able to offer the statement attributed by a detective to the victim for purposes of its truth, rather than simply to impeach the victim (*compare People v Rutter*, 202 AD2d 123, 133-134 [1994], *lv dismissed* 85 NY2d 866 [1995]). Defendant's assertion that the victim might have changed his testimony had he been confronted with the police report is highly speculative.

Defendant makes *Brady* claims regarding other midtrial disclosures, each of which had a bearing on the degree of defendant's alleged intoxication at the time of the crime. However, defendant received the only remedy he requested for any of these belated disclosures. Therefore, defendant has not preserved any *Brady* claim regarding these matters (*see People v Monserate*, 256 AD2d 15, 16 [1998], *lv denied* 93 NY3d 855 [1999]), and we decline to review them in the interest of justice.

As an alternative holding, we also reject them on the merits. Defendant received a full opportunity to make effective use of the belatedly disclosed material at trial, and he was not

prejudiced by the timing of the disclosure (*see e.g. People v Johnson*, 303 AD2d 208 [2003], *lv denied*, 100 NY2d 595 [2003]).

The People's nondisclosure of a medical form indicating that defendant was intoxicated at the time of his arrest does not warrant reversal. This information was entirely cumulative to evidence received at trial.

We find that youthful offender status is appropriate under all the circumstances of the case. In particular, defendant was 16 years old at the time of the crime, and the Probation Department recommended this disposition. Furthermore, although the jury correctly rejected defendant's intoxication defense, intoxication evidently played a role in this robbery.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 12, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Román, JJ.

7358 In re Joy Goldberg, Index 109078/10
Petitioner,

-against-

Lorraine Cortez-Vasquez, etc.,
Respondent.

Joy Goldberg, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Marion R. Buchbinder of counsel), for respondent.

Determination of respondent, dated March 11, 2010, which revoked petitioner's real estate broker's license and notary commission, and directed that no action be taken to restore the license until petitioner demonstrated that she had refunded the sum of $10,475, plus statutory interest from November 28, 2006, to the seller, Julio Alejandro, Jr., unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered January 11, 2011) dismissed, without costs.

Respondent's finding that petitioner participated in a scheme in a real estate transaction which defrauded the mortgage lender by making it appear that a deposit was paid by the

purchaser, when none was provided, was supported by substantial evidence in the record (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-181 [1978]). To the extent petitioner argues that the witnesses against her were incredible because they were involved in the deception, we defer to the credibility findings of the administrative law judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The penalty imposed is not disproportionate and does not shock the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]).

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

ENTERED: APRIL 12, 2012

CLERK

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

7359N Parkview Owners, Inc., et al., Index 104584/10
Plaintiffs-Respondents,

-against-

DF Restoration, Inc.,
Defendant-Respondent,

Interstate Fire & Casualty, etc., et al.,
Defendants,

RSUI Indemnity Company,
Defendant-Appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Eric D. Suben of counsel), for appellant.

Malapero & Prisco LLP, New York (Andrew L. Klauber of counsel), for Parkview Owners, Inc., Hudson River Property Management Corp. and Philadelphia Indemnity Insurance Company, respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for DF Restoration, Inc., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 26, 2011, which denied defendant RSUI Indemnity Company's motion for leave to amend its answer, unanimously affirmed, with costs.

Defendant waited more than one year from the date on which it received notice of the claim against its insured to assert a disclaimer based on the policy exclusion for residential projects. This unexplained delay was unreasonable as a matter of

law (*see* Insurance Law § 3420[d]; *Agoado Realty Corp. v United Intl. Ins. Co.*, 260 AD2d 112, 118 [1999], *mod on other grounds* 95 NY2d 141 [2000]). Thus, although leave to amend a pleading "shall be freely given" (CPLR 3025[b]), the residential project exclusion "[can] not be used as an affirmative defense because of its late assertion and the strictures of Insurance Law § 3420(d)" (*Agoado Realty Corp.*, 95 NY2d at 146 n).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7361 In re Rosamond March, Index 109981/10
Petitioner,

-against-

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

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for New York City Department of Housing Preservation and Development, respondent.

Barry Mallin & Associates, P.C., New York (Michael Schwartz of counsel), for Mutual Redevelopment Houses, Inc., respondent.

Determination of respondent New York City Department of Housing Preservation and Development, dated April 6, 2010, which issued a certificate of eviction as to petitioner, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Jane S. Solomon, J.], entered January 11, 2010), dismissed, without costs.

The determination to issue a certificate of eviction is supported by substantial evidence (*see Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [2006]). The

hearing testimony shows that petitioner breached the stipulation in which she agreed to keep her apartment clean and free of unsanitary conditions and odor. Further, in view of the condition of the apartment, we do not find the penalty of eviction shocking to the conscience.

Petitioner did not raise at the hearing her argument that she was entitled to an accommodation. Indeed, in the stipulation, she explicitly withdrew her request for a reasonable accommodation (*see Matter of Seril v New York State Div. of Hous. & Community Renewal*, 205 AD2d 347 [1994]).

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: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7362 Jose Raposo, Index 302145/10
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

David Resnick & Associates, P.C., New York (Justin D. Brandel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered September 23, 2011, which, in an action for personal injuries allegedly sustained when plaintiff slipped and fell on a substance as he descended a stairway in defendant's building, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant established its prima facie entitlement to judgment as a matter of law by establishing that it did not have notice of the condition that allegedly caused plaintiff to fall. Defendant's caretaker testified that he followed the janitorial schedule pursuant to which he would have inspected all the

staircases in the morning and afternoon, mopped the stairs any time he encountered a wet condition, replaced any light bulbs that were not functioning, and reported the condition to his supervisor (*see Torres v New York City Hous. Auth.*, 85 AD3d 469 [2011]; *Love v New York City Hous. Auth.*, 82 AD3d 588 [2011]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480, 481-482 [2010]).

Plaintiff's opposition does not raise a triable issue of fact. The evidence fails to demonstrate a specific recurring dangerous condition routinely left unaddressed by defendant, as opposed to a mere "general awareness" of such a condition, for which defendant is not liable (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [2008], *affd* 11 NY3d 889 [2008]).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7363-
7364-
7364A Stanimir Nenadovic, Index 108917/07
Plaintiff-Respondent, 400595/08

-against-

P.T. Tenants Corp., etc., et al.,
Defendants-Appellants,

Proto Construction Development Corp., et al.,
Defendants.

[And Another Action]
- - - - -
Stanimir Nenadovic,
Plaintiff-Respondent,

-against-

P.T. Tenants Corp., etc., et al.,
Defendants-Appellants,

Liro Program and Construction
Management, P.C., et al.,
Defendants-Respondents.
- - - - -
Park Terrace Gardens, Inc., etc., et al.,
Third-Party Plaintiffs,

–against-

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

[And Other Actions]

Brody, O'Connnor & O'Connor, New York (Scott A. Brody of counsel), for P.T. Tenants Corp. and Prudential & Douglas Elliman, appellants/appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for Liberty Architectural Products Co., Inc., appellant/respondent.

O'Connor Redd LLP, White Plains (Joseph A. Orlando of counsel), for Liro Program and Construction Management, P.C., appellant/respondent.

Silverstein & Stern, New York (James M. Lane of counsel), for Stanimir Nenadovic, respondent/respondent.

McMahon, Martine & Gallagher, Brooklyn (Patrick W. Brophy of counsel), for A Tech Environmental Restoration, Inc., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 11, 2011, which denied defendant Liro Program and Construction Management, P.C.'s motion to renew plaintiff Stanimir Nenadovic's motion for partial summary judgment on his Labor Law § 240(1) claim, and granted plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) claim as against Liberty Architectural Products Co., Inc., unanimously affirmed, without costs. Order, same court and Justice, entered January 11, 2011, which denied defendant P.T. Tenants Corp.'s motion to renew plaintiff's motion, unanimously affirmed, without costs. Order, same court and Justice, entered September 19, 2011, which, insofar as appealed from as limited by the briefs, denied defendants P.T. Tenants Corp. and Prudential & Douglas Elliman's motion for summary judgment on their claims for

contractual indemnification, common-law indemnification and breach of contract as against defendants Liro and Liberty and third-party defendant A-Tech Environmental Restoration, Inc., and for summary judgment dismissing plaintiff Nenadovic's Labor Law § 200 and § 241(6) and common-law negligence claims as against them, unanimously affirmed, without costs.

Plaintiff demonstrated prima facie entitlement to summary judgment on his Labor Law § 240(1) claim as against the property owner (PT Corp), general contractor (Liro) and general construction contractor (Liberty) by evidence that plaintiff, an employee of asbestos-removal contractor A-Tech, and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries (*see Labor Law* § 240[1]; *see generally Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]; *Balbuena v New York Stock Exchange, Inc.*, 49 AD3d 374 [2008], *lv denied* 14 NY3d 709 [2010]). The burden having shifted, PT Corp, Liro and Liberty failed to present evidence demonstrating, at minimum, a factual issue whether plaintiff's fall was caused by other than a § 240 violation, or whether his conduct constituted the sole proximate

cause of his injury (*see McCallister v 200 Park, L.P.*, 92 AD3d 927 [2012]; *Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2010]). Here, the evidence demonstrated, *inter alia*, that the defendant contractors were aware that the scaffold was indicated to have a two-man maximum capacity, that three workers (including plaintiff) were nonetheless assigned to work together from the scaffold, and that there was no other adequate safety equipment made available to the workers (*see e.g. Balbuena*, 49 AD3d 374 [2008], *lv denied* 14 NY3d 709; *Ramirez v Shoats*, 78 AD3d 515 [2010]). There was no evidence to indicate that the resulting injury to plaintiff was exclusively caused by his own willful or intentional acts (*see generally Tate v Clancy-Cullen Storage Co., Inc.*, 171 AD2d 292 [1991]). The court's finding of liability under § 240(1) was not premature in light of ongoing testing of the structural integrity of the scaffold, inasmuch as the evidence that plaintiff and his co-workers were instructed to man a scaffold that was inadequate for its purposes could not be altered, except by additional evidence that might inculpate other defendant contractors with negligence.

Liberty, as the only licensed rigger of the scaffolds on the job site, was properly found by the court to be a statutory agent for purposes of Labor Law § 240(1), inasmuch as Liberty was the

lone licensed authority on the project which, pursuant to applicable regulations, was under an obligation to supervise and control the conduct of the workers that manned the scaffolds (*see* generally *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

As issues on this record remain as to whether and to what extent each of the defendants might be negligent in having caused the scaffold to collapse, denial of PT Corp's motion for summary judgment on its contractual indemnification claim and its common law indemnification claim is warranted at this time (*see e.g. Callan v Structure Tone, Inc.*, 52 AD3d 334 [2008]; *Benedetto v Carrera Realty Corporation*, 32 AD3d 874 [2006]). To the extent PT Corp sought summary judgment on its breach of contract claims as against Liro, Liberty and A-Tech for alleged failure to procure insurance naming it as an additional insured, such argument is premature, as against Liro, in light of a related declaratory judgment action pending on the issue (*see e.g. Callan*, 52 AD3d 334), or otherwise insufficiently pled in light of the absence of identifiable damages at this juncture (*see generally Greater New York Mutual Insurance Company v White Knight Restoration, Ltd.*, 7 AD3d 292 [2004]). That branch of PT Corp's motion that also sought summary judgment dismissing

plaintiff's remaining claims under Labor Law §§ 200 and 241(6), as well as common law negligence, was properly denied as negligence on the part of any party has yet to be established, including that of PT Corp, which faced evidence indicating a potentially unsafe premises for purposes of construction (*see generally Kittlestad v The Losco Group, Inc.*, 92 AD3d 612 [2012]; *Linares v United Management Corp.*, 16 AD3d 382 [2005]).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7365 The People of the State of New York, Ind. 2679/09
Respondent,

-against-

Benjamin Dent,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered June 1, 2010, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of six years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress the cocaine recovered from his person. The court found that defendant's resemblance to a person depicted in a wanted poster was "uncanny," even though defendant turned out not to be that person. The record establishes that the closeness of the resemblance outweighed other factors such as a height difference

between defendant and the person in the wanted poster, and the lack of spatial or temporal proximity to the crime that formed the basis for the poster. Accordingly, the resemblance, coupled with defendant's immediate flight, warranted an inference that defendant was the person in the poster, and provided reasonable suspicion for a stop and frisk (*see People v Collado*, 72 AD3d 614 [2010], *lv denied* 15 NY3d 850 [2010]; *People v Wilson*, 5 AD3d 408 [2004], *lv denied* 2 NY3d 809 [2004]). Defendant's violent struggle with the police raised the level of suspicion to probable cause.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters of strategy not reflected in the record (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has failed to demonstrate "the absence of strategic or other legitimate explanations" (*People v Rivera*, 71 NY2d 705, 709 [1988]) for his counsel's failure to request submission of seventh-degree possession as a lesser included offense of third-degree possession. In any event,

regardless of whether counsel should have made that request, defendant has not established that this omission deprived him of a fair trial or affected the outcome of the case.

Defendant's general objection failed to preserve his claim that the trial court erroneously admitted a statement that had been suppressed by the hearing court, and we decline to review it in the interest of justice (*see People v Tevaha*, 84 NY2d 879 [1994]). As an alternate holding, we find that the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7366 Yusef Flynn, Index 15684/07
Plaintiff-Appellant,

-against-

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

_____

Edward Friedman, Brooklyn (Stuart Diamond of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 14, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion as to the common-law negligence causes of action as against all defendants and as to the cause of action under 42 USC § 1983 as against defendant Corrections Officer Stephen Barr, and otherwise affirmed, without costs.

Defendants failed to establish prima facie, through plaintiff's testimony and that of defendant Barr, that they did not breach their duty of care to plaintiff after he was attacked by other inmates (*see Sanchez v State of New York*, 99 NY2d 247, 252-253 [2002]). Plaintiff testified that Barr encouraged the attack and stopped it only after plaintiff had been seriously

injured. Barr testified that he did not remember the incident, and he did not recall it even when shown the incident report he had filed. Thus, defendants failed to controvert plaintiff's version of the incident. The motion court erred in disregarding plaintiff's testimony as self-serving or lacking credibility; credibility determinations are for the trier of fact (*Martin v Citibank, N.A.*, 64 AD3d 477, 478 [2009]).

As to his 42 USC § 1983 claim, plaintiff's testimony that Barr encouraged the attack and intentionally waited for it to run its course before intervening shows the "callous indifference" required for a claim against the individual defendant (*see Corley v New York City Dept. of Correctional Facility*, 1984 US Dist LEXIS 20321, *2-3 [SD NY 1984]). However, plaintiff failed to raise an issue of fact whether the City deprived him of any civil right, because the record indicates only the isolated attack, not

the requisite "reign of terror of inmate violence" (*see Stevens v County of Dutchess*, 445 F Supp 89, *3 [SD NY 1977] [internal quotation marks omitted]).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7367
7367A In re Commissioner of Social Services, etc.,
Petitioner-Respondent,

-against-

Dimarcus C.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Elisa Barnes, New York, attorney for the child.

_____

Order, Family Court, New York County (Mary Bednar, J.), entered on or about December 1, 2010, which denied appellant's motion seeking genetic testing; and order of filiation, same court and Judge, also entered on or about December 1, 2010, declaring appellant to be the father of the subject child, unanimously affirmed, without costs.

The court properly determined that it was in the best interests of the child to estop respondent from denying that he is the child's father (*see Matter of Shondel J v Mark D,* 7 NY3d 320, 326 [2006]). The testimony established that respondent has held himself out to be the father to his friends, family and co-workers, permits the child to call him "daddy," brought the child

to the funeral of his grandmother, watched the child at his workplace on a regular basis, and provided the mother with money for the child. Moreover, the social worker stated that the twelve-year old child believes that respondent is his father and understands that other men in the mother's life are not his father.

The court was not required to determine the child's biological father when it dismissed the petition brought against another man, whom DNA testing established was not the father. Nor was it required to have the other man joined as a necessary party to these proceedings since the child was born out of wedlock and a father-son relationship exists between the child and respondent.

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, Abdus-Salaam, JJ.

7368 Cohen PDC, LLC, a Delaware Limited Liability Company, etc., et al., Plaintiffs-Respondents,

Pacific Design Center 1, LLC, et al., Nominal Plaintiffs,

-against-

Cheslock-Bakker Opportunity Fund, LP, a Delaware Limited Partnership, et al., Defendants-Appellants.

- - - - -

CBO-PDC 1, LLC, a Delaware Limited Liability Company, et al., Plaintiffs-Appellants,

-against-

Cohen PDC, LLC, a Delaware Limited Liability Company, et al., Defendants-Respondents.

[And Another Action]

Index 601024/03
114718/03

_____

Lankler & Carragher, LLP, New York (Daniel J. Horwitz of counsel), for appellants/appellants.

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for respondents/respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 19, 2010, which granted the motion of Cohen PDC, LLC and Cohen Bros. Realty Corp. of California (together, the

Cohen entities) for summary judgment dismissing all of CBO-PDC1, LLC, CBO-PDC2, LLC, and Cheslock-Bakker Opportunity Fun, LP's (collectively, the CBOs) claims and counterclaims, except for their sixth counterclaim for attorneys' fees, and denying the CBOs' cross motion for summary judgment on certain claims and counterclaims, unanimously affirmed, with costs.

The CBOs' claim that Cohen PDC violated the 2002 Operating Agreement by failing to (i) "deposit actual 'funds' as its shortfall deposit," (ii) "ensure that BDO calculated the buy/sell amount properly," (iii) "submit a Business Plan, Capital Budget, or Operating Budget for . . . 2003," (iv) "obtain Executive Committee approval before making 'major decisions,'" or (v) "obtain Executive Committee approval to request shortfall contributions from [the CBOs]" is belied by the factual record.

In addition, the CBOs' claim that they were entitled to an increased amount for their purchase price, based on the "waterfall" provision found in §6.3 of the Operating Agreement is without merit. The fact that an express waterfall calculation was included in §8.2, a second buy/sell provision within the Operating Agreement, but not included in §8.1, upon which the CBOs rely, means, as a legal matter under standard rules of contract construction, that a waterfall was not intended as

part of §8.1 (*see Seidensticker v Gasparilla Inn, Inc.*, 2007 WL 4054473 [Del Ch Nov 8, 2007]). Further, the testimony adduced established that the CBOs' counsel advised his client, principal of the CBOs, that the Operating Agreement treated the subject buy/sell as a "deemed liquidation" which is "specifically to be determined" based upon §6.4 and not based upon §6.3, the provision in which the "waterfall" is found. The Cohen entities were entitled to rely on their accountant's calculations, and further, their capital call under §4.2(a), of the Operating Agreement was entirely consistent with the obligations that the company and its members had already undertaken, both in the Capital Expenditure Plan, the Mezzanine Loan Agreement, and the Guaranty, which the CBOs had, in fact, approved.

The CBOs' claim of breach of the implied covenant of good faith and fair dealing is inapplicable because the buy/sell calculation at issue is subject to and governed by the express terms and conditions contained in the parties' 2002 Operating Agreement (*see Capital Z Fin. Serv. Fund IL L.P. v Health Net, Inc.*, 43 AD3d 100 [2007]); *Quadrangle Offshore (Cayman) LLC v Kenetech Corp.*, 1998 WL 778359, at *6 [Del Ch Oct 21, 1998]; *see also Chamison v Healthtrust*, 735 A2d 912, 921 [Del Ch 1999], *affd* 748 A2d 407 [Del 2000]).

The CBOs do not dispute that they voluntarily triggered the entire §8.1 buy/sell process, or that they voluntarily decided to close the sale. Indeed, the letter stipulation executed at the time of the closing (and relied upon by the CBOs) expressly states that "the CBO Members have agreed to sell their respective interest [in the parties' LLC] to Cohen PDC . . . pursuant to the terms of Section 8.1 of the Operating Agreement" They did close, and sold their interests to Cohen PDC in exchange for a payment of $36.659 million, which they admittedly received and which was both a profit and admittedly more than their interests were worth. In sum, the CBOs utterly fail to establish, as they must, that Cohen PDC engaged in any arbitrary, unreasonable, oppressive, or underhanded conduct.

Finally, the motion court properly denied both parties summary judgment regarding the CBOs' counterclaim for attorneys'

fees in connection with the federal action between the parties, which was dismissed sua sponte for lack of diversity jurisdiction.

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7370 The People of the State of New York, Ind. 6073/08
Respondent,

-against-

Sergei Kuramtsov, etc.,
Defendant-Appellant.

Stephen C. Cooper, New York, for appellant.

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 21, 2009, convicting defendant, upon his plea of guilty, of criminal mischief in the second degree, and sentencing him to a term of 60 days, concurrent with 5 years' probation, unanimously affirmed.

Defendant asserts that his plea was involuntary and that he received ineffective assistance of counsel. Although defendant raised these claims in an unsuccessful CPL 440.10 motion, his motion for leave to appeal to this Court was denied. Therefore our review of defendant's present claims is limited to the plea and sentencing record (*see People v Stevens*, 88 AD3d 494 [2011]). The record, to the extent it permits review, establishes that defendant's plea was knowing, intelligent and voluntary, and that

it was made with effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant's assertion that the charge to which he pleaded guilty was confusing, and that he never intended to plead guilty to a felony, is belied by the plea allocution. The court and the clerk clearly informed defendant of the charge, and that it was a felony. The record does not indicate any discussion of a misdemeanor plea.

To the extent defendant is arguing that his attorney provided inadequate advice regarding the deportation consequences of a plea to a felony, that claim is unsupported by anything in the record. Moreover, the record does not even indicate whether or not defendant is a United States citizen.

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7371 Luis De Oleo, Index 301267/07
Plaintiff,

-against-

Charis Christian Ministries, Inc., et al.,
Defendants.
- - - - -
Charis Christian Ministries, Inc., et al.,
Third Party-Plaintiffs-Appellants,

-against-

St. Loren Construction Corp.,
Third-Party Defendant-Respondent.

_____

Olukayode Babalola, Bronx, for appellants.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 7, 2011, which denied defendants/third-party plaintiffs' motion for entry of a default judgment on their third-party claims for common-law and contractual indemnification and contribution against third-party defendant, unanimously modified, on the law, to grant the motion as to the claim for common-law indemnification, and otherwise affirmed, without costs.

In this action, plaintiff seeks to recover for injuries sustained while performing construction work at a building owned and managed by appellants (Charis), for his employer, third-party defendant, St. Loren Construction Corp. (St. Loren).

The motion court correctly found that Charis had failed to submit adequate proof to support a determination of liability on their claim for contractual indemnification, as they failed to provide a copy of any contract providing for indemnification, or an affidavit detailing the contract's provisions (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Sullivan*, 269 AD2d 149 [2000].

However, Charis submitted sufficient proof that, if plaintiff was injured while performing work on the roof of the building owned by Charis, it was due to the negligence of St. Loren, with no negligence on the part of Charis. Charis did not need to disprove the defense of Worker's Compensation Law § 11, since, in order for an employer to invoke the protection of that statute, it must plead it as an affirmative defense (*see e.g. Caceras v Zorbas*, 74 NY2d 884 [1989]; *Joyce v McKenna Assoc.*, 2 AD3d 592 [2003]; *Lanpont v Savvas Cab Corp.*, 244 AD2d 208 [1997]). Charis had no burden to disprove a defense which had

never been raised and a court may not, sua sponte, take judicial notice of a defense which has not been raised (*see e.g. Horst v Brown*, 72 AD3d 434 [2010], *lv dismissed* 15 NY3d 743 [2010]; *Paladino v Time Warner Cable of N.Y. City*, 16 AD3d 646 [2005]).

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7372 & M-365 Michael Drezin, Plaintiff-Appellant, Index 305398/10

-against-

The New Yankee Stadium Community Benefits Fund, Inc., Defendant-Respondent.

_____

Michael Drezin, Bronx, appellant pro se.

Underweiser & Underweiser, LLP, White Plains (Barry L. Mendelson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 10, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's first, third and fourth causes of action, and to dismiss so much of plaintiff's second cause of action as seeks punitive damages, and denied plaintiff's cross motion for summary judgment on his second cause of action, unanimously affirmed, without costs.

The court properly determined that plaintiff lacked standing to seek the removal of defendant's chairman. The documentary evidence established that defendant, a not-for-profit corporation, had terminated plaintiff from the position of its fund administrator in 2008, prior to the time the action was

commenced. Even assuming that plaintiff had been an officer or director of defendant at any point, plaintiff did not represent any interest in defendant at the time the proceeding was commenced (*see Matter of Romney v Mazur*, 52 AD3d 610 [2008], *lv denied* 11 NY3d 710 [2008]). The court also properly dismissed the punitive damages claims, since the complaint fails to identify specific tortious acts committed separately from the contract claims (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). Similarly, plaintiff's claims based on negligent or grossly negligent performance of a contract are not cognizable (*see City of New York v 611 W. 152nd St.*, 273 AD2d 125 [2000]).

The court also properly dismissed plaintiff's causes of action seeking compensation for the years 2009 and 2010, after he had been terminated, and for compensation for drafting defendant's by-laws and its application for tax exempt status, since he failed to allege that he expected compensation for those services (*see Freedman v Pearlman*, 271 AD2d 301, 304 [2000]). Finally, plaintiff's motion for summary judgment was premature since issue had not yet been joined (*see* CPLR 3212[a]).

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

M-365 ***Michael Drezin v The New Yankee Stadium Community Benefits Fund, Inc.***

Motion seeking reargument of a prior motion denied.

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7373 The People of the State of New York, Ind. 523/03
Respondent,

-against-

Francisco Javier,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 24, 2010, resentencing defendant, as a second felony offender, to a term of 9 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). Defendant's remaining claim is procedurally barred (*see People v Jordan*, 16 NY3d 845 [2011]; *People v Harper*, 85 AD3d 617 [2011], *lv denied* 17 NY3d 903 [2011]), and is without merit in any event.

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

ENTERED: APRIL 12, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7374 In re Thomas H. Beals, Index 108825/10
Petitioner-Appellant,

-against-

New York City Transit,
Respondent-Respondent.

_____

The Law Offices of Fausto E. Zapata, Jr., P.C., New York (Craig Hanlon of counsel), for appellant.

Martin B. Schnabel, Brooklyn (Baimusa Kamara of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered March 9, 2011, granting respondent's cross motion to dismiss the petition to vacate the arbitration award confirming petitioner's termination, unanimously affirmed, without costs.

The arbitrator properly declined to apply the collective bargaining agreement's statute of limitations on the ground that, pursuant to its terms, it had not commenced running while an investigation of the conduct leading to the disciplinary charges against petitioner was under way. In any event, any error by the arbitrator in interpreting the facts or applying the law on this issue did not provide a basis for vacatur of the award (*see Matter of Adolphe v New York City Bd. of Educ.*, 89 AD3d 532, 533

[2011]). Petitioner waived his claim that the arbitrator should have enforced his witness subpoenas by failing to seek a stay of the arbitration and a court ruling compelling compliance and by continuing with the arbitration. Moreover, an arbitrator's erroneous evidentiary rulings may support vacatur only if the evidence would have been pertinent and material (*see Matter of Professional Staff Congress/City Univ. of N.Y. v Board of Higher Educ. of City of N.Y.*, 39 NY2d 319, 323 [1976]). The unproduced testimony of the investigators would have been merely hearsay and cumulative of the testimony based on personal knowledge that had been heard from witnesses and targets of petitioner's misconduct, the testimony of the Transit Authority managers that the use of profanity was common in the workplace would not have shed light on other charges or rebutted the charge that petitioner's use of profanity was pervasive, and the woman working in a rehabilitation facility was not a Transit Authority employee subject to subpoena. To the extent that any of the unproduced testimony may have been useful for impeachment, the foreclosure of collateral evidence going to credibility is not misconduct (*see Kaminsky v Segura*, 26 AD3d 188, 189 [2006]; *Matter of Smith v Suffolk County Police Dept.*, 202 AD2d 678, 679 [1994], *lv denied* 84 NY2d 807 [1994]). Petitioner fails to point to any

provision in the collective bargaining agreement to support his contention that the arbitrator exceeded a restriction on his power (*see Matter of Chaindom Enters., Inc. v Furgang & Adwar, L.L.P.*, 10 AD3d 495, 497 [2004], *lv denied* 4 NY3d 709 [2005]). The contention that the failure to consider his alcoholism defense renders the award in violation of public policy is merely a semantic variation on the ineffective claim that the arbitrator failed to properly evaluate the evidence (*see Kalyanaram v New York Inst. of Tech.*, 79 AD3d 418, 419-420 [2010], *lv denied* 17 NY3d 712 [2011]).

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

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

ENTERED: APRIL 12, 2012

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4804 Manuel De La Cruz, et al., Index 26220/02
Plaintiffs-Appellants,

-against-

Caddell Dry Dock & Repair Co., Inc., et al.,
Defendants-Respondents.

_____

Virginia & Ambinder, LLP, New York (James Emmet Murphy of counsel), for appellants.

Blank Rome LLP, New York (Richard V. Singleton II of counsel), and Frank & Associates, P.C., Farmingdale (Peter A. Romero of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered May 19, 2010, affirmed, without costs.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
James M. Catterson
Sheila Abdus-Salaam
Sallie Manzanet-Daniels, J.P.

4804
Index 26220/02

_____x

Manuel De La Cruz, et al.,
Plaintiffs-Appellants,

-against-

Caddell Dry Dock & Repair Co., Inc., et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered May 19, 2010, which denied plaintiffs' motion for partial summary judgment on the issue of liability and granted defendants' motion for summary judgment dismissing the complaint.

Virginia & Ambinder, LLP, New York (James Emmet Murphy, Lloyd R. Ambinder and Marc A. Tenenbaum of counsel), for appellants.

Blank Rome LLP, New York (Richard V. Singleton II and Anthony A. Mingione of counsel), and Frank & Associates, P.C., Farmingdale (Peter A. Romero of counsel), for respondents.

CATTERSON, J.

In this action arising out of the plaintiffs' claim that they were not paid the required prevailing wage and supplemental benefits under Labor Law § 220, we are constrained by the decision of the Court of Appeals in Brukhman v. Giuliani (94 N.Y.2d 387, 705 N.Y.S.2d 558, 727 N.E.2d 116 (2000)) to find that the repair of City vessels is not a "public work" within the meaning of the statute. The plaintiffs' claim fails on the ground that Brukhman mandates a showing of more than just public purpose or function to determine that a project is a "public work."

The undisputed facts of this case are as follows: Between 1996 and 2006, defendant Caddell Dry Dock & Repair Co. entered into contracts with various municipal corporations of the City of New York – including the Fire Department, the Department of Transportation, and the Department of Sanitation (collectively, the "agencies") – to perform dry-docking and repairs on various publicly-owned vessels, such as fire boats, garbage barges, and ferries. Many of the contracts, including the ones relevant to this action, contained provisions calling for the payment of the prevailing rate of wages and supplemental benefits for work performed on "public works" projects pursuant to Labor Law section 220(3).

The plaintiffs commenced this action on or about September 25, 2002, on behalf of themselves and a putative class of approximately 750 workers, against Caddell and against American Automobile Insurance Company and American Manufacturers Mutual Insurance Company, Caddell's sureties. In the complaint, plaintiffs alleged that they performed work for Caddell under the "public works" contracts, and that the work included repair and maintenance work. The plaintiffs further alleged that they were not paid the required prevailing rate of wages and supplemental benefits.

On or about December 24, 2002, the defendants moved to dismiss the complaint. The court denied the motion, and directed defendants to file an answer. On or about August 11, 2003, defendants renewed their motion to dismiss the complaint. Upon renewal, the motion court granted the motion to dismiss. In granting the motion, the court determined that the work under the contracts was not "public work" within the meaning of Labor Law § 220(3).

On appeal, this Court reinstated so much of plaintiffs' complaint as alleged breach of contract against Caddell (the complaint's second cause of action) and joint and several liability against the sureties (the complaint's sixth cause of action) De La Cruz v. Caddell Dry Dock & Repair Co., 22 AD3d 404,

804 N.Y.S.2d 58 (1st Dept. 2005)(hereinafter referred to as "Caddell I"). However, we stated that the fifth cause of action for willful failure to pay prevailing wages was "properly dismissed" and remanded the matter for further proceedings. Id. at 406. The parties subsequently cross-moved for summary judgment, with the plaintiffs moving only for partial judgment on liability and the defendants moving for dismissal of the complaint. By order entered May 19, 2010, the motion court denied the plaintiffs' motion and granted the defendants' motion, dismissing the complaint against both Caddell and the sureties. The court found that determination of the motions depended on whether repair work on a vessel constitutes a "public work." The court found, therefore, that the issue was not properly before it as the issue was decided by the original trial court and upheld by the Appellate Division. The plaintiffs appealed.

As a threshold matter, the sole issue to be determined on this appeal is whether the plaintiffs' work, repairing vessels, is "public work" since we did not decide this issue when we dismissed the plaintiffs' fifth cause of action in Caddell I. Thus, the motion court erred in basing its determination on what it perceived to be the law of the case. However, the court was correct in granting the defendants' motion for summary judgment. We now affirm for the reasons set forth below.

The contractual provision regarding the payment of prevailing wages is inapplicable because the work done by employees on vessels owned by City agencies was not "public work" as required by Labor Law § 220(3). The statute does not define "public work," but, as the defendants correctly assert, precedent mandates that the prevailing wage law is limited to those workers employed in the construction, repair and maintenance work of fixed structures, and does not apply to workers who are servicing a commodity owned by the City.

The plaintiffs' arguments that the work at issue falls within the scope of "public work" relies on case law that purportedly mandates a focus on the "function" or "purpose" of the project. The plaintiffs rely on Matter of Twin State CCS Corp. v. Roberts, 72 N.Y.2d 897, 532 N.Y.S.2d 746, 528 N.E.2d 1219 (1988), and Matter of Sewer Envtl. Contrs. v. Goldin, 98 A.D.2d 606, 469 N.Y.S.2d 339 (1983), in support of that proposition. The plaintiffs characterize these cases as "contemporary" case law. However, labeling them as such does not mean there is no well-established precedent that enunciates different determinative factors for "public work." The plaintiffs would have us adopt a principle enunciated in just two cases, namely that "purpose" and/or "function" is the sole focus of a "public work" analysis. However, they ignore the fact that

well-settled law mandates more than just an inquiry into the purpose or function of a project. In so doing, the plaintiffs discard the seminal opinion of the Court of Appeals on the issue. See Brukhman, 94 N.Y.2d at 393, 705 N.Y.S.2d at 561.

Their view that the Brukhman Court's long explication on "public work" is dictum, and therefore not binding on us, is incorrect. The Court stated unequivocally that the plaintiffs in that case, who were engaged in skilled electrical and painting work and office clerical functions in various City agencies, were not engaged in "public work."[1] Id. It is true that the Court stated that some of the plaintiffs "might be deemed to squeeze into the 'public work' column," and found it unnecessary to analyze those claims because *those* plaintiffs did not meet the "other requisites of th[e] constitutional entitlement." Brukhman, 94 N.Y.2d at 396, 705 N.Y.S.2d at 563. Nevertheless, its finding as to the overwhelming majority of plaintiffs was

[1]While that case was brought under article I, § 17 of the New York Constitution rather than Labor Law § 220(3), the Court explicitly stated that the scope of the definition of "public works" under each provision is the same. Brukhman, 94 N.Y.2d at 396, 705 N.Y.S.2d at 563.

based on a very thorough analysis as to what constitutes "public work."

Thus, even were the Court's discussion in Brukhman dictum, such well-reasoned dicta may not be discarded as non-binding. See Garofano Constr. Co., Inc. v. City of New York, 180 Misc. 539, 540, 43 N.Y.S.2d 26, 27 (App. Term, 1st Dept. 1943), affd. 266 App. Div. 960 (1943) (dictum of the Court of Appeals in Ewen v. Thompson-Starrett Co. "which was not casual but carefully and thoroughly reasoned, is binding upon this intermediate appellate court ... Particularly is this so where the statute, as the one here involved, is of such far-reaching public importance"). Interestingly, the statute at issue in the cited cases, the prevailing wage law, is the very same as the one at issue here. See Ewen v. Thompson-Starrett Co., 208 N.Y. 245, 101 N.E. 894 (1913).

Moreover, Brukhman affirmed this Court's determination that plaintiffs were not performing public work "regardless whether a public purpose is being served." Brukhman v. Giuliani, 253 A.D.2d 653, 654, 678 N.Y.S.2d 45 (1998). Indeed, the Court of Appeals was unequivocal as to its consistent "narrow[]" definition of what constitutes "public work." Brukhman, 94 N.Y.2d at 396, 705 N.Y.S.2d at 563; and it reiterated "hornbook law" to establish that "the Labor Law provision applies only to

workers involved in the construction, replacement, maintenance and repair of public works in a legally restricted sense of that term." Id., 705 N.Y.S.2d at 563 (internal quotation marks omitted).

Moreover, the *fixed* nature of "public work" projects is emphasized in the Court's reference to the debate record of the 1938 Constitutional Convention. The Court referenced phrases used in the debate to limit the definition of "public work" to "*constructing* a public building," and "*erecting an office building*" and "*highway construction*." 94 N.Y.2d at 394-395, 705 N.Y.S.2d at 562. The Court noted that the discussion "specifically and intentionally related to *construction* projects rather than general services." 94 N.Y. 2d at 394, 705 N.Y.S.2d at 562 (emphasis added). It further characterized the debate as one "replete with references that *limit* the breadth of the prevailing wage provision." 94 N.Y.2d at 393, 705 N.Y.S.2d at 561 (emphasis added). Finally, it rejected the plaintiffs' urging (as plaintiffs urge in this case) that the term "public work" be given an "elastic" interpretation. The Court characterized this as plaintiffs' attempt at "sweeping recategorization." Brukhman, 94 N.Y.2d at 395, 705 N.Y.S.2d at 562.

A brief look at the "hornbook law" cited by the Brukhman

Court shows that the emphasis on construction projects and construction-like activity as the defining nature of "public work" reaches back more than a half-century: In 1950, the Court affirmed this Court's dismissal of a proceeding brought by laundry workers in institutions maintained by the City of New York. It was held that section 220 "is confined to such laborers[...] whose services are performed in connection with the construction, replacement, maintenance and repair of public works owned by the City of New York." Matter of Pinkwater v. Joseph, 300 N.Y. 729, 730, 92 N.E.2d 62 (1950), affg. 275 App. Div. 757, 88 N.Y.S. 895 (1st Dept. 1949).

In 1979, the Court of Appeals affirmed the Second Department's determination that school bus drivers and matrons are not workers covered by the statute. Varsity Tr. v. Saporita, 48 N.Y.2d 767, 423 N.Y.S.2d 910, 399 N.E.2d 941 (1979), affg. 71 A.D.2d 643, 418 N.Y.S.2d 667 (1979). These determinations were essentially based on Supreme Court's analysis of the Labor Law, and its conclusion that:

> "the legislators were interested in protecting that specific portion of the work force which is involved in the construction, replacement, maintenance and repair of public works. It has long been established that this law does not blanket all workers who have some working contact with the city or agency or department ... Even with the most liberal construction, a bus driver or matron in charge of children passengers is not a construction worker nor do they replace, maintain

or repair public works." Varsity Tr., 98 Misc.2d 255, 259-260, 413 N.Y.S.2d 868, 870-871 (Sup. Ct. Kings County 1979).

In 1983, the Court of Appeals affirmed the Fourth Department in rejecting a prevailing wage claim in Matter of Erie Co. Indus. Dev. Agency v. Roberts (94 A.D.2d 532, 465 N.Y.S.2d 301 (4th Dept. 1983), aff'd 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43 (1984)). This included the Fourth Department's finding that "public works" has a generally accepted plain meaning found in dictionaries, including Black's Law Dictionary, as "fixed works constructed for public use." 94 A.D.2d at 538, 465 N.Y.S.2d at 305 (internal quotation marks omitted).

Indeed, it is construction or construction-like activity on a fixed structure, rather than a finding of public purpose, that is the essential component of any determination as to a project being a "public work." Even in Matter of Miele v. Joseph (280 App. Div. 408, 113 N.Y.S.2d 689 (1952), aff'd, 305 N.Y. 667, 112 N.E.2d 764 (1953)) cited for the proposition that work does not need to be construction work, the Court refers to the "making" of a public sign, not to sign painting or lettering. The Court used the phrase "*making* of signs" throughout, indicating that it was aware it had to shoehorn the task into a construction-like activity. Miele, 280 App. Div. at 409, 113 N.Y.S.2d at 691. Moreover, the Court emphasized that the work involved fixed

public structures, and specifically stated that there was no necessity to differentiate between signs painted directly onto fixed structures, and those painted elsewhere and later "attached" to fixed public structure. 280 App. Div. at 409, 113 N.Y.S.2d at 690.

In Matter of Long Is. Light. Co. v. Industrial Commr. of N.Y. State, (40 A.D.2d 1003, 338 N.Y.S.2d 751 (1972), aff'd, 34 N.Y.2d 725, 357 N.Y.S.2d 493, 313 N.E.2d 787 (1974)), the Second Department found that, as to a job for the installation of street lights, the purpose was "the construction of fixtures for a public object." 40 A.D.2d at 1004, 338 N.Y.S.2d at 754). This, according to the Court, required it to be deemed a public work, rather than simply the provision of a lighting service.

Indeed, any view that status as a public work is determined solely by focusing on the work's purpose and function ignores the weight of precedent that clearly establishes that a finding of public purpose alone is not sufficient for a finding that "public work" is being performed. See also County of Suffolk v. Coram Equities LLC, 31 A.D.3d 687, 821 N.Y.S.2d 215 (2d Dept. 2006) (construction of facility to be used as public building not "public work" because constructed on privately-owned land); Cattaraugus Community Action v. Hartnett, 166 A.D.2d 891, 560 N.Y.S.2d 550 (4th Dept. 1990) (home operated as facility for

homeless mothers under a state program not a public work because privately developed and owned); Matter of 60 Mkt. St. Assoc. v. Hartnett, 153 A.D.2d 205, 551 N.Y.S.2d 346 (3d Dept. 1990) (construction of office building for county agency/social service department not a "public work" because project privately financed and on privately owned property).

Moreover, the plaintiffs' reliance on case law, which they cite for the proposition that purpose and function alone determine whether a project is a public work, is misplaced: Matter of Twin State CCS Corp. concerned the installation of a telecommunications system in a public building. The Court found it was a public work because it was not only installed in a public building for use by public employees, it was a system which required "a degree of *construction*-like labor." Twin State CCS Corp., 72 N.Y.2d at 899, 532 N.Y.S.2d at 747 (emphasis added). Thus, the Court acknowledged that construction of, in this case, a fixed structure was as necessary a determinative characteristic as the fact that the building was to be used for public employees.

Neither does Matter of Sewer Envtl. Contrs. support the plaintiffs' contention because sewers are already a specifically included "public work" pursuant to Labor Law § 220. See Labor Law § 220(3-a)(a). So the enunciated principle that "function

rather than magnitude" should be the test appears to refer to the finding that "sewer cleaning involves repair, [and] repair of a public work is a public work." Sewer Envtl. Contrs, 98 A.D.2d at 606, 469 N.Y.S.2d at 340.

Indeed, Labor Law § 220(3-a)(a) further supports the defendants' argument that the statute plainly reflects legislative intent to limit public work to the construction, repair and maintenance of fixed structures. The specific section which relates to the setting of wages directs that the department for whom the work is done shall file a proper classification of the workers involved in the "public work" by taking into account whether the work is "heavy and highway, building, sewer and water, tunnel work or residential." See Labor Law § 220(3-a)(a)(i).

In more than 50 years, only one decision, on which the plaintiffs also rely, has found that repair work on a vessel is "public work." In Matter of Falk v. Generosa (138 N.Y.S.2d 425 (Supreme Court, N.Y. County 1954)), the court acknowledged that Labor Law § 220 applies to those "whose work has to do with the construction and maintenance of the fabric and essential parts of public buildings." Id. at 426, quoting Matter of Golden v. Joseph, 307 N.Y. 602, 607, 120 N.E.2d 162, 164 (1954). However, the court found that seamen on sludgeboats had as much connection

with building construction and maintenance as that of Miele's sign painters and sign letterers, and therefore were entitled to the prevailing wage. The court's incomprehensible analysis would be sufficient reason to question its precedential value even if it was a decision binding on this Court, which it is not.

Accordingly, the order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered May 19, 2010, which denied plaintiffs' motion for partial summary judgment on the issue of liability and granted defendants' motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 12, 2012

CLERK

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

6220 Joyce Villarin, Index 108417/09
Plaintiff-Respondent,

-against-

The Rabbi Haskel Lookstein School,
also known as The Ramaz School,
Defendant-Appellant.

_____

Debevoise & Plimpton LLP, New York (Bryan P. Kessler of counsel), for appellant.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 9, 2010, affirmed, without costs.

Opinion by Renwick, J. All concur except Friedman and DeGrasse, JJ. who dissent in an Opinion by DeGrasse, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Leland G. DeGrasse, JJ.

6220
Index 108417/09

_____x

Joyce Villarin,
Plaintiff-Respondent,

-against-

The Rabbi Haskel Lookstein School,
also known as The Ramaz School,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered July 9, 2010, which, insofar as appealed from, denied its motion to dismiss the cause of action alleging retaliatory discharge.

Debevoise & Plimpton LLP, New York (Bryan P. Kessler, Andrew J. Ceresney and Zahra Nahar-Brown of counsel), for appellant.

RENWICK, J.

In New York, pursuant to the well-established common-law doctrine of employment at will, an employee-employer relationship, in the absence of a contract and a stated duration, is presumed to be a hiring at-will. An at-will employment relationship may be freely terminated by either party for any reason or even no reason at all (*Wider v Skala*, 80 NY2d 628, 633 [1992]). In the 1980s, however, New York, like the vast majority of jurisdictions, enacted public policy whistleblower exceptions for both private and public employees. At-will whistleblowing employees in the private sector are protected by section 740 of the Labor Law. Some commentators question whether the Legislature has formulated the proper balance between the competing interests intended to be protected by the statutorily created private sector at-will whistleblower exception and the judicially created traditional employment-at-will doctrine.[1] Our task here, however, is simply to determine, within the context of a motion to dismiss (CPLR 3211[a][7]), whether plaintiff's

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[1] *See e.g.* Liu, *When Doing the Right Thing Means Losing Your Job: Reforming the New York Whistleblower Statute*, 7 NY City L Rev 61, 83 [2004]; Lorbo, Note, *Kraus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting The Protection They Need*? 12 Hofstra Labor LJ 141 [1994]; Minda and Raab, *Time for an Unjust Dismissal Statute in New York*, 54 Brooklyn L Rev 1137, 1138, 1182-1187 [1989]).

allegations that the headmaster terminated her employment as the school's nurse for reporting suspected child abuse in accordance with Social Services Law § 413, rise to the level of whistleblowing activity protected by Labor Law § 740.

In 2010, plaintiff Joyce Villarin commenced this action against defendant The Rabbi Haskel Lookstein School, a/k/a The Ramaz School, alleging wrongful and retaliatory termination. In the complaint, which we must accept as true on a dismissal motion pursuant to CPLR 3211(a)(7), plaintiff alleges that, in 2006, she began her employment as a nurse in defendant school's nursery through fourth grade division (the Lower School). On November 30, 2007, a student visited plaintiff with a prominent injury on his left cheek. The student told plaintiff that his father had intentionally struck him in the face. Plaintiff then contacted the father, who admitted that he had struck the child. Moreover, the father boasted that the mother had encouraged him to do so, and that he had no remorse. At the time, plaintiff determined that, consistent with Social Services Law § 413, she had a duty to report the suspected abuse or maltreatment to the New York State Central Child Abuse and Maltreatment Register (Register).

Accordingly, plaintiff discussed this matter with Rabbi Alan Berkowitz, the Headmaster of the Lower School. Berkowitz allegedly questioned plaintiff's motives and discouraged her from

reporting the incident, even after plaintiff explained to Berkowitz that she had a legal obligation under Social Services Law § 413 to report the incident to the Register. Nevertheless, plaintiff reported the incident to the Register on December 1, 2007. There were unexpected ramifications. At a meeting on April 15, 2008, the Headmaster allegedly informed plaintiff that she was going to be terminated because both he and the director of the early childhood program thought that she was not "a team player." The termination took place on June 13, 2008.

Plaintiff then commenced this action for wrongful and retaliatory termination, alleging that defendant terminated her employment in retaliation for fulfilling her reporting obligations under Social Services Law § 413. Defendant moved to dismiss pursuant to CPLR 3211(a)(7), arguing that the complaint failed to state a claim under Labor Law § 740 because the alleged abuse was committed by a third party (the student's father), and the incident did not present a substantial and specific danger to public health or safety. Plaintiff replied that she had a private right of action under Labor Law § 740 because she objected to or refused to participate in defendant's policy of declining to report abuse as required under Social Services Law § 413, and defendant retaliated by terminating her employment.

Noting that plaintiff was an at-will employee, the motion

court granted defendant's motion insofar as dismissing the cause of action for wrongful termination, but denied dismissal of the retaliatory termination claim. First, the court found that "defendant's apparent activity, policy, or practice of failing to comply with Social Services Law [§] 413's mandatory requirement would clearly amount to a violation of law." Second, the court rejected defendant's contention that because the alleged violation of law was not ongoing, it did not substantially endanger the public health or safety. Instead, the court found that "defendant[']s] alleged expressed intention not to comply with Social Services Law [§] 413 may have a widespread effect on all abused children at the school, and not just this particular case brought to plaintiff's attention." This appeal ensued and we now affirm.

When a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to whether the allegations state any claim cognizable at law *(see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Viewing the complaint in the light most favorable to plaintiff, and presuming the factual allegations supporting plaintiff's claim to be true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Leibowitz v Bank Leumi Trust Co.*, of N.Y., 152 AD2d 169, 171 [1989]), we find that plaintiff's claim falls within both the letter and the spirit of the private-

employee whistleblower statute.

The applicable whistleblower statute is Labor Law § 740, which provides, in pertinent part, that "[a]n employer shall not take any retaliatory personnel action against an employee because such employee . . . objects to, or refuses to participate in any . . . activity, policy or practice in violation of a law, rule or regulation" (§ 740[2][c]). This provision "is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety" (*Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801, 802 [1990]). "Retaliatory personnel action" includes the discharge of an employee (Labor Law § 740[1][e]). "An employee who has been the subject of a retaliatory personnel action in violation of this section" has a private right of action (Labor Law § 740[4][a]).

In order to establish wrongful termination pursuant to Labor Law § 740, a plaintiff must (1) allege a law, rule or regulation violated by the employer; and (2) demonstrate that the violation presents a substantial and specific danger to the public health or safety (*Remba*, 76 NY2d at 802; *Leibowitz,* 152 AD2d at 176-179). The statutory language of "substantial and specific danger to the public health and safety" is not defined in the whistleblower statute. Courts have consistently held that the

statute addresses only traditional “public health and safety” concerns. Accordingly, illegal economic or financial activities that may be inimical to the public welfare are not within the statutory protection absent a showing that the illegal activity concomitantly creates “substantial and specific danger to the public heath and safety” (*see e.g.*, *Remba*, 76 NY2d at 802 [fraudulent billing does not create a substantial and specific danger to the public health or safety]; *McGrane v Reader's Digest Assn., Inc.*, 822 F Supp 1044, 1051 [SD NY 1993] [“Financial improprieties within a corporation do not constitute threats to public health or safety”]).

In this case, the claim of retaliatory termination is predicated upon the duty to report alleged child abuse pursuant to Social Services Law. Specifically, Social Services Law § 413(1)(a) requires a “school official, which includes but is not limited to . . . [a] school nurse, ”to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child.” Social Services Law § 413(1)(c) further provides:

> "A . . . school . . . shall not take any retaliatory personnel action, as such term is defined in paragraph (e) of subdivision one of section seven hundred forty of the labor law, against an employee because such employee believes that he or she has reasonable cause to suspect that a child is an abused or maltreated child and that employee therefore makes a report in accordance with this title."[2]

It cannot be seriously disputed that this statutory scheme implicates public health and safety concerns. Indeed, a review of the relevant legislative history reveals that the New York Legislature's overriding concern was for the protection of the abused children, with the aim of preventing further harm to children (*see* Bill Jacket, L 1973, ch 1039). Moreover, the statute itself explicitly acknowledges the Legislature's heightened awareness that children are being abused and that there is a need to offer them greater protection. It provides that the aforementioned reporting scheme is intended to further the findings and purpose of the Social Services Law:

> "Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage

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[2] A school official who makes a report pursuant to Social Services Law § 413(1)(a) must "immediately notify the person in charge" of the school (§ 413[1][b]). The person in charge is then "responsible for all subsequent administration necessitated by the report" (*id*.).

> more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved" (Social Services Law § 411).

In furtherance of this purpose, the Legislature enacted Social Services Law § 419, which expressly provides immunity to those people or entities who report or provide services based upon a report of child abuse or maltreatment. "Immunity attaches where there is reasonable cause to suspect that the child might have been abused, and where the reporting party has acted in good faith" (*see Goldberg v Edson*, 41 AD3d 428, 428 [2007]). A school official acting in the scope of his or her employment is presumptively acting in good faith so long as the person did not engage in willful misconduct or gross negligence (*see* Social Services Law § 419; *Scholz v Wright*, 57 AD3d 645, 646 [2008]).

Moreover, in furtherance of the goal of encouraging such reporting, the Legislature also enacted Social Services Law § 420, which expressly allows a private cause of action for money damages upon the failure of any person, official or institution required by § 413 to report a case of suspected child abuse or maltreatment (*see* § 420[b]). It is clear that Social Services

Law §§ 419 and 420 are complementary. To "encourage" reporting of suspected child abuse or neglect immunity is granted by § 419 when a party, in good faith, reports suspected abuse or maltreatment, while under § 420, there are criminal and civil penalties for the failure to do so.

Despite this comprehensive statutory scheme — intended to encourage reporting of child abuse, with the aim of preventing further harm to children — defendant argues on this appeal that because the alleged violation posed a danger only to a single individual or a small group of individuals, rather than the public at large, it does not create and present a substantial and specific danger to the public health and safety. Contrary to defendant's contention, which the dissent here adopts, "there is no requirement that there be a . . . *large-scale* threat, or multiple potential or actual victims [;] . . . [rather] a threat to any member of the public might well be deemed sufficient" (*Bompane v Enzolabs, Inc.*, 160 Misc 2d 315, 318-319 [1994], quoting Givens, Suppl Practice Commentaries, McKinney's Cons Laws of NY, Book 30, Labor Law § 740, 1993 Pocket Part at 67). Further, the statute "envisions a certain quantum of dangerous activity before its remedies are implicated" (*Cotrone v Consolidated Edison Co. of N.Y., Inc.*, 50 AD3d 354, 355 [2008]). That is, any claim that an alleged wrongdoing would create a

substantial and specific

danger to the public health or safety must be based on more than "mere speculation" (*id*. at 354-355).

This Court's determination in *Rodgers v Lenox Hill Hosp*. (211 AD2d 248 [1995]) aptly illustrates the point. In *Rodgers*, the plaintiff alleged that he was fired in retaliation for investigating an incident in which paramedics made a series of mistakes in treating a third party who was found unconscious in her apartment, leading to her death. The paramedics then attempted to conceal the records of this incident. This Court affirmed the denial of the defendant's motion to dismiss, explaining that the alleged misconduct represented "a manifestation of a larger problem, which may not yet have been solved," given that there was no indication that the defendant had disciplined or retrained the paramedics (*id*. at 253-254). This Court emphasized that, even though the plaintiff, like plaintiff here, had alleged only one mishap, the possibility that the paramedics' inherently dangerous practice might recur "clearly me[t] the required threat to public health and safety to

satisfy" Labor Law § 740 (*id*. at 254).[3]

Likewise, in *Finkelstein v Cornell Univ. Med. College* (269 AD2d 114 [2000]), this Court found that the possibility that an inherently dangerous practice might recur met the necessary quantum of dangerous activity required to implicate Labor Law § 740's protection. In *Finkelstein*, the issue arose in the context of a motion for summary judgment. The plaintiff alleged that he had been terminated for complaining about a doctor who worked in the burn unit (*id.* at 115). This Court held that a triable issue of fact existed as to whether the defendant hospital's failure to address the doctor's alleged psychiatric problems presented a substantial danger to public health and safety (*id*. at 116-117). In doing so, this Court held that the plaintiff's affidavit contending that the doctor's behavior pattern might cause a patient harm was sufficient to make out a prima facie case under Labor Law § 740(2)(a) (*id*.).

Similarly, in this case, the nurse's allegation that

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[3] The holding in *Rodgers* also refutes defendant's argument, made before the IAS court, that Labor Law § 740 does not apply because the student was harmed by his father rather than defendant. Just as the paramedics in *Rodgers* had a duty to follow proper procedures in treating the patient even though the defendant bore no responsibility for the patient's unconscious state, the parties in this case had a legal duty under Social Services Law § 413 to report the suspected child abuse or maltreatment committed by a third party.

defendant actively discouraged the reporting of suspected child abuse or maltreatment was sufficient to state a claim under § 740(2), as the school's alleged inaction might result in further abuse or maltreatment. The dissent cannot seriously dispute that ignoring a duty to report child abuse constitutes an inherently dangerous practice. If anything, the alleged misconduct here presents a more substantial danger to public health and safety than in *Finkelstein*, in which the alleged misconduct was limited to erratic behavior by one doctor; here, by contrast, defendant's alleged act of firing plaintiff could potentially discourage other nurses from reporting any suspected child abuse or maltreatment.

In short, the holdings of *Rodgers* and *Finkelstein* amply refute defendant's position, which the dissent here inexplicably adopts, that the punishment of an employee for performing her statutory duties to report child abuse or mistreatment is an insufficient predicate for whistleblower protection under Labor Law § 740, despite the school's alleged practice of discouraging such reporting. This, of course, would be contrary to the legislative policy to encourage professionals of certain fields dealing with children to freely report suggested child mistreatment. Indeed, as noted above, in enacting Social Services Law § 413, the Legislature determined that a qualified

immunity from civil and criminal liability would remove "the fear of an unjust lawsuit for attempting to help protect a child" (*see Mark G. v Sabol*, 93 NY2d 710, 721 [1999] [internal quotation marks omitted]); *see* Social Services Law § 419). The Legislature deemed qualified immunity "indispensable," as it furthered the strong public policy of protecting children (*Sabol*, 93 NY2d at 721). This Court declines to dilute such critical statutory protection.

Ultimately, if we were to adopt the dissenter's position, we would place an employee who has gained credible information about child abuse on the horns of a dilemma. If she remains silent, she would subject herself to civil liability for failing to report it under § 413. If she performs her duties under § 413, she would be subject to termination by her employer without any whistleblower protection. It is difficult to conceive that, in enacting Social Services Law § 413, the Legislature ever intended to place the aggrieved employee in such a tenuous position, and we decline to do so. In this Court's view, the whistleblower statute should be interpreted in a way that avoids such a manifestly unjust outcome.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered July 9, 2010, which, insofar as appealed from, denied defendant's motion to dismiss the cause of

action alleging retaliatory discharge, should be affirmed, without costs.

All concur except Friedman and DeGrasse, JJ. who dissent in an Opinion by DeGrasse, J.

DeGRASSE, J. (dissenting)

I respectfully dissent and would reverse the motion court's order to the extent it denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7). The issue on this appeal is whether plaintiff has stated a cause of action under Labor Law § 740 (the Whistleblower Law). Plaintiff alleges that defendant terminated her employment as a school nurse in retaliation for a report she made to the New York State Child Abuse and Maltreatment Register. The report concerned a suspected incident of maltreatment of one of the school's pupils by his parent. The operative provision of Labor Law § 740 is found in subdivision 2, which reads as follows:

> "2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
>
> (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety . . . ;
>
> (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

> (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation."

Like subdivision 2(a), subdivision 2(c), upon which the majority relies, "is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety" (*Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801, 802 [1990]). In *Leibowitz v Bank Leumi Trust Co. of N.Y.* (152 AD2d 169 [1989]), which the *Remba* Court cited with approval (76 NY2d at 802), the Appellate Division, Second Department, noted:

> "Section 740 was intended to deal with a situation where, for example, an employee at a hazardous installation notices a dangerous condition, reports it, but finds that no action is taken, then reports the risk to the authorities and is fired for doing so. The hope is, of course, that the frequency of events such as those involving the pesticide plant at Bhopal, the accident at Three Mile Island, manufacture and distribution of Thalidomide, failure of the Challenger space shuttle and the like can be reduced" (152 AD2d at 176 [internal quotation marks omitted]).

Here, plaintiff has not alleged any facts from which it can be inferred that she objected to or refused to participate in any practice that implicated a substantial and specific danger to the public health or safety. "Public" means, among other things, "[r]elating or belonging to an entire community, state or nation"

(Black's Law Dictionary 1264 [8th ed 2004]). The complaint itself makes no mention of public health and safety or any policy or practice that was inimical to same. In her memorandum of law plaintiff argued that "[t]he 'activity' of Defendant -- its expressed intention not to comply with Social Services Law § 413 -- will have a widespread effect on all abused children *at the school* and not just the one brought to Plaintiff's attention" (emphasis added). The argument is flawed because the subject single instance of suspected parental maltreatment of a child is not indicative of a schoolwide problem of child abuse or a schoolwide practice or policy of failing to report such abuse.

Rodgers v Lenox Hill Hosp. (211 AD2d 248 [1995]), which the majority cites, is distinguishable because it involved the conduct of paramedics who were required to render treatment to sick or injured members of the public. The same is true of *Finkelstein v Cornell Univ. Med. Coll.* (269 AD2d 114 [2000]), which involved the treatment of members of the public who were patients at a hospital. A more analogous case is *Kern v DePaul Mental Health Servs.* (152 AD2d 957 [1989], *lv denied* 74 NY2d 615 [1989]) in which the Appellate Division, Fourth Department, held that allegations of neglect of a single patient, a failure to report an incident of patient neglect, and the improper deletion of a record entry concerning the incident, did not trigger Labor

Law § 740. Moreover, the majority's position that "defendant's act of firing plaintiff *could* potentially discourage other nurses from reporting any suspected child abuse or maltreatment" (emphasis added) does not speak to a *specific* danger to public health or safety as required by Labor Law § 740.

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

ENTERED: APRIL 12, 2012

CLERK