SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 13, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5010 In re Majid Zarinfar, Index 100489/09
Petitioner-Appellant,

-against-

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

Office of Richard E. Casagrande, New York (Lori M. Smith of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alyse Fiori of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered January 14, 2010, which, to the extent appealed from, denied the petition to annul respondents' determination terminating petitioner's employment as a probationary teacher and to direct respondents to reinstate his employment with back pay and interest, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's challenge to his termination as a probationary teacher is time-barred because it was not brought within four months of the effective date of termination (*see* CPLR 217[1]; *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763 [1988]; *Kahn v New York City Dept. of Educ.*, 79 AD3d 521 [2010], *affd*, NY3d , 2012 NY Slip Op 1098 [2012]).

Even if the petition was timely, we would find that it was properly dismissed. Petitioner has failed to establish that the termination, which was based on unsatisfactory ratings and his failure to make recommended improvements, was for "a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Frasier*, 71 NY2d at 765; *see Curcio v New York City Dept. of Educ.*, 55 AD3d 438 [2008]).

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

ENTERED: MARCH 13, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6272 The People of the State of New York, Ind. 1013/08
Appellant,

-against-

Terrence McFarlane,
Defendant-Respondent.

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

David Segal, New York, for respondent.

Order, Supreme Court, Bronx County (Nicholas Iacovetta, J.), entered August 23, 2010, which granted defendant's suppression motion, affirmed.

The record supports the hearing court's finding that defendant did not consent to a search of the car's locked glove compartment.

After a lawful traffic stop, a police officer, having observed a large wad of rolled-up cash, a partly empty liquor bottle, and crushed papers, and having received suspicious responses to his questions, asked defendant if there was anything in the vehicle that he should know about. Defendant answered, "[N]o." The officer then asked, "[D]o you mind if I take a look," or whether it would be okay if he "checked." Defendant

replied, "[G]o ahead." After checking the seats and the center console, the officer, without asking, took the keys from the ignition and unlocked the glove compartment, where he found a loaded gun.

"When a search and seizure is based upon consent . . . the burden of proof rests heavily upon the People to establish the voluntariness of that waiver of a constitutional right" (*People v Whitehurst*, 25 NY2d 389, 391 [1969]). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (*Florida v Jimeno*, 500 US 248, 251 [1991] [citations omitted]). Here, the officer's request to "take a look" into the car or "check" it for contraband could reasonably have been understood to be a request to search the vehicle, possibly to include closed containers, but it did not reasonably imply a request for permission to open the locked glove compartment (*cf. People v Gomez*, 5 NY3d 416, 418-419 [2005] [general consent to search car did not authorize breaking into hidden compartment]). That the officer subjectively intended to search the glove compartment when he made the request is not determinative. Normally, a locked container can only be opened

by breaking into it or using a key. A reasonable person in defendant's situation would have assumed that if the officer wanted to open the glove compartment with defendant's consent he would have asked for the key or asked defendant to open it. The officer did neither; after checking the seats and the center console, he simply took the keys from the ignition and opened the glove compartment.

The dissent's reliance on *People v Mitchell* (211 AD2d 553 [1995], *lv denied* 86 NY2d 738 [1995]) is misplaced. In *Mitchell*, the officer asked a defendant if he could "look through" the car, and the defendant responded, "[Y]ou can look through anything you want. It's not my car" (at 553 [internal quotation marks omitted]).

In view of the foregoing, we find it unnecessary to address any of the procedural or substantive issues presented by defendant's alternative arguments for affirmance.

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

SAXE, J. (dissenting)

I respectfully disagree with the majority's ruling upholding the suppression of a gun found in the glove compartment of defendant's car. The police lawfully stopped defendant's vehicle for excessive tint on the windows, and upon their observations of a large wad of rolled-up cash, a partly-empty bottle of liquor, and crushed paper cups inside the car, and upon receiving suspicious responses to their questions, they acted properly in asking for consent to search the car's interior. In view of that consent, I see nothing improper in the officer's use of the ignition key to unlock the glove compartment in order to inspect its interior.

In granting suppression, the motion court accepted the officer's testimony that he asked, "[D]o you mind if I take a look" and whether it would be okay if he "checked," and that defendant shrugged his shoulders and said, "[G]o ahead." It concluded that such language did not establish consent to a search. However, the majority does not adopt that portion of the motion court's reasoning; it concedes that the officer's request to "take a look" into the car or "check" it for contraband would have been reasonably understood to be a request to search the vehicle, including visible but closed containers. Yet, it then

holds that the request did not reasonably include searching the glove compartment, which happened to be locked. I dissent because I see no reason to make that distinction. In my view, the record does not support the majority's conclusion that defendant's consent to a search of the interior of the car did not encompass the glove compartment.

The applicable standard is what the typical reasonable person would have understood by the exchange (*see Florida v Jimeno*, 500 US 248, 251 [1991]). This Court has previously interpreted a request to "look through" a car to be the equivalent of a request to search (*see People v Mitchell*, 211 AD2d 553, 554 [1995], *lv denied* 86 NY2d 738 [1995]; *see also United States v Rich*, 992 F2d 502, 506 [5th Cir 1993], *cert denied* 510 US 933 [1993]; *but see People v Hall*, 35 AD3d 1171, 1172 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007], and other Fourth Department cases cited therein). Here, the officer's request to check or to take a look inside the car, to which defendant agreed, is not logically distinguishable from the request made in *Mitchell*, and should be treated as the equivalent of a request to search the interior of the car. The nature of the answer the driver gave in *Mitchell* to the officer's request to conduct a search does not alter the fact that we have treated

the request to "look through" the car as a viable request to search; an affirmative answer to that request constitutes a consent to search.

By the time the request to search was made, the police had *already* visually examined the interior of the car. They had already asked defendant and his passenger about the large wad of rolled-up cash in the center console and the liquor bottle and cups. They had already asked whether the car held any contraband. Under these circumstances, defendant could *only* understand the request to then "take a look" as a request to search for contraband inside closed containers in the car and places the police had not already been able to see (*see People v Mota*, 2003 NY Slip Op 50017[U], *11 [Sup Ct, Bronx County 2003]). In seeking consent to search, the officers, who of course had no reason to know that the glove compartment was locked, necessarily intended to look inside that glove compartment as well as inside any other containers within the car. Indeed, it seems to me that a search of the interior of the car would have been incomplete without a search of the glove compartment. As one of the officers testified, "[W]henever I search a vehicle I search around . . . under the seats, inside the console, the glove compartment."

In view of these circumstances and defendant's response to the request to search, I consider it objectively reasonable for the police to conclude that defendant's consent to a search of his car included a search of the locations within the car where contraband might be hidden.

The only remaining question is whether the fact that the glove compartment was locked would, as a matter of law, alter the normal expectation that a consent to search the interior of a car would include the glove compartment. Does merely encountering a lock negate the consent, requiring the police to seek additional permission before proceeding further with their search?

People v Gomez (5 NY3d 416 [2005]) is inapposite. The *Gomez* Court merely held, unremarkably, that the defendant's general consent to search his car did not authorize the police to impair the structural integrity of the car by breaking through the floorboard and into a hidden compartment in the gas tank. Along the same lines, when the United States Supreme Court mentioned the prospect of the police encountering a locked briefcase in the trunk of a car during a search, in *Florida v Jimeno* (500 US 248, 251-252 [1991], *supra*), it merely expressed the view that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the *breaking*

open of a locked briefcase within the trunk" (emphasis added). But we are not presented here with the exceptional circumstance in which opening a container within a car requires doing physical damage to the defendant's personal property.

In my view, there is nothing unreasonable about a police officer who already had consent to search a car, upon finding the glove compartment locked, reaching over to the key in the ignition, removing it and using it to unlock the glove compartment. Rather, that action is exactly what is reasonably to be expected.

I would therefore reverse the order on appeal and deny defendant's suppression motion, and remit the case for further proceedings on the accusatory instrument.

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

ENTERED: MARCH 13, 2012

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6408 William Pfeuffer, Index 300103/08
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Siler & Ingber, LLP, Mineola (Alissa Amato of counsel), for respondent.

Order, Supreme Court, Bronx County (Mitchell J. Danzinger, J.), entered March 14, 2011, which, in this personal injury action resulting from a slip and fall on a staircase 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.

Plaintiff, a New York City police officer, claims that he sustained a torn Achilles tendon after slipping on a staircase in the Highbridge Garden Houses in the Bronx at 1:00 p.m. on February 8, 2007. Highbridge is owned by defendant New York City Housing Authority (NYCHA). By summons and verified complaint

dated December 24, 2007, plaintiff commenced this action alleging that NYCHA was negligent in permitting the stairway to remain "in a dangerous, defective, slippery, wet, dirty, debris filled, improper and unlawful condition." Plaintiff also asserts that NYCHA violated General Municipal Law § 205-e; Administrative Code of City of NY §§ 27-127, 27-128, and § 27-375; and Multiple Dwelling Law § 52 and § 78.

At the General Municipal Law § 50–h hearing, plaintiff testified that when he was walking down the stairs, at around the fifth step from the bottom between the sixth and seventh floors, he slipped on a wet substance that he believed was urine. Plaintiff noted that the building, a known drug location, was generally "dirty" with empty marijuana bags, glassine envelopes, and cigar wrappers on the floors. Two other officers who witnessed the accident corroborated plaintiff's account and testified that the building was frequently dirty, with debris and urine in the hallways and stairs. One of the officers testified that when they notified the groundskeeper of debris, he would eventually "get around to" cleaning it up.

Both the NYCHA superintendent, who was responsible for overseeing the maintenance and janitorial staff, and the caretaker who was responsible for cleaning the common areas on

the day of plaintiff's accident testified to the cleaning schedule of the buildings. NYCHA moved for summary judgment on July 8, 2010, and the motion was denied. Relying on testimony that debris on the stairs was a recurring condition in the building, the motion court found that the record presented a question of fact regarding the condition of the stairs on the day of the accident. For the reasons set forth below, we reverse.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Rodriquez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [2010][internal quotation marks omitted]). Here, NYCHA demonstrated that it did not create or have actual notice of the wet spot on the stairs. The superintendent and caretaker testified that they were unaware of any complaints from tenants of the building concerning garbage or other debris in the stairwells or the condition of the steps between the seventh and sixth stories.

Moreover, plaintiff fails to raise a triable issue of fact as to NYCHA's constructive notice. A defendant may be charged with constructive notice when a dangerous condition is "ongoing .

. . [and] routinely left unaddressed" (*Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [2003][internal quotation marks omitted). Plaintiff's argument that NYCHA had constructive notice because the accumulation of debris and liquids in the stairwell was a routinely ignored, recurring condition is simply not supported by the record. To the contrary, NYCHA presented evidence that the building was cleaned daily and that the stairwell where plaintiff fell was cleaned shortly before he fell.

The NYCHA superintendent testified that the caretaker was required to inspect the building each morning by walking through every area of the building from "top to bottom." The caretaker was directed to immediately clean up any debris, including daily "spot mopping" of liquids or other substances, found in the common areas and stairways. The daily maintenance schedule indicated that the caretaker was required to "sweep down" the building and stairwells, and "check for hazardous conditions" between 10:00 a.m. and 11:30 a.m. The caretakers' logbook from the date of the accident does not indicate that a hazardous condition existed in any stairwells on the morning of plaintiff's accident.

The NYCHA caretaker submitted an affidavit stating that each

morning, he walked down all of the staircases in the building to remove garbage and debris prior to reporting to his supervisor. He further stated that later in the morning, he swept and mopped the halls and stairs beginning with the 13th floor and working his way down the stairs. He confirmed that he completed his cleaning of the "'B' stairs between the 7th and 6th floors" shortly before his lunch break at 12:00 p.m. each day. The caretaker further stated that he conducted a second inspection of the staircases in the afternoon at 3:30 p.m. The caretaker's affidavit together with the testimony of the NYCHA superintendent establish that the stairs were cleaned at approximately the same time every day, within one-to-three hours of plaintiff's fall.

A defendant cannot be expected to "patrol its staircases 24 hours a day" (*Love v New York City Hous. Auth.*, 82 AD3d 588 [2011]). Even if the problem was recurring, the record reflects that NYCHA addressed it by cleaning up garbage and spills daily and inspecting the stairs twice a day thereby establishing that summary judgment should have been granted (*see e.g. Torres v New York City Hous. Auth.*, 85 AD3d 469 [2011][summary judgment granted to defendant because the janitorial schedule for the building included cleaning the subject stairs an hour before plaintiff fell]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410

[2008], *affd* 11 NY3d 889 [2008][summary judgment granted to defendant because caretaker testified that he removed any improperly discarded garbage and cleaned the area twice a day). As we observed in *DeJesus*, this is not a case where "defendant negligently failed to take any measures to avoid the creation of a dangerous condition" (53 AD3d at 411).

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

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

ENTERED: MARCH 13, 2012

CLERK

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

7047 The People of the State of New York, Ind. 1784/80
Respondent,

-against-

Carlos Correa,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about May 20, 2005, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed.

The court properly exercised its discretion when it granted a downward departure to risk level two, but declined to grant a further departure (*see People v Mingo*, 12 NY3d 563, 568 n 2

[2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). After weighing the extreme seriousness of defendant's criminal conduct against the mitigating factors he cites, we conclude that departure to the lowest risk level would not be appropriate.

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

ENTERED: MARCH 13, 2012

CLERK

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

7048 Leida Ramos, et al., Index 305662/09
Plaintiffs-Respondents,

-against-

Willis Rodriguez,
Defendant,

Executive Pickups,
Defendant-Appellant-Respondent,

Jose L. Cordero, et al.,
Defendants-Respondents-Appellants.

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

Law Offices of Nancy L. Isserlis, Long Island City (Lawrence R. Miles of counsel), for respondents-appellants.

Steven I. Fried, New York, for respondents.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered June 23, 2011, denying defendants' motions for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motions to the extent of dismissing plaintiffs' 90/180-day claims, and otherwise affirmed, without costs.

Defendants made a prima facie showing of entitlement to judgment as a matter of law as to plaintiff Ramos's claims of

"permanent consequential limitation of use" and "significant limitation of use" of her right knee and cervical spine, and plaintiff Benvenutty's similar claims of serious injury to his lumbar spine. Defendants submitted expert medical reports finding normal ranges of motions in the subject areas, as well as the MRI reports of a radiologist who opined that plaintiffs' MRI studies indicated preexisting and degenerative conditions (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [2011]).

In opposition, plaintiffs raised a triable issue of fact. Plaintiff Ramos submitted the affirmation of a radiologist who found disc herniations and a meniscal tear on MRI films taken a month after the accident. Ramos also submitted the affirmation of her treating physician who, based on objective tests, found limitations in the range of motion of Ramos's right knee and cervical spine, opined that her injuries were causally related to the accident, and were not degenerative. In addition, she submitted an affirmation from the surgeon who performed surgery on her right knee in which he opined that her knee injury was causally related to the accident and was not degenerative (*see Spencer*, 82 AD3d at 591).

Plaintiff Benvenutty submitted the affirmation of his radiologist who found a herniated disc on an MRI film of his

lumbar spine taken a month after the accident, and the affirmation of his treating physician who, based on objective tests, found limitations in the range of motion of Benvenutty's lumbar spine and opined that his injury was causally related to the accident and was not degenerative (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Bonilla v Abdullah*, 90 AD3d 466, 467 [2011]).

Plaintiffs' deposition testimony refuted their 90/180-day claims, since they alleged that they were confined to bed for only one week after the accident (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [2010]). In addition, their treating physician's statements advising them to avoid activities that caused pain and discomfort were too general to raise an issue of fact with respect to those claims (*see Antonio v Gear Trans Corp.*, 65 AD3d 869, 869-870 [2009]).

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

ENTERED: MARCH 13, 2012

CLERK

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

7049 In re Myles M.,
Petitioner-Respondent,

-against-

Pei-Fong K.,
Respondent-Appellant.

Weil, Gotshal & Manges, LLP, New York (Debora Hoehne of counsel), for appellant.

Louise Belulovich, New York, for respondent.

Order, Family Court, New York County (Monica Schulman, Referee), entered on or about March 28, 2011, which modified a temporary order of visitation to grant petitioner unsupervised visitation with the parties' child, unanimously affirmed, without costs.

The court properly determined the matter of visitation without a plenary evidentiary hearing (*see e.g. Matter of David T.*, 268 AD2d 309 [2000]). It took judicial notice of the parties' many appearances before the court during the past year, the December 2010 adjudication that petitioner had committed several family offenses against respondent, and the five-year order of protection issued against him in her favor. It also heard the testimony of a forensic social worker who had observed

some 80 supervised visits between petitioner and the child during the course of a year, and considered his reports on those visits and his proposed plan for gradually including unsupervised visitation in petitioner's visitation schedule with the child.

The determination that unsupervised visitation with petitioner is in the child's best interests has a sound and substantial basis in the record (see *Matter of Frank M. v Donna W.*, 44 AD3d 495 [2007]). The social worker reported that the visits he observed between petitioner and the child were overwhelmingly positive, that petitioner and the child had bonded, and that petitioner was a loving and capable parent. Although petitioner has a history of alcohol and substance abuse, he submitted to court-ordered drug testing, and the results were negative. Moreover, the evidence demonstrates that the child was at risk only when she was present during the incidents of domestic violence by petitioner against respondent, while the parties were still in a relationship. The plan structured by the court, in reliance on the expertise of the social worker and the family services agency, minimized that risk by mandating that exchanges be made at the agency's office to avoid contact between

the parties. Indeed, the parties had been making exchanges at the agency's office for nearly a year, without a single violent episode.

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

ENTERED: MARCH 13, 2012

CLERK

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

7050 In re Robin Collazo, Index 114261/09
Petitioner-Appellant,

-against-

The New York City Housing Authority
Respondent-Respondent.

Robin Collazo, appellant pro se.

Sonya M. Kaloyanides, New York (Melissa Renwick of counsel), for respondent.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 30, 2010, inter alia, denying the petition to annul respondent's determination, dated June 17, 2009, which denied petitioner succession rights as a remaining family member to his deceased mother's apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner does not qualify as a remaining family member because he never obtained respondent's written permission to return to residence in his mother's apartment is based upon a fair interpretation of respondent's rules and regulations and is not arbitrary and capricious (*see e.g. Matter of Johnson v New York City Hous.*

Auth., 50 AD3d 438 [2008]).

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

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

ENTERED: MARCH 13, 2012

CLERK

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

7056 The People of the State of New York, Dkt. 47190C/07
Respondent,

-against-

Ramon Lewis,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered May 30, 2008, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict 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 established that defendant struck the victim with intent to harass and alarm her (*see* Penal Law § 240.26[1]).

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

ENTERED: MARCH 13, 2012

CLERK

CORRECTED ORDER - August 17, 2012

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

7057 **[M-3949]** In re Bankers Trust Corporation, etc, et al., Petitioners-Appellants,

-against-

Tax Appeals Tribunal of the City of New York, et al., Respondents-Respondents.

Tax Tribunal 04-36

Clayman & Rosenberg LLP, New York (Brian D. Linder of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

Decision of respondent New York City Tax Appeals Tribunal, dated April 8, 2010, affirming an administrative determination that petitioner is not entitled to a 17% interest deduction for the interest income it received from its third- and fourth-tier indirect subsidiaries, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 and New York City Charter § 171, commenced in this Court pursuant to CPLR 506(b)(4), dismissed, without costs.

Respondent's decision that petitioner was not the beneficial owner of two indirect subsidiaries, BT Trust Holdings (U.K.) Ltd. (BT UK) and Bankers Trust GmbH (BT GMBH), from which its

operating company, Bankers Trust Company (BT), was three and four times removed, respectively, was "based on a rational interpretation of the relevant statutory provisions" (*see Matter of American Airlines, Inc. v New York City Tax Appeals Trib.*, 77 AD3d 478 [2010], *lv denied* 16 NY3d 712 [2011]; *see also Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]; *Matter of Hilton Hotels Corp. v Commissioner of Fin. of City of N.Y.*, 219 AD2d 470, 476 [1995] [agency's rational statutory construction need not be the only reasonable construction]).

The New York State Tax Appeals Tribunal's decisions in *Matter of Racal Corp. and Decca Electronics, Inc.* (1993 WL 181623 [1993], 1993 NY Tax LEXIS 208 [1993]) and *Matter of Bankers Trust New York Corp.* (1996 WL 131497 [1996], 1996 NY Tax LEXIS 133 [1996]) do not compel a different result. Together, they stand only for the proposition that the 17% income deduction can be claimed by an indirect parent if that parent can establish beneficial ownership by showing that it "had command over property or enjoyment of its economic benefits; own[ed] indirectly and control[ed] the voting stock of [the other] corporation; or had the absolute right to sell or pledge the stock, receive dividends from the stock and vote and maintain a

shareholder derivative action" (*Bankers Trust*, 1996 WL 131497, *19, 1996 NY Tax LEXIS 133, *50 [internal quotation marks omitted]).

However, although this test was mentioned in both decisions, the State Tribunal never actually applied it in either. In *Racal*, the parties stipulated that the direct parent of the indirect subsidiary was a "paper" entity that performed no business, so there was no question of beneficial ownership, and, in *Bankers Trust*, the petitioner failed to supply sufficient evidence to which the panel could apply the test criteria. Thus, although petitioner takes issue with the manner in which respondent applied the test criteria in this case, its argument that respondent acted in contravention of the State Tribunal's dictates as set forth in either *Racal* or *Bankers Trust* is misplaced.

Respondent correctly found that for a parent to be treated as the beneficial owner of the assets of a subsidiary that serves a meaningful purpose apart from the parent's purposes, it must do more than merely control the subsidiary by voting its stock (*see Moline Props., Inc. v Commissioner of Internal Revenue*, 319 US 436 [1943]; *see also National Carbide Corp. v Commissioner of Internal Revenue*, 336 US 422, 429 n 6, 433 [1949]). Here, all

BT's control of BT UK and BT GMBH, both fully functioning corporations, came by way of its three- and four-times-removed stock ownership. Thus, respondent's determination that BT was not the beneficial owner of BT UK and BT GMBH is rational and not at odds with the State Tribunal's decision in *Racal*.

We have considered petitioner's remaining arguments and find them without merit.

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

ENTERED: MARCH 13, 2012

CLERK

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

7058 The People of the State of New York, Ind. 6140/07
Respondent,

-against-

Loren Mackie,
Defendant-Appellant.

Stanley Neustadter, Cardozo School of Law, New York (Jill Harrington of counsel), for appellant.

Loren Mackie, appellant pro se.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 22, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted the People to cross-examine defendant about uncharged crimes that were not unduly prejudicial, and were probative of defendant's willingness to place self-interest ahead of principle or the interests of

society. This evidence was received solely to impeach defendant's credibility as a witness, and there was no need for it to be independently admissible under the principles of *People v Molineux* (168 NY 264 [1901]).

Defendant's pro se ineffective assistance of counsel claim is unreviewable on direct appeal because it primarily involves matters outside the record. 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]).

We have considered and rejected the remaining claims contained in defendant's main and pro se briefs.

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

ENTERED: MARCH 13, 2012

CLERK

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

7059-
7060 Index 114359/10

Scheichet & Davis, P.C.,
Plaintiff-Respondent,

-against-

Kenneth Nohavicka, as Executor of the
Estate of Michael J. Endico, Sr., etc.,
Defendant-Appellant.

Clement S. Patti, Jr., White Plains, for appellant.

Scheichet & Davis, P.C., New York (Harry J. Petchesky of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered May 20, 2011, awarding plaintiff law firm the principal sum of $167,419.83 pursuant to an order, same court and Justice, entered May 11, 2011, which granted plaintiff's cross motion for summary judgment on its cause of action for an account stated and denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established entitlement to summary judgment on its claim for an account stated by showing that its client "received, retained without objection, and partially paid invoices without

protest" (*Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473, 474 [2009], *lv dismissed* 13 NY3d 763 [2009]). Defendant's conclusory allegations of protests fail to raise a triable issue of fact as to the existence of an account stated (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604 [2010]).

The court properly determined that a prior order fixing the amount of plaintiff's charging lien on the proceeds of the settlement of the underlying lawsuit was not res judicata as to plaintiff's account stated claim (*see generally O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Plaintiff did not have an opportunity to litigate its account stated claim when the court awarded the charging lien.

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

ENTERED: MARCH 13, 2012

CLERK

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

7061 John Zieris, et al., Index 103335/06
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

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

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 11, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff John Zieris, who was employed by non-party Koch Skanska Inc. (KSI) as an ironworker, was injured while performing rivet removal work on a bridge when he stepped on a loose rivet stem and fell. He commenced this action against defendant alleging, inter alia, violations of Labor Law § 200 and § 241(6).

The court properly dismissed the Labor Law § 200 claim as there is no evidence that defendant created the condition. It was neither responsible for nor had any input in setting up the work site. Moreover, plaintiff testified that he did not notice

any debris on the platform where he fell before the accident and that proper procedures were in place to clear the platform of any debris during the day. Additionally, neither KSI nor defendant received any complaints regarding any tripping hazards (*see Canning v Barneys N.Y.*, 289 AD2d 32, 33 [2001]). Insofar as plaintiff argues that defendant should have known about the condition, defendant's engineer testified that although proper procedures were in place, it was not possible to catch all of the rivet pieces upon removal and a general awareness of a hazardous condition is insufficient to impute constructive notice (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [2008]).

The court also properly dismissed plaintiff's Labor Law § 241(6) claim, which was predicated on an alleged violation of Industrial Code Rule 23-1.7(e). Even assuming that the area plaintiff traversed could be deemed a "passageway" within the meaning of Rule 23-1.7(e), plaintiff testified that he tripped on the rivet after he entered the common, open work area (*see Dalanna v City of New York*, 308 AD2d 400, 401 [2003]). Additionally, Rule 23-1.7(e) does not apply because the evidence shows that the subject rivet stem constituted an integral part of

plaintiff's work. Defendant's evidence that plaintiff was engaged in rivet removal, such work was ongoing in various parts of the bridge, and all falling parts could not be caught while plaintiff and his coworkers were actively engaged in the removal work, established that the rivet stem resulted from the work plaintiff was performing (*see Solis v 32 Sixth Ave. Co., LLC*, 38 AD3d 389, 390 [2007]; *Cabrera v Sea Cliff Water Co.*, 6 AD3d 315, 316 [2004]). Plaintiff's argument that the rivet did not originate from the work that he himself was performing is unavailing, as rivets left by his coworkers, who were performing the same rivet removal work, could still be deemed an integral part of the work (*Cabrera*, 6 AD3d at 316).

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

ENTERED: MARCH 13, 2012

CLERK

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

7062 Option One Mortgage Corp., Index 107675/10
Plaintiff-Respondent,

-against-

J.P. Morgan Chase & Co., et al.,
Defendants-Appellants,

Washington Mutual, Inc., et al.,
Defendants.

Satterlee Stephens Burke & Burke LLP, New York (James Doty of counsel), for J.P. Morgan Chase & Co., and J.P. Morgan Chase Bank, N.A., etc., appellants.

Zeichner Ellman & Krause LLP, New York (Ronald M. Neumann of counsel), for TD Bank, N.A., sued herein as Commerce Bank, N.A., appellant.

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, New York (Barry M. Weiss of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 8, 2010, which, to the extent appealed from, denied the motions of defendants J.P. Morgan Chase & Co., JPMorgan Chase Bank, N.A., and TD Bank, N.A. (sued herein as Commerce Bank, N.A.) to dismiss this action for conversion, negligence, and violation of Uniform Commercial Code § 3-419(1)(c), unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

In this action arising from plaintiff's purchase of real estate at a foreclosure sale, the only basis for plaintiff's claim of entitlement to insurance proceeds paid to the previous owners of the home who cashed the insurance checks but failed to use the money to repair fire damage to the property, is pursuant to a paragraph of a mortgage entitled "Borrower's Obligation to Maintain Hazard Insurance or Property Insurance." However, bidding at a foreclosure sale and taking title generally terminates "the mortgagee's insurable interest as a mortgagee" (*Whitestone Sav. & Loan Assn. v Allstate Ins. Co.*, 28 NY2d 332, 334 [1971]; *see Kessler v Government Empls. Ins. Co.*, 179 AD2d 492, 493 [1992]; *Cohen v New York Prop. Ins. Underwriting Assn.*, 160 AD2d 287, 288 [1990]). Although it is true that where, as here, the mortgagee's bid at a foreclosure sale is less than the amount of the debt secured by the mortgage, there remains "a deficiency for which the mortgagor would be obligated and from which there would survive an insurable interest" (*Whitestone*, 28 NY2d at 335), RPAPL 1371(3) provides that if no motion for a deficiency judgment is made, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

It is undisputed that plaintiff made no motion for a deficiency judgment in its action against the mortgagors. "Plaintiff's failure to obtain a deficiency judgment within the prescribed time . . . defeats any right of recovery [it] may have had as mortgagee" (*Cohen*, 160 AD2d at 288).

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

ENTERED: MARCH 13, 2012

CLERK

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

7066 Migdalia Soto, Index 306009/08
Plaintiff-Respondent,

-against-

Bronx-Lebanon Hospital Center,
Defendant,

Heidi Dupret, M.D.,
Defendant-Appellant.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for appellant.

Irom, Wittels, Freund, Berne & Serra, P.C., Bronx (Richard W. Berne of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 25, 2011, which, in this action alleging medical malpractice, denied the motion of defendant Heidi Dupret, M.D. to dismiss the amended complaint as time-barred, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's action against Dupret, the attending obstetrician and gynecologist who performed the allegedly negligent abdominal hysterectomy, should have been dismissed as time-barred. The amended complaint naming her as an additional defendant was not commenced within the 2½-year statute of

limitations (*see* CPLR 214-a), and plaintiff failed to meet her burden of demonstrating the applicability of the relation-back doctrine (*see Bulow v Women in Need, Inc.*, 89 AD3d 525, 527 [2011]). The record fails to establish that Dupret knew or should have known that, but for plaintiff's mistake in identifying the proper parties, she would have been named as a party in the lawsuit (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]). No mistake can be shown by plaintiff's intentional decision not to initially assert a claim against Dupret, a party known to be potentially liable (*see id.* at 181; *Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 [2007]).

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

ENTERED: MARCH 13, 2012

CLERK

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

7067 The People of the State of New York, Respondent, Ind. 5560/08

-against-

Ancelmo Biscain, Jr., Defendant-Appellant.

Flamhaft Levy Hirsch & Rendeiro LLP, Brooklyn (Harold L. Levy of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered August 12, 2009, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]). Since defendant was convicted of an armed felony, youthful offender treatment would require a showing of mitigating circumstances or relatively minor participation in the crime (CPL 720.10[2][a][ii];[3]), and we do not find that those criteria applied to the facts of this case. In any event, regardless of defendant's eligibility, youthful offender treatment was not warranted.

Defendant did not preserve his claim that the court considered inappropriate factors in denying youthful offender treatment, and we decline to review it in the interest of justice.

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

ENTERED: MARCH 13, 2012

CLERK

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

7068 The People of the State of New York, Ind. 5069/08
Respondent,

-against-

Jamal Bodrick,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered on or about August 10, 2009,

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

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

ENTERED: MARCH 13, 2012

CLERK

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

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

7069 Mark Gruenspecht, Index 114848/10
Plaintiff-Respondent,

-against-

Balboa Insurance Company, et al.,
Defendants-Appellants.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for appellants.

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 6, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint in its entirety, unanimously affirmed, with costs.

Accepting the allegations in the complaint as true and resolving all inferences in plaintiff's favor on this motion to dismiss (*see generally Leon v Martinez*, 84 NY2d 83, 87 [1994]), the complaint sufficiently states a cause of action for recovery of consequential damages arising from defendants' failure to adjust and pay plaintiff's claim for flood damage to his home in a timely and good-faith manner (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008]).

Defendant was aware that plaintiff had received an offer on his house and that without prompt funding of the repairs needed the offer on the property would be lost (*id.*).

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7071 The People of the State of New York, Respondent, Ind. 6826/05

-against-

James Wilson, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Dechert LLP, New York (Benjamin E. Rosenberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearing; Ronald J. Zweibel, J. at jury trial and sentencing), rendered April 17, 2009, as amended April 29, 2009, convicting defendant, of murder in the first degree, and sentencing him to a term of life without parole, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing any of the hearing court's credibility determinations, including its acceptance of the lead detective's testimony notwithstanding his delay in recording certain information, its rejection of a portion of another detective's testimony as based on faulty recollection, and its refusal to credit defendant's version of his interactions with

the police.

The hearing court correctly determined that defendant did not make an unequivocal request for a lawyer during police questioning. Before defendant made his first statement to the police, which was exculpatory, he said that "maybe" he wanted a lawyer. This was ambiguous and equivocal both on its face and in the surrounding context, and it was not sufficient to invoke the right to counsel (*see Davis v United States*, 512 US 452, 459 [1994]; *People v Glover*, 87 NY2d 838, 839 [1995]; *People v Hicks*, 69 NY2d 969, 970 [1987]).

Before defendant made his second statement, which was inculpatory, he made another remark about getting a lawyer. However, this remark was clearly intended to be facetious, and in any event, it only expressed a possible intention to get a lawyer in the future, depending on a condition that had not yet occurred. Accordingly, it did not invoke defendant's right to counsel.

Furthermore, the record also supports the hearing court's finding that defendant was not in custody until after he made his inculpatory statement (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *see also Stansbury v California*, 511 US 318 [1994]). A suspect who is not in custody when he or she invokes the right to counsel can withdraw the request and be

questioned by the police (*People v Davis*, 75 NY2d 517, 522 [1990]). The record establishes that defendant effectively withdrew any possible request for counsel that he may have made.

Finally, the hearing evidence also established that, regardless of the admissibility of defendant's statements, the recovery of physical evidence was generally attenuated from any violation of defendant's right to counsel. To the extent there was any error in the receipt of a knife, that error was harmless under the circumstances.

Turning to issues relating to the trial, we find no basis for reversal. We agree with defendant that his trial testimony did not open the door to an inquiry that had been precluded under the court's *Sandoval* ruling. However, any error in the court's modification of its *Sandoval* ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence of defendant's guilt, and there is no reasonable possibility that the jury would have accepted his incredible testimony, in which he attempted to explain his possession of the victim's property (*see People v Hall*, 18 NY3d 122, 132 [2011][considering defendant's "ridiculous explanation" in harmless error analysis]). Furthermore, the offending evidence was cumulative to other impeachment material.

The court properly instructed the jury on defendant's status

as an interested witness. Defendant only argued that the court's charge should not have identified him as an interested witness as a matter of law. He did not preserve any other objection to the phrasing of the instruction, and we decline to review such claim in the interest of justice. As an alternative holding, we also reject it on the merits. The charge did not undermine the presumption of innocence, suggest that defendant had a motive to lie, or intimate that defendant should not be believed. Instead, it simply referred to defendant as an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the witness's truthfulness (*see People v Blake*, 39 AD3d 402, 403 [2007], *lv denied* 9 NY3d 873 [2007]). Defendant's present challenges to the phrasing of the instruction go to form rather than substance, and we do not find any constitutional deficiencies (*see Reagan v United States*, 157 US 301, 305-311 [1895]; *Hicks v United States*, 150 US 442, 451-452 [1893]).

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that defendant was not deprived of his constitutional right to a speedy trial.

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct (*see People v Rodriguez*, 100 NY2d 30, 35 [2003]). The court conducted

a thorough hearing, and we find no basis for disturbing its credibility determinations. The juror made Facebook postings that merely advised her friends that she was on a jury, but did not discuss the case in any way. Unfortunately, some of her friends made foolish replies relating to trials in general that defendant characterizes as "inflammatory." However, the juror testified unequivocally that she was not affected by these comments, that she did not discuss the case with anyone during the trial, and that she had decided the case impartially, based only on the evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7072 Michael Ervin, et al., Index 23210/06
Plaintiffs-Appellants,

-against-

Consolidated Edison of New York, et al.,
Defendants-Respondents.

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

Lewis & Cote, LLP, White Plains (Deborah A. Summers of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered January 31, 2011, which, insofar as appealed from, denied plaintiffs' motion for summary judgment on the cause of action alleging violation of Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted.

In this action for personal injuries, plaintiff Michael Ervin, was injured while working at a construction site owned by defendant Consolidated Edison where an electrical substation was being built, when a temporary structure that he was descending to gain access to grade level from the top of a concrete wall, approximately three feet high, gave way causing him to fall. It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to

afford him proper protection from a gravity-related risk (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8-10 [2011]). Accordingly, plaintiff is entitled to judgment as a matter of law on his claim pursuant to Labor Law § 240(1).

Defendants' argument, raised for the first time on appeal, that an issue of fact exists as to whether plaintiff was the sole proximate cause of his injury is unpreserved and, in any event, lacks merit. Defendants failed to submit any evidence showing that plaintiff knew or should have known that he was expected to employ some other device (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Auriemma*, 82 AD3d at 11). To the contrary, the project manager testified that there were no A-frame ladders or extension ladders provided for access to the structure.

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7073 AJW Partners, LLC, et al., Index 110349/10
Plaintiffs-Appellants,

-against-

Admiralty Holding
Company, etc., et al.,
Defendants,

Herbert C. Leeming,
Defendant-Respondent.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Thomas J. Fleming of counsel), for appellants.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 11, 2011, which granted defendant Leeming's motion to dismiss the complaint as against him, unanimously affirmed, with costs.

Plaintiffs allege that Leeming, an officer of both defendant Admiralty Holding Company (AHC) and defendant Undersea Recovery Corporation (URC), knew about plaintiffs' security agreements with AHC when he allowed AHC to enter into a license agreement with URC, and therefore knew that the license agreement would constitute a breach of the security agreements between plaintiffs and AHC. These allegations fail to state a cause of action against Leeming for tortious interference with contract or

fraudulent conveyance based on the acts of either AHC or URC. As to tortious interference with contract, there are no allegations that Leeming's procurement of the breach was malicious; that the URC license was not in the best interests of both URC and AHC; that Leeming received any personal benefit other than the benefit he received as an officer of both companies; or that Leeming acted outside the scope of his employment in entering into the URC license agreement (*see Murtha v Yonkers Childcare Assoc.*, 45 NY2d 913,917 [1978]). As to fraudulent conveyance, there are no factual allegations that give rise to an inference that Leeming, as an individual engaged in any conduct, to avoid payment to, or defraud, plaintiffs (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1999]).

Plaintiffs contend that the motion court erred in failing to address their request for leave to replead. However, there is no indication in the record that plaintiffs actually made such a request. In any event, the record contains no proposed pleading

and no affidavit of merit (*see Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [2010]).

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7074 The People of the State of New York, Respondent, Ind. 2059/95

-against-

Keisha Saunders, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Jane Levitt of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Peter J. Benitez, J. at plea; Patricia M. Nunez, J. at sentencing), rendered October, 21, 2008, convicting defendant of attempted criminal possession of a controlled substance in the third degree, and sentencing her to a term of one year, unanimously affirmed.

The court was not deprived of jurisdiction by the 13-year delay between defendant's plea and her sentencing (*see* CPL 380.30[1]; *People v Drake*, 61 NY2d 359, 366 [1984]). The delay was almost entirely caused by defendant's continuing unlawful failure to appear for sentencing, as well as her use of multiple aliases and false pedigree information at the time of her numerous arrests and incarcerations during the period of delay (*see People v Ortiz*, 60 AD3d 563 [2009], *lv denied* 12 NY3d 919

[2009]). Furthermore, defendant had many opportunities to end the delay by surrendering herself while at large, or by correctly identifying herself when arrested; instead, she "continued to disregard [her] legal duty to present [her]self for sentencing." (*People v Robinson*, 69 AD3d 498, 499 [2010], *lv denied* 15 NY3d 955 [2010]).

In 2006, the Department of Correctional Services and the Department of Criminal Justice Services discovered that defendant, then incarcerated under the name Rashonda Kareem, was also known under other names, including a name similar to the name she is using in this case. Although defendant's NYSID sheets were consolidated, there is no evidence that these State agencies, or anyone else, ever informed the District Attorney's Office that defendant was incarcerated, and such knowledge will not be imputed to the People absent some evidence that they knew

or should have known of such incarceration (*see People v Reyes*, 214 AD2d 233, 236 [1995], *lv denied* 87 NY2d 850 [1995]; *see also People v Williams*, 78 AD3d 160, 167 [2010], *lv denied* 16 NY3d 838 [2011]).

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7075 Agim Dedndreaj, Index 310410/08
Plaintiff-Appellant,

-against-

ABC Carpet & Home, et al.,
Defendants-Respondents.

Block O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for appellant.

Burke, Gordon & Conway, White Plains (Michael G. Conway of counsel), for ABC Carpet & Home, respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for Deegan Overhead Doors Company Inc., respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 7, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507 [2011]).

In opposition, defendants failed to raise a triable issue of fact. Even assuming that plaintiff disregarded warnings by walking through the passageway and under the pipe, such conduct was not the sole proximate cause of the injury (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). Nor may defendants rely upon the "recalcitrant worker" defense given that plaintiff was following his superior through the passageway, which was the only means of exiting the room (*see Ramirez v Shoats*, 78 AD3d 515, 517 [2010]).

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7076-
7077 Robert A. Denenberg, etc.,
Plaintiff-Respondent,

Index 110441/06
602453/07
603409/08

-against-

Warren Rosen, et al.,
Defendants-Appellants,

John Repetti, et al.,
Defendants-Respondents-Appellants,

Bankers Life of New York, etc., et al.,
Defendants-Respondents.

[And Other Actions]

Harrington, Ocko & Monk, LLP, White Plains (Kevin J. Harrington of counsel), for respondents-appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Emily A. Hayes of counsel), for appellants.

Schrier, Fiscella & Sussman, LLC, Garden City (Richard E. Schrier of counsel), for Robert Denenberg, respondent.

K&L Gates LLP, New York (Alyssa B. Cohen of counsel), for Bankers Life of New York, respondent.

Calinoff & Katz LLP, New York (Robert A. Calinoff of counsel), for Kenneth R. Hartstein, ECI Pension Services, LLC and Economic Concepts, Inc., respondents.

McDermott Will & Emery LLP, New York (John Litwinski of counsel), for Richard C. Smith and Bryan Cave LLP, respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 1, 2011, which, to the extent appealed from,

denied the motion of defendants Warren Rosen and Warren Rosen & Co. (Rosen) for summary judgment dismissing plaintiff's unjust enrichment claim as against them and the cross claims of defendants John Repetti and Graf Repetti & Co., LLP (Repetti) for contribution and indemnification as against them, denied the cross motion of Repetti to dismiss plaintiff's cause of action for unjust enrichment as against them, and granted the motions of defendants Bankers Life of New York (Bankers), Kenneth R. Hartstein, ECI Pension Services, LLC, Economic Concepts, Inc. (collectively Hartstein), and Richard C. Smith and Bryan Cave, LLP (collectively Bryan Cave) to dismiss Repetti's cross claims for contribution and indemnification as against them, unanimously affirmed, with costs.

In this action alleging that defendants induced plaintiff to establish a pension plan that guaranteed tax benefits that were later disallowed, the motion court properly determined that plaintiff's unjust enrichment claims as against Rosen, an insurance broker, and Repetti, an accountant, were viable. Plaintiff sufficiently alleges that these defendants were enriched, at plaintiff's expense, by receiving financial incentives in return for their marketing and promotion of the tax shelter scheme (*see generally Mandarin Trading Ltd v Wildenstein*,

16 NY3d 173, 182 [2011]; *see also Georgia Malone & Co. v Rieder*, 86 AD3d 406, 408-409 [2011]).

The motion court properly dismissed Repetti's cross claims for contribution and common-law indemnification against Bankers, the provider of the insurance policies, Hartstein, who administered the pension plan, and Bryan Cave, his attorneys. It has been determined in this litigation and in the prior appeal (*see* 71 AD3d 187 [2010], *lv dismissed* 14 NY3d 910 [2010]) that, as relevant to plaintiff's claims, these defendants did not give plaintiff professional advice, did not have a fiduciary or confidential relationship with him upon which a duty of care could be imposed and cannot be held liable to plaintiff or Repetti based upon their opinion letters or promotional materials (*see Seldin v Smith*, 76 AD3d 623 [2010]). Moreover, notwithstanding the policy liberally favoring the granting of permission to amend pleadings, Repetti has not shown that amendment of the cross claims was warranted.

The court also properly determined that Rosen owed plaintiff

a duty to disclose information that was relevant to affairs entrusted to them. Accordingly, they were not entitled to dismissal of Repetti's cross claims against them.

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7078-
7079 Index 118318/09

Mary Matias, et al.,
Plaintiffs-Appellants,

-against-

Merck Sharp & Dohme
Corp., etc., et al.,
Defendants-Respondents.

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about November 15, 2010, and judgment, same court and Justice, entered on or about December 22, 2010,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 21, 2012,

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7080 UBS Securities LLC, et al., Index 650097/09
Plaintiffs-Respondents,

-against-

Highland Capital Management, L.P., et al.,
Defendants,

Highland Financial Partners, L.P., et al.,
Defendants-Appellants.

Lackey Hershman, LLP, New York (Kieran M. Corcoran of counsel), for appellants.

Kirkland & Ellis, LLP, New York (Andrew B. Clubok of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 3, 2011, which denied the motion of defendants Highland Financial Partners, L.P., Highland Credit Opportunities CDO, L.P., and Strand Advisors, Inc. to dismiss the amended complaint's causes of action for declaratory judgment and fraudulent conveyance, unanimously modified, on the law, to the extent of granting the motion with respect to claims arising before February 2009, and otherwise affirmed, without costs.

This Court's reversal of an order denying dismissal of the complaint in a related action (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469 [2011]), warrants dismissal of a portion

of plaintiff's claims in this action due to res judicata since defendants are in privity with the defendant in the other action (*see Simmons v New York City Health & Hosps. Corp.*, 71 AD3d 410, 411 [2010], *lv denied* 16 NY3d 709 [2011]).

Contrary to plaintiff's contention, there is no need to remand the matter for a determination regarding whether defendants are in privity with defendant Highland Capital Management, L.P. The complaint seeks to hold Highland Financial liable as the alter ego of defendant Highland Special Opportunities Holding Company (SOHC). The motion court correctly ruled that New York law governs plaintiff's veil-piercing claim (*see Serio v Ardra Ins. Co., Ltd.*, 304 AD2d 362 [2003], *lv denied* 100 NY2d 516 [2003]), and that such claim was sufficiently stated based on the alter ego allegations which allege, inter alia, that SOHC's sole board member is on Highland Financial's board, Highland Financial did not distinguish between its debts and obligations and those of SOHC, and that it operated SOHC and Highland Financial as a single economic entity. The fraudulent conveyance claim is also sufficiently stated with particularized

detail (*see* CPLR 3016[b]*; Holme v Global Mins. & Metals*, 63 AD3d 417, 418 [2009]), insofar as the complaint specifically alleges certain fraudulent conveyances and transfers.

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7081 Good Life Realty, Inc., Index 104500/09
Plaintiff-Appellant,

-against-

Massey Knakal Realty of
Manhattan, LLC, etc.,
Defendant-Respondent.

Tsyngauz & Associates, P.C., New York (Michael Treybich of counsel), for appellant.

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 11, 2011, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff failed to show that it was the "procuring cause" of the sale of the cooperative unit so as to qualify for a real estate brokerage commission (*see Greene v Hellman*, 51 NY2d 197, 205–206 [1980]). Plaintiff's principal made the buyer aware that the unit was being offered for sale, but there was no "direct and proximate link" between that "bare introduction and the consummation" (*see id.*). Plaintiff's principal did not introduce

the buyer to the seller, did not show the unit to the buyer, did not negotiate the sale price, did not personally see the unit, did not attend the closing, and had no contact with defendant, the broker exclusively responsible for listing the property (*see id.*; *Manning v Briar Hall N.*, 151 AD2d 650 [1989]; *Taibi v American Banknote Co.*, 135 AD2d 810 [1987], *lv denied* 72 NY2d 803 [1988]).

Moreover, plaintiff and Joseph Klaynberg, the unlicensed third party who allegedly performed brokerage services on plaintiff's behalf, admitted that neither of them had entered into a co-brokerage agreement with defendant (*see Brandenberg v Waters Place Assoc., L.P.*, 17 AD3d 615 [2005]).

In any event, plaintiff was barred by Real Property Law § 442-d from recovering a co-brokerage commission based upon services rendered by Klaynberg, because Klaynberg was not a duly licensed real estate broker or salesperson (*see City Ctr. Real*

Estate, Inc. v Berger, 39 AD3d 267 [2007], *lv denied* 9 NY3d 814 [2007]; *Siegel v Henry Fippinger, Inc.*, 264 App Div 203 [1942]).

Plaintiff's claim for money had and received is without merit.

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7082-
7083-
7084 In re Joel O., and Another,

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

Administration for Children's Services,
Petitioner-Respondent,

Yvonne O., et al.,
Respondents-Appellants.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Yvonne O., appellant.

Patricia W. Jellen, Eastchester, for Alberto T., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondent.

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

Order of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about December 1, 2010, which, upon fact-findings that respondents neglected the child Kenneth O. and derivatively neglected the child Joel O., placed the children in the custody of the Commissioner of Social Services until the completion of the next permanency hearing, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence that the younger child, who is autistic, suffered injuries that would ordinarily not occur absent acts or omissions of respondents, his caretakers (*Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]). The doctor who examined the child at the hospital testified that the child's injuries, which included multiple bruises on his body and a bruised lip, were not accidental and could not have been caused by adults trying to lift him off the ground, as the mother's boyfriend claimed. Respondents' explanation that the child was injured in school was not supported by any evidence. Indeed, the school psychologist denied that the child was ever lifted off the ground, and she noted that respondent mother had never complained about the child's treatment at the school, which he had attended for over two years, until shortly before he left.

The court was permitted to draw an adverse inference against the mother based on her failure to testify (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983]). In addition, the record shows that the mother's boyfriend, who resided with the mother and children during the relevant time and was an active participant in the children's lives, was a person legally responsible for the children within

the meaning of Family Court Act § 1012(g) (*see Matter of Samantha M.*, 56 AD3d 299, 300-301 [2008], *lv denied* 11 NY3d 716 [2009]).

The evidence supporting neglect of the younger child also supported the finding of derivative neglect of the older child (*see Matter of Samantha M.*, 56 AD3d 299, 301 [2008], *lv denied* 11 NY3d 716 [2009]; Family Court Act § 1046[a][i]).

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: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7085 The People of the State of New York, Respondent, Ind. 2246/07

-against-

William Steele, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Davis Polk & Wardwell LLP, New York (Justin Sommers of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered October 22, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, attempted assault in the first degree, assault in the second degree (two counts), robbery in the first degree, criminal possession of a weapon in the second degree and burglary in the second degree, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

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

inconsistency between an eyewitness's testimony and his alleged prior statements. The element of homicidal intent could be inferred from defendant's act of firing two shots at the victim at close range, striking him in the shoulder (*see e.g. People v Cabassa*, 79 NY2d 722, 728 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]).

Defendant did not preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). While the prosecutor's comment about sending a "message" should have been avoided, that isolated comment could not have deprived defendant of a fair trial.

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7087 Private Capital Group, LLC, et al., Index 650338/07
Plaintiffs-Respondents,

-against-

Private Lender Service Corp., et al.,
Defendants,

Gnosis LLC,
Defendant-Appellant.

Law Offices of Ira Bierman, Syosset (Ira Bierman of counsel), for appellant.

Alston & Bird LLP, New York (Michael P. De Simone of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 23, 2010, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on their claims for conversion and replevin, unanimously affirmed, with costs.

The motion court correctly found that Gnosis was not a holder in due course of the mortgages it had acquired using plaintiffs' funds because its principal, Michael Bode, had actual knowledge, and not merely reason to know, of plaintiffs' claim (*see* Uniform Commercial Code § 3-304 [7]; *Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 162-163 [1989]). Such

knowledge was derived from all the attendant circumstances, including Bode's participation in the underlying diversion of plaintiffs' funds and his signing of the mortgage transfer documents, and not just from the complaint in a related action.

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, DeGrasse, Román, JJ.

7088 Madonna Constantine, Index 116528/08
Plaintiff-Appellant,

-against-

Teachers College, et al.,
Defendants-Respondents.

Paul J. Giacomo, Jr., New York, for appellant.

Nixon Peabody LLP, Jericho (Michael S. Cohen of counsel), for Teachers College, Trustees of Teachers College of Columbia University, Christine Yeh, Karen Cort and Tracy Juliao, respondents.

Hughes, Hubbard & Reed LLP, New York (Derek J.T. Adler of counsel), for Hughes, Hubbard & Reed LLP and George Davidson respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 19, 2010, which granted the motions for summary judgment of defendants Teachers College and the Trustees of Teachers College of Columbia University (the College defendants), Christine Yeh, Karen Cort, Tracy Juliao (the individual defendants), George Davidson, and Hughes, Hubbard and Reed LLP (the HHR defendants), and dismissed the complaint in its entirety, unanimously affirmed, with costs.

The IAS court properly found that plaintiff's claims are barred by the principle of collateral estoppel (*see BDO Seidman*

LLP v Strategic Resources Corp., 70 AD3d 556, 560 [2010]). The defamation issues presented by this action are identical to a material issue decided in a prior article 78 proceeding, and plaintiff had a full and fair opportunity to litigate the issue in that proceeding (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500–501 [1984]); *Matter of Abady*, 22 AD3d 71, 81 [2005]). This Court affirmed those findings in a prior action (*Matter of Constantine v Teachers Coll.*, 85 AD3d 548 [2011]).

Even if the defamation issues were not litigated in the article 78 proceeding, they are nonetheless barred by collateral estoppel since they were also at issue in the College defendants' Faculty Advisory Committee (FAC) proceeding, which was quasi-judicial in nature and therefore entitled to collateral estoppel effect (*Samhammer v Home Mut. Ins. Co. of Binghamton*, 120 AD2d 59, 62-63 [1986]). Similarly, the FAC's finding that plaintiff committed plagiarism bars the action against the HHR defendants as well as the individual defendants. As noted above, the finding of plagiarism provides a complete defense to plaintiff's defamation claims against all parties (*see Ryan*, 62 NY2d at 503).

Collateral estoppel notwithstanding, this matter would be subject to dismissal upon the grounds of absolute and qualified privilege. The statements complained of were made during

judicial or quasi-judicial proceedings, were relevant to those proceedings, and thus were absolutely privileged (*Lacher v Engel*, 33 AD3d 10, 13 [2006]; *Bassim v Howlett*, 191 AD2d 760, 762 [1993]). Similarly, the communications were subject to a qualified privilege, which is a defense to a defamation claim, as the communications were made to persons who had some common interest in the subject matter (*Foster v Churchill*, 87 NY2d 744, 751 [1996]). Although the defense of qualified privilege will be defeated by demonstrating that a defendant spoke with malice (*id.* at 752), plaintiff failed to adduce evidentiary facts sufficient to permit such an inference (*Hanlin v Sternlicht*, 6 AD3d 334, 334-35 [2004]).

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7089 Pat Roddy, Index 113659/02
Plaintiff,

-against-

Nederlander Producing Company
of America, Inc., et al.,
Defendants-Appellants,

Abhann Productions, Inc., et al.,
Defendants.
- - - - -
The Gershwin Theatre,
Third-Party Plaintiff,

-against-

Abhann Productions, Inc.,
Third-Party Defendant-Respondent.

Law Offices of Charles J. Siegel, New York (Robert S. Cypher, Jr. of counsel), for appellants.

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

Order, Supreme Court, New York County (Louis B. York, J.), entered September 30, 2011, which denied defendants Nederlander Producing Company of America, Inc. and the Gershwin Theatre's motion to require former defendant Abhann Productions, Inc. to indemnify Nederlander, unanimously affirmed, with costs.

Defense counsel admitted in prior motion papers that Nederlander could not assert a cross claim for contractual

indemnification because it was not an indemnitee named in the license agreement for use of the theater. Moreover, Nederlander has not shown that it ever pleaded a cause of action for contractual indemnification against Abhann, and its motion, brought after years of litigation, is unsupported by any evidence in the record and prejudices plaintiff's interest in the resolution of his claims (*see Kramer v Danalis*, 49 AD3d 263 [2008]). The motion court correctly concluded that this court did not award Nederlander indemnification against Abhann in a prior appeal in which we granted Gershwin's motion for summary judgment on its contractual indemnification claim against Abhann (*see* 44 AD3d 556 [2007]).

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7090 In re Episcopal Health Services, Inc., Index 115699/10
Petitioner-Appellant,

-against-

Kurron Shares of America, Inc.,
Respondent-Respondent.

Epstein Becker & Green, P.C., New York (Matthew T. Miklave of counsel), for appellant.

Vandenberg & Feliu, LLP, New York (Bertrand C. Sellier of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard Fried, J.), entered September 30, 2011, denying the petition pursuant to CPLR article 75 to permanently stay an arbitration and dismissing the proceeding, unanimously affirmed, without costs.

Petitioner sought the stay by arguing that the management agreement between the parties, and hence the arbitration agreement contained therein, was invalid based upon the failure to have the agreement approved by the Commissioner of the New York State Department of Health (10 NYCRR 405.3 [f]). The IAS court correctly rejected this argument, determining that, under the Federal Arbitration Act, which the parties concede applies here: (1) the arbitration clause was severable from the alleged invalid agreement and still enforceable and (2) the issue of the

validity of the entire agreement was one for the arbitrator to decide in the first instance (*see e.g. Buckeye Check Cashing, Inc. v Cardegna*, 546 US 440, 445-446 [2006], *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v St. Barnabas Community Enters., Inc.*, 48 AD3d 248, 249 [2008]).

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

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7091 Herman Fleischman, etc., Index 106772/10
Plaintiff-Respondent,

-against-

New York Life Insurance
and Annuity Corporation,
Defendant-Appellant.

Drinker Biddle & Reath LLP, New York (Stephen R. Harris of counsel), for appellant.

Lipsius-BenHaim Law, LLP, Kew Gardens (Ira S. Lipsius of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 19, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion, which was based on the theory of accord and satisfaction, was properly denied since defendant failed to show that there was a "clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim" (*Nationwide Registry & Sec. v B&R Consultants*, 4 AD3d 298, 300 [2004]; *see Manley v Pandick Press*, 72 AD2d 452 [1980], *appeal dismissed* 49 NY2d 981 [1980]). Here, there was nothing on the refund check or in the letter enclosing the check that

indicated that the check was tendered only on the condition that it was in full payment of the disputed claim (*see Nadel v Manhattan Life Ins. Co.*, 211 AD2d 900, 902 [1995]; *compare Sarbin v Southwest Media Corp.*, 179 AD2d 567 [1992]).

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7092 The People of the State of New York, Respondent, Ind. 4596/02

-against-

Troy Jackson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about June 15, 2009, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure to risk level one (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate any mitigating factors not taken into account by the risk assessment instrument

that would warrant a downward departure. Furthermore, the mitigating factors cited by defendant were outweighed by the seriousness of the underlying sex offense, as well as defendant's criminal history.

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

ENTERED: MARCH 13, 2012

CLERK

Tom, J.P., Saxe, Acosta, DeGrasse, Román, JJ.

7093N Daniel Wise, Index 108739/10
Plaintiff-Appellant,

-against-

378 Third Avenue Associates LLC, et al.,
Defendants,

Robert George,
Defendant-Respondent.

Weiss & Hiller, PC, New York (Arnold M. Weiss of counsel), for appellant.

Romeo J. Salta, New York, for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 14, 2011, which granted Robert George's motion to intervene, unanimously affirmed, with costs.

As the motion court observed, it is impossible on this record to determine the true owner of the disputed promissory note. Thus, plaintiff's argument in opposition to George's motion to intervene, that the alleged assignment of the note to George was a fraudulent conveyance under Debtor and Creditor Law § 273, is unavailing. Plaintiff has not established that he was a creditor; issues of fact exist whether he was reimbursed for any renovations completed at the property and whether he owed "hundreds of thousands of dollars" as a result of his failure to

pay rent throughout 2006.

Plaintiff has no standing to argue that the two promissory notes totaling $610,000, with an interest rate of 24%, that were allegedly given to George by James Gomez are usurious and therefore void. These two notarized promissory notes are sufficient to establish George's claim that the disputed note was assigned to him. In view of the existing factual issues, plaintiff's contentions that the transfer to him cannot be voided by the non-assignability provision of the disputed note and that George's claim is rife with fraud are unavailing.

George's interest in the disputed note, as well as in monies currently in escrow, will be adversely affected if he is not permitted to intervene and it is determined that he is owed money (*see* CPLR 1013). His motion to intervene was timely under the circumstances, and plaintiff has failed to allege any prejudice to him resulting from the intervention.

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

ENTERED: MARCH 13, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6283-
6284 Index 103436/10

Susan Scott Stanley, et al.,
Plaintiffs-Appellants,

-against-

Amalithone Realty, Inc., et al.,
Defendants-Respondents.

Whitney North Seymour, Jr., New York, for appellants.

Brown Rudnick LLP, New York (Wayne F. Dennison of counsel), for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 8, 2011, affirmed, without costs. Appeal from order, same court and Justice, entered March 23, 2011, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

6283-6284
Index 103436/10

x

Susan Scott Stanley, et al.,
Plaintiffs-Appellants,

-against-

Amalithone Realty, Inc., et al.,
Defendants-Respondents.

x

Plaintiffs appeal from a judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered July 8, 2011, dismissing the complaint, and from an order, same court and Justice, entered March 23, 2011, granting defendants' motion to dismiss the complaint.

Whitney North Seymour, Jr., New York, and Gabriel North Seymour, New York, for appellants.

Brown Rudnick LLP, New York (Wayne F. Dennison and Katherine S. Bromberg of counsel), for respondents.

ACOSTA, J.

Plaintiffs are apartment residents seeking, inter alia, the removal of a cell phone tower from a nearby rooftop based on allegations that the tower's radio frequency emissions present a danger to health and constitute a nuisance. Defendant Amalithone Realty, Inc. owns the building with the cell phone tower, 113-115 University Place, in Manhattan. Defendant Amalgamated Lithographers of America, Local One, occupies Amalithone's building, and is the building's alleged beneficial owner. AT&T, a nonparty, leases or licenses the rooftop space where the cell phone tower was constructed and is the owner of the tower. At issue in this appeal is whether an action against the continued maintenance and operation of the rooftop cell phone tower is preempted by federal standards permitting the subject radio frequency radiation (RFR). We hold that plaintiffs' claims are preempted by the Telecommunications Act of 1996 (TCA). We thus affirm the dismissal of the complaint.

Background

Plaintiffs and their minor son have resided in an apartment on East 12th Street in Manhattan since about April 2007. Shortly after occupying the apartment, plaintiffs allegedly began to experience ill health. An environmental consultant and an electrical engineer they hired allegedly found high levels of

radio frequency radiation in their apartment. Believing that the cell phone tower on defendant's nearby building is responsible for their ill health, plaintiffs' counsel wrote on November 2, 2009 to Amalithone requesting removal of the cell phone tower and enclosing a list of recent foreign studies of the health effects of cell antennas. After Amalithone failed to respond to plaintiffs' letter, plaintiffs sent a follow up letter on December 2, 2009. On December 17, 2009, Michael Minieri, the building manager of 113-115 University Place, sent a fax to plaintiffs' counsel from the office of defendant Amalgamated Lithographers of America, Local One enclosing an AT&T safety compliance certification indicating that the cell tower met FCC RFR regulations on July 5, 2009.

On March 16, 2010, plaintiffs filed a complaint pleading numerous causes of action, including claims for nuisance, trespass and an unlawful taking. In their prayer for relief, plaintiffs seek: a permanent injunction requiring the removal of all cell transmission antennas; damages for personal and property injury; punitive damages; and a declaratory judgment that they were entitled not to be subjected to unreasonable levels of RFR in their home from wireless transmission antennas. Defendants moved to dismiss the complaint pursuant to CPLR 3211 on various grounds, including federal preemption and the failure to join an

indispensable party. In opposition, plaintiffs argued that preemption does not apply because they are not seeking to "regulate" radio frequency emissions and defendants were the primary and necessary parties to the lawsuit.

The motion court dismissed the complaint, finding nonparty AT&T indispensable under CPLR 1001(b) because it would be prejudiced unless able to address the ultimate relief sought, namely, removal of its cell phone tower (31 Misc 3d 995 [2011]). The court also found that plaintiffs would have a meaningful forum in the event of dismissal; namely, a petition to the Federal Communications Commission (FCC) to deny AT&T's license renewal and seek review of the resulting decision in federal court (*id.*).

The motion court expressly declined to address the preemption issue in its opinion. We, however, find that issue dispositive and conclude that plaintiffs' claims are preempted by federal law. Accordingly, we affirm the dismissal of the complaint.

Federal Preemption

The TCA, which is part of the Federal Communications Act of 1934 (FCA) and is administered by the FCC,[1] restricts the ability

[1]Under the FCA, the FCC is responsible for regulating wire and radio communication service nationwide (*see generally* 47 USC

of states to regulate cellular towers through state statutes and state common law.[2] The TCA imposes certain express limitations on the exercise of the states' traditional authority over the placement of facilities for wireless communications (*see City of Rancho Palos Verdes, Cal. v Abrams*, 544 US 113, 115 [2005]). In pertinent part, the TCA provides:

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

(47 USC § 332[c][7][B][iv]).[3] In addition to the specific restrictions on state regulatory powers in the TCA, the FCC has used its somewhat circumscribed preemption authority under that statute to issue an interpretive ruling preempting state and

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151 *et seq.*).

[2]In determining the preemptive scope of 47 USC § 332, the FCC has concluded that "judicial action constitutes a form of state regulation" (*In re Wireless Consumers Alliance, Inc.*, 15 FCCR 17021, 17027 [2000]). We find the FCC's conclusion persuasive and will treat, for the purposes of our preemption analysis, common-law causes of action as being no different from claims based on a state statute or state regulation (*see Bennett v T- Mobile USA, Inc.*, 597 F Supp 2d 1050, 1053 [CD Cal 2008]; *Murray v Motorola, Inc.*, 982 A2d 764, 777 [DC 2009]).

[3]For the purpose of interpreting 47 USC § 332[c][7][B][iv], we treat the term "environmental effect" as interchangeable with "health concerns" (*Cellular Tel. Co. v Town of Oyster Bay*, 166 F3d 490, 495 n 3 [2d Cir 1999]; *T-Mobile Northeast LLC v Town of Ramapo*, 701 F Supp 2d 446, 460 [SD NY 2009]).

local governments from regulating the operation of personal wireless facilities that comply with FCC regulations for RF emissions (*Cellular Phone Taskforce v FCC*, 205 F3d 82, 95 [2d Cir. 2000], *cert denied*, 531 US 1070 [2001], referring to *In the Matter of Guidelines for Evaluating the Envtl. Effects of Radio Frequency Radiation*, 11 FCCR 15123 [1996]).

When reviewing a preemption defense, we first consider whether our analysis must be guided by the presumption against preemption.[4] In so doing, we begin with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (*Wyeth v Levine*, 555 US 555, 565 [2009] [internal quotation marks omitted).[5] Indeed, the presumption has

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[4]If the presumption against preemption is applicable, the nature of the Congress' preemption is irrelevant (*see Wyeth v Levine*, 555 US 555, n 3 [2009]; *Altria Group, Inc v Good*, 555 US 70, 76 [2008]).

[5]Thus, the mere fact that the federal government has also been regulating in an area for a particularly long time — as is true in the area of telecommunications — does not per se undercut the presumption against preemption (*compare Wyeth v Levine*, 555 US 555, 565, n3 [2009] [applying the presumption even though the FDA has been regulating in the area for almost a century], *with United States v Locke*, 529 US 89, 107-109 [2000] [declining to apply the presumption where "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" because of the overwhelmingly federal nature of the area, i.e., national and international maritime commerce, in which the state was attempting to regulate]).

particular force where an act of Congress implicates a state's historic "police powers" (*see Medtronic, Inc. v Lohr*, 518 US 470, 485 [1996]). We thus interpret the relevant portions of the TCA with the understanding that we should favor a reading of the statute that disfavors preemption (*see Altria Group, Inc. v Good*, 555 US 70, 77 [2008] ["(W)hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption'"]; *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 US 707, 716 [1985] [requiring a "strong" showing to establish implicit preemption]).

In deciding whether state law is preempted by the TCA (or, more broadly, any federal law), "[t]he purpose of Congress is the ultimate touchstone in every preemption case" *(Altria Group, Inc*, 555 US at 76 [internal quotation marks omitted]).[6] The Supreme Court has explained that there are three ways of establishing Congress' preemptive intent:

[1] Congress may indicate pre-emptive intent through a

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[6]We may also consider a federal agency's views respecting preemption under the statute it administers (*cf Wyeth*, 555 US at 576-77; *Geier v American Honda Motor Co., Inc.*, 529 US 861 [2000] ; *Lohr*, 518 US 470; *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 US 707 [1985]). However, "we [need] not defer to an agency's ultimate conclusion about whether state law should be pre-empted" (*PLIVA, Inc. v Mensing*, 564 US _, 131 S Ct 2567, 2584 n 3 [2011], citing, *Wyeth*, 555 US at 576).

> statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if [2] the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or [3] if there is an actual conflict between state and federal law."

(*Id.* [internal citations omitted]).

Since 47 USC § 332(c)(7)(B)(iv) does "not expressly command the displacement of state [common law] claims concerning wireless service [towers]," we do not believe that the TCA should be interpreted to expressly preempt the plaintiffs' common law claims (*see Jasso v Citizens Telecom. Co. Of Cal.*, 2007 WL 2221031, *6, 2007 US Dist LEXIS 54866, *18 [ED Cal 2007]).

We next address whether the narrowest ground for preemption - conflict preemption - is sufficient to preempt the plaintiffs' claims. To the extent that a law or regulation of this state conflicts with the TCA of 1996 or any of the FCC's valid regulations under that statute, it is preempted and has no effect (*see Capital Cities Cable, Inc. v Crisp*, 467 US 691, 699 [1984], citing *Fidelity Federal Sav. & Loan Assn. v De la Cuesta*, 458 US 141, 153-154 [1982]). A conflict between state and federal law arises "when it is impossible for a private party to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress" (*PLIVA, Inc. v Mensing*, 564 US __, 131 S Ct 2567, 2587 [internal quotation marks and citation omitted]). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects" (*Crosby v National Foreign Trade Council*, 530 US 363, 373 [2000]).

Here, we find that such a conflict exists. The FCC, pursuant to its regulatory authority, has set forth Maximum Permissible Exposure limits for RF radiation (*see* 47 CFR § 1.1310). Plaintiffs allege that high levels of RF emissions, measuring 30,000 microwatts per square meter, were found in various areas of their apartment. When plaintiffs' measurements are converted to the unit of measurement used by the FCC, it is apparent that the levels found in plaintiffs' apartment are entirely within the permissible range of the FCC's guidelines and therefore consistent with federal law. In any event, defendants gave plaintiffs a certificate of compliance with the FCC regulations provided to them by AT&T in connection with plaintiffs' concerns about the RF emissions. That certificate, issued by AT&T, undisputedly reflects compliance with the FCC's regulations.

Although plaintiffs assert that they are not asking this Court to regulate RF emissions, all of plaintiffs' claims are

premised on the notion that the RF emissions emanating from 113-115 University Place are unsafe or dangerous. Entertaining plaintiffs' claims would require us to second guess the FCC's standards and engage in our own form of judicial regulation of RF emissions. Because "allow[ing] state law challenges to the judgment of Congress and the FCC with respect to allowable levels of RF emissions would interfere with the goal of national uniformity in telecommunications policy,"[7] we believe that the presumption against preemption is overcome by the need to preclude the conflict between state and federal law that would arise were we to entertain plaintiff's state law claims. In short, AT&T's cell phone towers are in compliance with FCC regulations and thus not subject to the kind of state regulation that plaintiff seeks. Consequently, we hold that plaintiffs' claims are preempted on the grounds of conflict preemption (*Bennett*, 597 F Supp 2d at 1053; *cf. Matter of Procedures For Reviewing Requests For Relief From State & Local Regulations Pursuant To Section 332(c)(7)(B)(v) Of The Communications Act Of*

[7](*Bennett*, 597 F Supp 2d at 1053; *accord Jasso*, 2007 WL 2221031,*7-8 2007 US Dist LEXIS 54866, *26 ["(The) determination (that plaintiffs seek) would undo the FCC's balancing between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that the industry be allowed to provide telecommunications services to the public"] [internal quotation marks omitted]).

1934, 15 FCCR 22821, 22828 [2000] ["(A) local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions"]; *Perrin* v *Bayville Vil. Bd.*, 2008 NY Slip Op 32401(U), *6-7).

Were we not affirming on preemption grounds, we would nonetheless affirm on the ground relied on by the motion court, i.e., failure to join an indispensable party.

Accordingly, the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered July 8, 2011, dismissing the complaint, should be affirmed, without costs. The appeal from the order, same court and Justice, entered March 23, 2011, which granted defendants' motion to dismiss the complaint, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: MARCH 13, 2012

CLERK