SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 28, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1008 Hector Rodriguez, Index 305618/11
Plaintiff-Respondent,

-against-

Heritage Hills Society, Ltd.,
Defendant-Respondent,

M.J.C. Construction Corp.,
Defendant-Appellant.

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Carroll McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for appellant.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for Hector Rodriguez, respondent.

Thomas M. Bona, P.C., White Plains (Kimberly C. Sheehan of counsel), for Heritage Hills Society, Ltd., respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered January 13, 2015, which, to the extent appealed from, granted defendant Heritage Hills Society, Ltd.'s motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it and on its cross claims against defendant M.J.C. Construction Corp. (MJC) for contractual

indemnification and breach of a contractual obligation to procure insurance, unanimously modified, on the law, to make the grant of the motion as to the cross claim for contractual indemnification conditional, and to deny the motion as to the cross claim for failure to procure insurance, and otherwise affirmed, without costs.

The open trap door through which plaintiff fell was not a latent hazard, and defendant Heritage Hills (the owner) failed to make a prima facie showing that it did not create or have notice of the allegedly dangerous condition. Although an issue of fact exists as to Heritage Hills' negligence under the common law and Labor Law § 200, since plaintiff did not appeal from the order dismissing those claims, and defendant MJC (the contractor) is not aggrieved by the dismissal of those claims, the claims will not be reinstated (*see Hecht v City of New York*, 60 NY2d 57 [1983]; *Mixon v TBV, Inc.*, 76 AD3d 144 [2d Dept 2010]; *see also Vazquez v Diamondrock Hospitality Co.*, 100 AD3d 502, 503 [1st Dept 2012]). Nevertheless, Heritage Hills is entitled to summary judgment on its cross claim against MJC for contractual indemnification only on the condition that Heritage Hills is found free from negligence on the remaining Labor Law claims (General Obligations Law § 5-322.1[1]; *Cuomo v 53rd & 2nd Assoc.*,

LLC, 111 AD3d 548 [1st Dept 2013]).

Heritage Hills failed to establish prima facie that MJC breached its contractual obligation to procure an insurance policy naming it as an additional insured. The insurance policy procured by MJC defines an additional insured as "any person or organization to whom the Named Insured has agreed by written contract to provide coverage." Heritage Hills submitted no evidence that, as it argues on appeal, it "has not been insured by MJC's insurance company." Because this issue cannot be resolved on the existing record, summary judgment on the cross claim is unwarranted.

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

ENTERED: JULY 28, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

1225 Mercedes Hernandez, etc., Index 350468/10
Plaintiff-Appellant,

-against-

David Cespedes,
Defendant-Respondent,

Jose A. Bencosme, et al.,
Defendants.

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Law Offices of Frank A. Whelan, P.C., Rockville Centre (Frank A. Whelan of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendant David Cespedes's motion for summary judgment dismissing plaintiff's claims based on a lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law by showing that plaintiff did not suffer a serious injury to her cervical spine, lumbar spine, or right knee as a result of the motor vehicle accident at issue. Defendant submitted the affirmed reports of an orthopedist and a neurologist, showing no

significant limitations, negative clinical results, and a resolved sprain and contusion (*see Michels v Marton*, 130 AD3d 476 [1st Dept 2015]; *Ahmed v Cannon*, 129 AD3d 645 [1st Dept 2015]). Defendant also submitted a radiologist's affirmed report which found, upon review of the MRI scans, no evidence of any disc bulges or herniations in the spine, no recent or acute posttraumatic or causally related disc changes, and only preexisting degenerative changes in the knee (*see Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]; *Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. She provided no medical findings of resulting limitations in use of her spine or right knee, shown by either quantified range of motion testing or by a qualitative assessment of her limitations compared with normal function (*see Toure v Avis Rent A Car Sys, Inc.*, 98 NY2d 345, 350, 353 [2002]). Plaintiff's orthopedic surgeon never examined her spine, and, although he performed diagnostic arthroscopic surgery on her right knee, he failed to set forth any findings of limitations in the knee, either before or after the surgery (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]). In light of the absence of evidence of limitations, the orthopedist's conclusory opinion that the

accident caused the right knee injury was also insufficient (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]). Furthermore, the unaffirmed MRI reports, which were the only objective evidence submitted by plaintiff concerning her claims of spinal injury, are inadmissible because they are unsworn, and ere not relied upon by defendant's experts (*see Malupa v Oppong*, 06 AD3d 538, 539 [1st Dept 2013]).

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

ENTERED: JULY 28, 2016

CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1246-
1247 In re Ronald D. Corwin, et al.,
Petitioners-Appellants,

-against-

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

Index 150668/15

Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellants.

Goodman & Jacobs LLP, New York (Thomas J. Cirone of counsel), for respondents.

Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered April 30, 2015, denying the petition for leave to amend the notice of claim pursuant to General Municipal Law § 50-e(6) or to serve a late notice of claim pursuant to General Municipal Law § 50-e(5), and dismissing the proceeding, reversed, on the facts, without costs, and the petition for leave to serve a late notice of claim granted. Appeal from order, same court and Justice, entered July 10, 2015, to the extent it denied petitioners' motion to renew, unanimously dismissed, without costs, as academic.

Petitioner Ronald Corwin (petitioner) was injured when the front wheel of the Citi Bike he was riding struck an unpainted

concrete wheel stop placed at the entrance to the Citi Bike station located at East 56th Street near Madison Avenue, causing the bike to flip over. Petitioner was riding his bike through the station to avoid car traffic. Petitioners (petitioner's wife is proceeding derivatively) served a timely notice of claim against the City alleging, inter alia, that petitioner's injuries were a result of its "negligence, recklessness and carelessness" in maintaining the station, particularly in the placement of a wheel stop that was not visible. The notice of claim alleged injuries to petitioner's head. Petitioners commenced a federal diversity action in the Southern District of New York that set forth the same allegations as those in the notice of claim.

In its answer in the federal action, the City asserted an affirmative defense that petitioner's own culpable conduct contributed to his injuries, but it did not specify what that conduct was. However, during a status conference before the United States Magistrate Judge who was overseeing discovery in the federal action, the City clarified that the comparative fault defense was based on the fact that petitioner had failed to wear a helmet. Petitioners' counsel indicated in the conference that petitioners would seek leave to amend the notice of claim to include an allegation that the City had a duty to provide

helmets. When the City's counsel responded that the City would oppose the amendment because it had no such duty, petitioners' counsel stated as follows:

> "The point is they can't have it both ways. They can't say we didn't have a helmet but we don't provide helmets because we know that our City bike share program is not going to work if we have a helmet law."

Petitioners then moved for leave to amend the federal complaint to add new allegations that the City was negligent in failing to provide helmets. They also sought to amend the complaint to add, as additional defendants, the private contractor that the City retained to implement the bike program; that entity's parent company, and a related entity that assisted in the design of the system. The Magistrate granted the motion. The City filed an amended answer that specifically cited as an affirmative defense that petitioner's failure to wear a helmet contributed to his injuries and damages.

Petitioners then commenced this proceeding seeking leave to amend their notice of claim to conform to the amended complaint in the federal action, and moved by order to show cause for leave to amend the notice of claim in accordance with the petition. They argued that they were entitled to the amendment under General Municipal Law § 50-e(6), which permits amendments to

correct "a mistake, omission, irregularity or defect," because the amendments were all still grounded in negligence and, therefore, did not assert new theories of liability. They further argued that the City would not be prejudiced by the amendment. They additionally asserted that, even if the amended notice of claim contained impermissible new theories of liability, the court could still grant leave to serve a late notice of claim under General Municipal Law § 50-e(5), since there was no unreasonable delay in seeking amendment, the City had timely actual knowledge of the essential facts constituting the claims, and, as such, the delay in asserting the new theory of liability did not substantially prejudice the City in maintaining its defense on the merits.

The proposed amended notice appended to the motion repeated the allegations set forth in the amended federal complaint. Specifically, it alleged that the City was "negligent, grossly negligent and committed professional negligence and malpractice" by designing the station in a way that it failed to provide adequate clearance, or a bike lane, between the station and vehicular traffic such that it required him to traverse the roadway portion of the station, and placed an unmarked concrete wheel stop at the end of that roadway, creating a trap-like

condition. In addition to the allegations contained in the original notice of claim, the amended notice alleged that the City was "negligent, grossly negligent and committed professional negligence and malpractice" in designing the bike share program in a way that the unmarked concrete wheel stops were used at Citi Bike stations, and also that wheel stops were inconsistently placed at certain Citi Bike stations and not others. Further, it added a claim that the City negligently failed to provide helmets to Citi Bike users, despite being aware that bike-share programs in other cities provided helmet rental systems.

The City argued in opposition that leave to amend was not warranted under General Municipal Law § 50-e(6) because petitioners were asserting new theories of liability. It further argued that leave to serve a late notice of claim was not warranted under General Municipal Law § 50-e(5) because (1) it did not have knowledge of the essential facts constituting the new claims within 90 days of the incident or a reasonable time thereafter, (2) petitioners did not set forth a reasonable excuse for their lengthy delay in seeking leave to serve a late notice of claim, and (3) the delay would substantially prejudice the City's defense against the new claims. The City argued that the delayed amendments would deprive it of an opportunity to timely

investigate the new claims and factual allegations. It further asserted that the individuals who had direct involvement with the implementation of the bike-share program were no longer employed by the City.

Supreme Court denied the motion. It held that the proposed amendment would introduce a new theory of liability and that the passage of 16 months between the accident and the application, coupled with the fact that discovery was under way, constituted prejudice to the City. It did not expressly address that part of the motion that sought leave to file a late, as opposed to an amended, notice of claim. Petitioners moved for leave to renew and reargue, based on documents provided by the City after disposition of the original motion. Such documents included, inter alia, the site plan for the subject Citi Bike station and a feasibility study of the bike-sharing program. Petitioners also pointed out that former City employees were actually available for discovery, that two of those former employees had in fact been served with nonparty deposition subpoenas in the federal action, and that the City had indicated that it would defend those employees during the depositions. They asserted that such new discovery showed that the City had the wherewithal to investigate all of the allegations contained in the proposed

amended notice of claim, negating the City's argument that it would be prejudiced by an inability to investigate the new claim. In opposition, the City argued that the motion to renew was untimely and that, in any event, the availability of the employees did not change the prejudice analysis because it lacked control over them. The court denied the motion for leave to renew and reargue.

General Municipal Law § 50-e(6) provides as follows:

> "Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby."

The statute "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (*Van Buren v New York City Tr. Auth.*, 95 AD3d 604, 604 [1st Dept 2012] [internal quotation marks omitted]). As such, amendments that create new theories of liability do not fall within the purview of General Municipal Law § 50-e(6) (*see Fleming v City of New York*, 89 AD3d 405 [1st Dept

2011]; *White v New York City Hous. Auth.*, 288 AD2d 150 [1st Dept 2001]).

Petitioners argue that the proposed amended notice of claim complies with General Municipal Law § 50-e(6) because the allegations of negligent design of the bike station merely expound on the allegations concerning the City's failure to safely protect riders from traffic, the City's improper placement of the wheel stop, and the City's negligent maintenance of the wheel stop without highly visible warning paint. They further assert that the allegations of failure to provide a helmet merely build on the original notice's claim of negligence.

The City counters that, while the original notice of claim was limited to allegations of negligent placement of the wheel stop at the station at the time of the accident, the amended notice of claim seeks to enlarge the scope of the City's alleged negligence to include the design of the infrastructure of the entire bike-share program. It further asserts that, contrary to petitioner's contention that he was merely expounding on the initial allegations of common-law negligence based on the placement and maintenance of the wheel stop, the new allegations of negligent design, "professional negligence or malpractice," "gross negligence," and negligent failure to provide helmets all

raise new theories of liability.

With respect to the defect that caused petitioner to fall from the bicycle, we agree with the City that the proposed amendments substantively change the initial theory of liability from one that focuses on the camouflaged wheel stop to one that more broadly alleges that the City failed to design the station in a manner that provided adequate clearance between the station and vehicular traffic. Further, the allegation that the City negligently failed to provide helmets went beyond mere amplification of the original notice of claim (*see Monmasterio v New York City Hous. Auth.*, 39 AD3d 354, 356 [1st Dept 2007]; *Lopez v New York City Hous. Auth.*, 16 AD3d 164, 165 [2005]). Since the new notice of claim does not present material authorized by section 50-e(6), the issue of whether the City would be prejudiced by the proposed amendment is irrelevant.

Petitioners argue that, even if General Municipal Law § 50-e(6) does not permit amendment of their notice of claim, General Municipal Law § 50-e(5) does. That section provides as follows:

> "Upon application, the court, in its discretion, may extend the time to serve a notice of claim . . .. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation . . . acquired actual knowledge of the essential facts constituting

> the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including . . . whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."

In determining whether to grant leave to file a late notice of claim, key factors to be considered are "'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense'" (*Velazquez v City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], quoting *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003], *lv denied* 15 NY3d 711 [2010]). The presence or absence of any one factor is not determinative (*Velazquez*, 69 AD3d at 442). However, courts have noted that the "most important factor" is whether the municipality "acquired actual knowledge of the essential facts constituting the claim within the time specified" (*Padilla v Department of Educ. of the City of N.Y.*, 90 AD3d 458, 459 [1st Dept 2011] [internal

quotation marks omitted]). The statute is remedial in nature and should be liberally construed (*see Matter of Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005]).

Here, to the extent that the allegations concerning the design of the station differ between the original notice of claim and the proposed amended notice of claim, the City unquestionably had actual notice of the claims in the latter document, based on the original notice of claim. Further, it was not prejudiced by petitioner's amplification of the claims in the proposed amended notice, since the alleged defect was not transitory in nature (*see Frederickson v New York City Hous. Auth.*, 87 AD3d 425 [1st Dept 2011]). Petitioner has established that the City was also in possession of relevant documents concerning the implementation of the system, and that it did have access to former employees with relevant knowledge of the facts at issue (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 449 [1st Dept 2011]).

In contrast to the design claim, we cannot say that, based on the original notice of claim, the City had actual knowledge of petitioners' claim concerning the City's failure to provide helmets. Nevertheless, it is not quite accurate to characterize petitioners' theory regarding petitioner's lack of a helmet as,

in the words of the dissent, a "new tort claim" that petitioners had to inform the City of during the 90 days following the accident. To the contrary, petitioners only raised the helmet issue in response to the City's decision to assert as an affirmative defense that petitioner's injuries would have been less severe had he worn one. We note that petitioner's failure to use a helmet is akin to a plaintiff's failure to use a seatbelt in a motor vehicle case. It is well settled that any such failure does not go to comparative liability but rather to how damages, if any, should be assessed (*see e.g. Davis v Turner*, 132 AD3d 603, 603 Dept 2015]). Further, the City bears the burden of proving that some or all of petitioner's injuries would not have been received had he used a helmet (*see Spier v Barker*, 35 NY2d 444, 450 [1974]). Accordingly, petitioners had no reason to make a claim concerning the lack of helmets until the City raised the issue. Additionally, to borrow language used by petitioners' counsel at the conference before the US Magistrate, the City "can't have it both ways." The City cannot claim to be prejudiced where it chose to inject a mitigation defense into the federal action, and petitioners are merely trying to ensure that their notice of claim supports their effort to rebut that defense (*see American Safety Cas. Ins. Co. v New York City School Constr.*

Auth., 33 AD3d 441 [1st Dept 2006] [no prejudice to the defendant in permitting the plaintiff to amend notice of claim to conform to evidence of damages where the defendant itself provided the plaintiff with the proper amount of the loss], *lv denied* 8 NY3d 804 [2007]). We recognize that prejudice is not the only, or even the most important, factor to consider in analyzing the applicability of General Municipal Law § 50-e(5) (*see Padilla*, 90 AD3d at 459). However, in this unique circumstance, we find that it would be patently unfair if petitioners are unable to contest the City's affirmative defense that petitioner should have worn a helmet. In addition, the City, which commissioned the Citi Bike program, was at all times aware of the unavailability of helmets to customers of the program. Further, any claim of prejudice is tempered by the fact that, like with the design claim, the decision by the City not to make helmets available to riders should be reflected in documents maintained by the City and in the knowledge of witnesses within its control.

All concur except Andrias and Richter, JJ.
who dissent in part in a memorandum by
Andrias, J. as follows:

ANDRIAS J. (dissenting in part)

I agree with the majority that the motion court properly denied petitioners' motion for leave to amend their notice of claim under General Municipal Law § 50-e(6). I also agree with the majority that petitioners should have been granted leave to file a late notice of claim pursuant to General Municipal Law § 50-e(6) to assert a claim based on the City's alleged negligence and professional negligence in the design of the infrastructure of the Citi Bike program and the incident site (the design claim). However, because I believe that petitioners should not be granted leave to file a late notice of claim to assert a claim based on the City's alleged negligent failure to provide helmets on a system-wide basis, through vending machines or otherwise (the helmet claim), I respectfully dissent in part.

On October 25, 2013, petitioner Ronald Corwin was injured when the front wheel of the Citi Bike he was riding allegedly struck an unpainted concrete wheel stop placed at a Citi Bike station, causing the bike to flip over. Petitioners served a notice of claim, dated December 23, 2013, alleging in part, that the City improperly installed the wheel stop at the accident location, where it was not necessary; forced Mr. Corwin into a position of danger; failed to make timely inspections; failed to

highlight the existence of the wheel stop with proper warnings; caused and allowed hazards to exist which brought about the accident; and created a trap and nuisance on the roadway.

More than 30 days later, petitioners commenced a federal action based on the same allegations as those in the notice of claim. In its answer dated April 16, 2014, the City asserted a boilerplate affirmative defense seeking to bar or diminish plaintiffs' claims based on Mr. Corwin's culpable conduct. On July 16, 2014, Mr. Corwin was deposed and stated that he was not wearing a helmet at the time of the accident, even though he is an avid cyclist who owned two helmets and had previously worn one of them while riding a Citi Bike.

Subsequently, petitioners amended the complaint in the federal action to assert, among other things, the design claim and the helmet claim. In its amended answer, the City raised an affirmative defense that Mr. Corwin's claims should be barred or diminished by his culpable conduct, including his failure to wear a helmet. Thereafter, petitioners commenced this proceeding seeking leave to amend their notice of claim to conform to the amended complaint in the federal action, thereby allowing them to assert the design claim and the helmet claim against the City.

As the majority finds, the motion court properly denied

petitioners leave to amend the notice of claim under General Municipal Law § 50-e(6). Section 50-e(6) authorizes the amendment of a notice of claim for the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability (*see Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]). Contrary to petitioners' contention that they are merely expounding on the initial allegations of common law negligence based on placement and maintenance of the wheel stop, the new allegations of negligent design, "professional negligence or malpractice," "gross negligence," and negligent failure to provide helmets all raise new theories of liability (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651[1st Dept 2013]; *Van Buren v New York City Tr. Auth.*, 95 AD3d 604 [1st Dept 2012]). Indeed, at the status conference in the federal action referenced by the majority, petitioners' counsel acknowledged "the City's failure to provide helmets was not something that was included in the original notice of claim."

General Municipal Law § 50-e(5) confers upon a court, under certain statutorily permitted circumstances, the discretion to determine whether to permit the filing of a late notice of claim to include new theories of liability (*see Pierson v City of New*

York, 56 NY2d 950, 954 [1982]; *Thomas v New York City Hous. Auth.*, 132 AD3d 432 [1st Dept 2015]). In determining whether leave should be granted pursuant to General Municipal Law § 50-e(5), "the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense.'" (*Velazquez v City of N.Y. Health & Hosps. Corp.* [*Jacobi Med. Ctr.*], 69 AD3d 441, 442, [1st Dept 2010], *quoting Matter of Dubowy v City of New York*, 305 AD2d at 321 [1st Dept 2003], *lv denied* 15 NY3d 711 [2010]). While the presence or absence of any one factor is not determinative (*Velazquez*, 69 AD3d at 442), this Court has stated that "[t]he most important factor that a court must consider . . . is whether [the City] . . . 'acquired actual knowledge of the essential facts constituting the claim within the time specified'" (*Padilla v Department of Educ. of the City of N.Y.*, 90 AD3d 458, 459 [1st Dept 2011], *quoting* General Municipal Law § 50-e [5]; *see also Matter of Whittaker v New York City Bd. of Educ.*, 71 AD3d 776, 778 [2d Dept 2010]).

Here, the request for leave was made 1 year and 87 days after the accident and petitioners did not establish a reasonable excuse for the delay. Accordingly, to prevail on their motion, it was incumbent on petitioners to demonstrate that there exists "some prior actual notice and the absence of prejudice--which would be relevant in condoning the lack of reasonable excuse" (*Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

Whether the municipal defendant received knowledge of the facts constituting the claim means "whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within [90 days of its occurrence] or within a reasonable time thereafter" (General Municipal Law § 50-e [5]). Knowledge that an accident occurred is not, in and of itself, enough (*see Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *appeal dismissed* 76 NY2d 875 [1990]). Rather, the municipal defendant must have knowledge of the essential facts that underlie the legal theory or theories upon which liability is predicated (*see Evans v New York City Hous. Auth.*, 176 AD2d 221, 221-222 [1st Dept 1991], *appeal dismissed* 79 NY2d 886 [1992], *lv denied* 79 NY2d 754 [1992]; *Bullard v City of New York*,

118 AD2d 447, 450-451 [1st Dept 1986]).

While the original notice of claim provided the City with timely actual notice or knowledge of the essential facts connecting the accident to the City's alleged negligence with respect to placement of the wheel stop, which is the basis for the design claim, it did not provide the City with actual notice or knowledge of the facts that underlie the legal theory that the City was negligent in failing to provide helmets on a system-wide basis, through vending machines or otherwise, which is the basis for the helmet claim. Significantly, the notice of claim did not inform the City that Mr. Corwin was not wearing a helmet at the time of the accident and there is no indication that the City was on notice, prior to the expiration of the time to file a notice of claim, or within a reasonable time thereafter, that its failure to provide a helmet would result in a distinct theory of liability (*see Matter of Gonzalez v City of New York*, 127 AD3d 632, 633-634 [1st Dept 2015] [no actual knowledge where workers' compensation form, among other things, made no mention of petitioners' present claim that the railroad car had a bent edge and was not equipped with proper safety devices]; *Kim v City of New York*, 256 AD2d 83, 84 [1st Dept 1998] [knowledge that the petitioner was injured when instructed by a teacher to move a

large piece of plywood, was not tantamount to notice of the petitioner's claim that the respondents "were negligent in not providing petitioner with the mechanical means to move the plywood and otherwise in their supervision of petitioner's activities"], *lv dismissed in part, denied in part* 93 NY2d 896 [1999]). Since petitioners did not show an excuse for their delay and the City did not have actual knowledge of the essential facts constituting the helmet claim, the motion court properly denied petitioners leave to serve a late notice of claim with regard to that claim.

Although the majority concedes that petitioners have not shown a reasonable excuse for their 1-year-and-87-day delay in bringing the motion, and that the original notice of claim did not provide the City with actual notice, it nevertheless grants petitioners leave to file a late notice of claim pursuant to General Municipal Law § 50-e(5) with respect to the helmet claim. The majority bases its determination on its belief that the City has not been substantially prejudiced because petitioners had no reason to make a claim concerning the lack of helmets until the City injected its mitigation defense into the federal action, and petitioners are merely trying to ensure that their notice of claim supports their effort to rebut that defense. Thus, the

majority finds that "it would be patently unfair if petitioners are unable to contest the City's affirmative defense that [Mr. Corwin] should have worn a helmet."

However, despite what the majority perceives as unfairness, this Court is constrained to follow the General Municipal Law and case law. Because petitioners have not demonstrated a reasonable excuse for the delay and the City did not have actual notice of the facts constituting the helmet claim, "which heavily militate against granting the petition," the motion court did not improvidently exercise its discretion in denying petitioners leave to file a late notice of claim asserting a new tort claim based on the City's alleged negligent failure to provide helmets on a system-wide basis (*Matter of Gonzalez v City of New York*, 127 AD3d at 634; *see also Matter of Peterson v New York City Dept. of Envtl. Protection*, 66 AD3d 1027, 1030 [2d Dept 2009] ["While the remaining respondents failed to demonstrate how the passage of time hampered their ability to investigate the alleged roadway defect, or interview witnesses or employees, and did not show substantial prejudice in their ability to defend this proceeding, the Supreme Court nonetheless properly, in effect, denied the petition insofar as asserted against them due to the lack of timely actual knowledge of the facts constituting the

claim and the petitioner's lack of a reasonable excuse for the delay in bringing the proceeding"]). Indeed, in *Gonzalez*, this Court held that where the petitioner does not establish a reasonable excuse for the delay and the City does not have actual knowledge of the essential facts underlying the claim, "we need not address the final criterion to be considered in assessing a late notice of claim — whether respondents have been substantially prejudiced by the delay" (127 AD3d at 634; *see also Hebbard v Carpenter*, 37 AD3d 538, 541 [2d Dept 2007]).

Nor does the fact that the City asserted an affirmative defense based on Mr. Corwin's failure to wear a helmet constitute a "unique" circumstance that warrants granting petitioners leave to assert the helmet claim. To succeed on its mitigation defense, the City bears the burden of proving that Mr. Corwin's conduct in failing to wear a helmet was culpable because he acted unreasonably under the circumstances. Even without the granting of leave to allow plaintiff to assert the helmet claim as a new theory of liability, petitioners will be free to argue that Mr. Corwin's conduct was not unreasonable under the circumstances and that he did not breach a duty of care because adults are not required to wear helmets while riding bicycles in New York City and the Citi Bike program does not provide helmets.

However, with respect to the design claim, the City had actual notice or knowledge of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter and no substantial prejudice has been shown. Consequently, the majority is correct that it was an improvident exercise of discretion to deny the City's motion for leave to serve a late notice to raise the design claim.

Accordingly, I would modify the judgment on appeal to the extent of granting the petition for leave to serve a late notice of claim asserting the design claim but not the helmet claim.

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

ENTERED: JULY 28, 2016

CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1248 Larry B. Moshan, Index 653522/13
Plaintiff-Respondent,

-against-

PMB, LLC, doing business as
Perfect Building Maintenance,
et al.,
Defendants-Appellants.

_____

Davidoff Hutcher & Citron LLP, New York (Joshua S. Krakowsky of counsel), for appellants.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 10, 2015, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing all claims as against defendant Mager, and the sixth and seventh claims for breach of the implied covenant of good faith and fair dealing and for an accounting as against defendant PBM as indicated herein, and otherwise affirmed, with costs against the defendants. The Clerk is directed to enter judgment dismissing the complaint as against Mager.

Plaintiff seeks damages from defendants, his former employer and its owner, chairman, and CEO, for failure to pay him

commissions, allegedly in breach of a commission agreement that was reduced to writing but not signed.

Plaintiff has sufficiently alleged that the commission agreement is a valid and binding contract, and not an unenforceable "agreement to agree" (*see Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1981]). Although the agreement is styled as a "Letter of Intent" and contemplates that a more detailed agreement will be entered into in future, this is not conclusive (*see Bed Bath & Beyond Inc. v Ibex Constr., LLC*, 52 AD3d 413, 414 [1st Dept 2008]; *Hajdu-Nemeth v Zachariou*, 309 AD2d 578 [1st Dept 2003]). Plaintiff has alleged sufficient facts to permit a reasonable inference that the parties manifested an intent to be bound by the commission agreement, including by performing in accordance therewith (*see Bed Bath*, 52 AD3d at 414). The Letter of Intent also sets forth the material terms of the agreement, i.e., the terms of payment of commissions.

Contrary to defendants' assertion, they have not established by documentary evidence that the commission agreement is subject to the statute of frauds. It is not shown to be a contract for services rendered in "negotiating" a business opportunity under § 5-701(a)(10) of the General Obligations Law. Because plaintiff's

responsibilities as a salaried PBM employee may have transcended those of a "finder" or "negotiator" of business opportunities, dismissal was not appropriate at this stage (*see Festa v Gilston*, 183 AD2d 525, 526-527 [1st Dept 1992]; *Maemone v Koren-DiResta Constr. Co.*, 45 AD2d 684, 685 [1st Dept 1974]; *Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1089-1090 [2d Dept 2009]).

Defendants also have not demonstrated conclusively by documentary evidence that the alleged commission agreement is a contract that "[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime," within the scope of § 5-701(a)(10) of the General Obligations Law. Contracts that are terminable at will are capable of performance within a year (*Cron v Hargro Fabrics*, 91 NY2d 362, 367 [1998]). This includes commission agreements, but only to the extent they contemplate payment of commissions earned *during* the period of employment (even if paid afterward) (*id.* at 370). Plaintiff asserts that his claims are based only on the commissions he earned while he was employed by defendants and, as so construed, the agreement is capable of completion within one year. However, plaintiff's seventh cause of action, must be dismissed to the extent it seeks an accounting to determine the value of commissions earned post-

termination.

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing must also be dismissed as duplicative (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]). However, it would be premature to dismiss plaintiff's implied contract and quantum meruit/unjust enrichment claims. Where, as here, there is "a bona fide dispute as to the existence of a contract," plaintiff is not required to elect his remedies (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]).

Finally, defendant Mager must be dismissed from the action. Plaintiff has not alleged that he was employed by Mager directly, nor has he alleged any facts that support piercing PBM's corporate veil (*see* Limited Liability Company Law § 609(a)*; Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210-211 [1st Dept 2005]*)*.

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

ENTERED: JULY 28, 2016

CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1594 Robert Herzog, Index 154427/15
Plaintiff-Appellant,

-against-

The New York City District Council
of Carpenters Pension Fund, et al.,
Defendants-Respondents.

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Zukerman Gore Brandeis & Crossman, LLP, New York (Ted Poretz of counsel), for appellant.

Kauff McGuire & Margolis LLP, New York (Marjorie B. Kulak of counsel), for the New York City District Council of Carpenters Pension Fund, the New York City District Council of Carpenters Welfare Fund, the New York City District Council of Carpenters Annuity Fund, the New York City District Council of Carpenters Apprenticeship, Journeyman Retraining, Educational and Industry Fund and the New York City Carpenters Relief and Charity Fund, respondents.

Spivak Lipton LLP, New York (Denis P. Duffey, Jr. of counsel), for District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 10, 2015, which granted the benefit fund defendants' (the funds) and the union defendant's (the union) motions to dismiss the complaint as against them unanimously reversed, on the law, without costs, the motions denied, and plaintiff granted leave to amend the complaint.

The funds provide pension, welfare, annuity, and

apprenticeship benefits to their participants who work under collective bargaining agreements between the union and various employers. Plaintiff, designated as an arbitrator of disputes in which the union and the funds are parties, alleges that his rates were determined and that he was paid pursuant to a "protocol" wherein he performed his duties as arbitrator, sent his invoices, as instructed by defendants, to an umbrella administrator organization for the funds and union, and received payments. Plaintiff provides copies of some invoices he submitted to the umbrella entity referencing the funds, the union, the date and nature of the arbitration work performed on their behalf, and the relevant payment stubs. Plaintiff alleges that defendants failed to pay 33 invoices he tendered to them through the umbrella entity between April 2010 and April 2012. These allegations, along with the paid invoices, are sufficient to state a cause of action against the funds and the union for breach of an oral or implied contract (*see Coca-Cola Refreshments, USA, Inc. v Binghamton Giant Mkts., Inc.*, 127 AD3d 1319, 1320-1321 [3d Dept 2015]; *Law Offs. of K.C. Okoli, P.C. v Maduegbuna*, 62 AD3d 477 [1st Dept 2009], *lv dismissed* 13 NY3d 771 [2009]; *see also Liddle & Robinson v Shoemaker*, 276 AD2d 335, 336 [1st Dept 2000]).

Plaintiff also alleges that he sent several invoices to

defendants through the umbrella entity, that his invoices were received and retained without objection within a reasonable time, that partial payments were made, and that defendants then stopped paying. He alleges that he engaged in this practice at the instruction of defendants and with regularity (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]). These allegations state a cause of action against defendants for an account stated (*see Brunelle & Hadjikow, P.C. v O'Callaghan*, 126 AD3d 584, 584 [1st Dept 2015], *appeal dismissed* 26 NY3d 975 [2015]).

Plaintiff is granted leave to amend the complaint to plead the elements of his causes of action against defendants with greater specificity (*see Palisades Tickets, Inc. v Daffner*, 118 AD3d 619, 620 [1st Dept 2014]).

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

ENTERED: JULY 28, 2016

CLERK

Corrected Order - August 4, 2016

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15715 Orfeusz M. Jerdonek, Index 103694/10
Plaintiff-Respondent, 590726/10

-against-

41 West 72 LLC, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

Baxter, Smith & Shapiro, P.C., Hicksville (Joseph M. Guzzardo of counsel), for appellants.

The Perecman Firm, PLLC, New York (David H. Perecman of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2014, modified, on the law, to grant defendants' motion for summary judgment as to the aforesaid claims against defendants 41 West 72 LLC and Property Markets, and, upon a search of the record, to grant plaintiff summary judgment as to liability on his Labor Law § 240(1) claim as against defendant the Hermitage board, and otherwise affirmed, without costs.

Opinion by Friedman, J.P. All concur except Gische, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
David B. Saxe
Judith J. Gische
Barbara R. Kapnick, JJ.

15715
Index 103694/10
590726/10

_____x

Orfeusz M. Jerdonek,
Plaintiff-Respondent,

-against-

41 West 72 LLC, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

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Defendants appeal from the order of the Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2014,to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) as against defendant Bar Construction, and denied defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against defendant 41 West 72 LLC and the Labor Law §§ 200, 240(1), and 241(6) claims as against Property Markets.

Baxter, Smith & Shapiro, P.C., Hicksville (Joseph M. Guzzardo of counsel), for appellants.

The Perecman Firm, PLLC, New York (David H. Perecman and Peter D. Rigelhaupt of counsel), for respondents.

FRIEDMAN, J.P.

Plaintiff was injured in a fall from a scaffold while he was working in a boiler room that is a common element of the condominium apartment building at 41 West 72nd Street in Manhattan, known as the Hermitage Condominium. All members of this panel agree that plaintiff is entitled to summary judgment as to liability under Labor Law § 240(1) against the party that owned the property on which he was injured when the accident occurred in February 2009. Because a declaration converting the building to condominium status was recorded in 2001, more than seven years before the accident, it is plain, under our precedents, that, at the time of the accident, the "owner" of the condominium's common elements, for purposes of this tort action, was defendant the Board of Managers of the Hermitage Condominium (hereinafter, the Hermitage board), not defendant 41 West 72 LLC, the entity that sponsored the conversion, regardless of 41 West 72 LLC's continued ownership of some of the building's individual units. It is the Hermitage board, not the former sponsor, that exercised exclusive control over the building's common elements and entered into the contract for the lobby renovation project in the course of which plaintiff was injured. The Hermitage board is a named defendant that has appeared in this action and is actively defending it; there is no reason to believe that the

Hermitage board might lack the resources to satisfy plaintiff's ultimate judgment. Moreover, plaintiff himself, through his counsel at the argument of this appeal, has stated that he does not oppose dismissing 41 West 72 LLC from the action, so long as he is granted summary judgment against the Hermitage board. Accordingly, while we affirm other aspects of Supreme Court's order, we modify it to grant 41 West 72 LLC's motion for summary judgment dismissing plaintiff's Labor Law claims as against it and, upon a search of the record, to grant plaintiff summary judgment as to liability on his claim under Labor Law § 240(1) as against the Hermitage board.

Initially, we address the merits of plaintiff's cause of action under Labor Law § 240(1). Plaintiff's testimony that he fell and was injured when the scaffolding on which he was working moved establishes prima facie that the statute was violated and that the violation was a proximate cause of plaintiff's injuries (*see Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426 [1st Dept 2009]). The conflicting testimony of Carlos Alvarado, an employee of defendant Bar Construction Corp., the general contractor that hired plaintiff's employer, does not preclude partial summary judgment in plaintiff's favor, since the statute was violated under either version of the accident (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]).

Bar Construction's foreman's admission that the first level of the scaffolding did not have middle or top guard rails also establishes a violation of the statute (*see Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]). The record does not support defendants' argument that plaintiff was the sole proximate cause of his accident or a recalcitrant worker since plaintiff's fall was caused in part by the fact that the scaffold was not properly secured and was not equipped with guard rails (*see Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]). There is no evidence that plaintiff disregarded an instruction to use any particular safety device (*see generally Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014]).

Turning to the question of which entities (other than Bar Construction and the Hermitage board) are properly named as defendants upon plaintiff's Labor Law causes of action, we hold that Supreme Court erred in denying defendants' motion insofar as it sought summary judgment dismissing plaintiff's claim under Labor Law §§ 240(1) and 241(6) as against defendant 41 West 72 LLC and plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6) as against defendant Property Markets Group, Inc. As to Property Markets, the record contains no evidence that this entity ever owned or controlled the premises where the accident occurred. The basis for dismissing the claim as against 41 West

72 LLC requires a more extended discussion.

As previously noted, plaintiff was injured in February 2009 in the boiler room of the residential apartment building located at 41 West 72nd Street in Manhattan. While defendant 41 West 72 LLC acquired the building in question by a deed recorded in January 2001, several months later, in August 2001, 41 West 72 LLC made the building subject to the Condominium Act (Real Property Law, article 9-B) by executing and filing a declaration of condominium pursuant to Real Property Law § 339-f.[1] The

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[1]The dissent seems to suggest that the deed of January 2001 is conclusive evidence that the building was "titled in [41 West 72 LLC's] name," without qualification, when plaintiff's accident occurred more than seven years later. This ignores the fact that, the following August, a declaration of condominium was "indexed and recorded pursuant to and with the same effect as provided in . . . [Real Property Law,] article nine" (Real Property Law § 339-s[1]), like any other instrument affecting real property interests. The declaration, although it did not convey ownership from 41 West 72 LLC to any other party, divided the building into multiple parcels, known as "units," that could be separately sold and conveyed to buyers, each along with its appurtenant interest in the building's common elements, as defined in the declaration. A deed necessarily was recorded upon each sale of a unit after the conversion to condominium status, with each such deed setting forth "[t]he common interest appertaining to that unit" (Real Property Law § 339-o[4]). Thus, contrary to the dissent's implication, it is clear that a full title search undertaken to determine ownership of the building's common elements at the time of the accident would not have stopped with the pre-conversion January 2001 deed. Rather, such a title search would have included the subsequent condominium declaration and the deeds for all units sold to new owners thereafter. While the dissent objects that 41 West 72 LLC did not place any deeds reflecting subsequent unit sales in the record, by the dissent's own reasoning, there would have been no

declaration defines the common elements of the condominium (Real Property Law § 339-e[2]) to include the building's boiler room. As a common element of the condominium, the boiler room was, at the time of plaintiff's accident, owned collectively by all of the owners of the building's 130 units.[2] However, the conversion of the building to a condominium placed its common elements "solely under the control of the [condominium's] board of managers" pursuant to the Condominium Act, which "recogni[zes] that the board exercises exclusive control over the common elements" (*Pekelnaya v Allyn*, 25 AD3d 111, 120 [1st Dept 2005]; *see also* Real Property Law § 339-v[1][a] [requiring that the

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reason for 41 West 72 LLC to place any of those deeds in the record unless it had sold 100% of the units and completely divested itself of any ownership interest in the common elements. This is because, as more fully discussed below, the dissent takes the position that each and every unit owner, even the owner of a single unit, is subject to personal liability on plaintiff's claim by reason of that owner's fractional ownership interest in the common elements.

[2]*See* Real Property Law § 339-e(5) (defining, in pertinent part, the term "common interest" to mean "the proportionate, undivided interest in fee simple absolute . . . in the common elements [of the condominium] appertaining to each unit, as expressed in the declaration"); Real Property Law § 339-I ("Each unit shall have appurtenant thereto a common interest as expressed in the declaration"); Real Property Law § 339-g ("Each unit, together with its common interest, shall for all purposes constitute real property"); Real Property Law § 339-o(4) (the deed to each condominium unit sold after the conversion must set forth "[t]he common interest appertaining to that unit").

bylaws of a condominium establish a board of managers]).[3]

In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers (*see Pekelnaya*, 25 AD3d at 113; *see also O'Toole v Vollmer*, 130 AD3d 597, 598 [2d Dept 2015]; *Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 431-432 [1st Dept 2008]). Further, this Court has held that a statute imposing obligations

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[3]The dissent, in support of the view that the complaint should not be dismissed as against 41 West 72 LLC, points to the declaration's recital that 41 West 72 LLC was, as of the time of the recording of that instrument, the sole fee owner of the property. This statement was obviously necessary to establish the standing of the declarant (41 West 72 LLC) to effect the conversion at the time the declaration was recorded, and has no implications for which party or parties may be properly sued as the building's "owner" upon causes of action arising *after* the conversion. As to the declaration's subsequent provision that upon its filing, "fee simple absolute title shall automatically vest in [41 West 72 LLC] in all Units, individually and collectively, without the need to execute specific and particular deeds or indentures for each and every Unit," this was necessary to enable the sponsor to sell units as separate parcels. As more fully discussed below, if 41 West 72 LLC's continued ownership of whatever units it had not sold as of the date of plaintiff's accident subjected it to personal liability to plaintiff for injuries he incurred within a common element of the building, it would follow that each and every owner of an individual unit in the building on that date would be subject to the very same personal liability. Indeed, the dissent acknowledges this implication of its position.

or liabilities upon the "owner" of real property does not give rise to a claim against the owners of individual condominium units where the claim arises from the common elements or concerns a duty not connected with any individual unit (*see Pekelnaya*, 25 AD3d at 118-119 [rejecting a claim against unit owners under Multiple Dwelling Law § 78, which makes "the owner" of a multiple dwelling responsible for keeping the building "in good repair"]; *Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624 [1st Dept 2012] [rejecting a claim against the owner of an individual condominium unit for violating Administrative Code of City of NY § 7-210, which imposes obligations on "the owner of real property abutting any sidewalk"]; *see also Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476 [1st Dept 2013], *appeal dismissed* 22 NY3d 979 [2013], *lv dismissed in part, denied in part* 24 NY3d 1079 [2014] [following *Araujo*]).[4]

In this action, plaintiff has named the condominium's board

[4]The dissent asserts that *Pekelnaya* is distinguishable from the instant case in that, here, "the Labor Law provides a statutory basis for strict liability against the owner and possibly others." This overlooks the fact, noted above, that *Pekelnaya* addressed, in addition to a common-law negligence claim, a statutory cause of action against "the owner" of the property under Multiple Dwelling Law § 78. The dissent makes no attempt to distinguish *Araujo* and *Fayolle*, in both of which cases we rejected arguments that obligations imposed by the New York City Administrative Code upon "the owner" of real property applied, where the property in question was a common element of a condominium, to owners of individual condominium units.

of managers, the aforementioned Hermitage board, as a defendant. It is the Hermitage board, not 41 West 72 LLC, that entered into the contract for the lobby renovation project in the course of which plaintiff was injured. The Hermitage board has appeared in this action and is actively defending itself in the matter, including by taking part in the instant appeal, and has admitted that it is properly sued as the owner of the building's common elements. Plaintiff makes no claim that the Hermitage board was not actually functioning at the time of the accident or that it lacks the resources to satisfy a judgment in his favor. In fact, as earlier noted, plaintiff, through his counsel at oral argument, has stated that he does not oppose dismissing 41 West 72 LLC from the action so long as he is granted summary judgment against the Hermitage board. Under these circumstances, we see no reason not to grant 41 West 72 LLC summary judgment dismissing the claims under Labor Law §§ 240(1) and 241(6) as against it. At the same time, because the record establishes that the Hermitage board is the proper party to be sued as owner of the building's common elements and, as previously discussed, plaintiff has otherwise established his right to judgment on the claim under § 240(1) as a matter of law, we further modify the order appealed from, upon a search of the record, to grant plaintiff summary judgment as to liability on his claim under §

240(1) as against the Hermitage board.

While the record does not reflect the extent to which 41 West 72 LLC has retained ownership of units in the building since its conversion to a condominium, we do not believe that 41 West 72 LLC's continued ownership of certain units at the time of the accident would affect its entitlement to dismissal from this action. It is true that each unit owner — including the sponsor of the condominium conversion (here, 41 West 72 LLC) to the extent it retains ownership of unsold units — owns an undivided fractional interest in the real property comprising the condominium's common elements. As previously discussed, however, our precedents make clear that a unit owner's ownership interest in the condominium's common elements does not give rise to liability, whether for common-law negligence or under the Labor Law, because the condominium declaration transfers complete and exclusive control of the common elements to the board of managers. In essence, the unit owners, though they collectively own the common elements, are divested of the powers and responsibilities of ownership with respect to those elements. Those powers and responsibilities are vested in the board of managers, which becomes the proper defendant on any claim, whether common-law or statutory, that lies against the owner of the common elements.

Indeed, if the sponsor of condominium conversion could be sued on a post-conversion cause of action arising from the common elements based on the sponsor's continued ownership of unsold units, it would follow that each individual unit owner could be sued on exactly the same ground. This is because, as provided in Real Property Law § 339-e(5) (quoted in pertinent part at footnote 2 above), each unit owner is the fee owner of a fractional undivided interest in the common elements as part of that owner's common interest appurtenant to the individual unit. As explained in the leading treatise on New York condominium law:

> "A condominium property regime involves the division of a real property parcel into 'units' and 'common elements.' The units are then individually sold to separate owners, and such owners also obtain an undivided interest in the common elements of the parcel. Thus, the condominium regime consists of (a) individual fee ownership of 'units,' and (b) common ownership of 'common elements' by unit owners . . . . A condominium regime involves a mingling of two distinct forms of real property interest: individual ownership and undivided joint ownership. The distinction with traditional joint ownership structures is that the entire parcel is not owned in common. Rather, only the 'common elements' are owned in common with other unit owners" (Vincent Di Lorenzo, New York Condominium and Cooperative Law § 1:1 at 2-3 [2d ed 1995]); *see also id.* at 4 ["The unit owners obtain an undivided interest, or 'common interest,' in the common elements"]).

Nor would a result different than the one we reach here be proper in the event that the sponsor, at the time the claim arose, continued to own a sufficient number of units to enable it

to control the condominium's board of managers. If the sponsor could be sued based on its ability to select a majority of the members of the board of managers, it would follow that, even where that is not the case, a plaintiff could sue all of the individual unit owners on the ground that the owners collectively control the board of managers. We held directly to the contrary in *Pekelnaya*, in which we rejected an attempt to impose liability on "the individual owners of the 11 units comprising the . . . [c]ondominium" (25 AD3d at 113). Given that there is no contention that the condominium in this case did not have a functioning and adequately capitalized board of managers at the time of plaintiff's accident, we see no warrant for departing from our holding in *Pekelnaya* to allow plaintiff to sue any owner of an individual unit, or units, on a claim arising from an area that was under the exclusive control of the board of managers.[5]

Our dissenting colleague devotes much of her writing to

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[5]In *Zebzda v Hudson St., LLC* (72 AD3d 679 [2d Dept 2010]), a plaintiff who had been injured "in the common area of a building being converted from commercial space into condominiums" (*id.* at 680) was permitted to sue the sponsor because, although the accident occurred after the recording of the declaration of the plan of condominium, it was not clear from the record "the extent to which [the sponsor] maintained control over the building during its conversion from commercial space into a condominium development" (*id.* at 681). *Zebzda* is distinguishable from the instant case in that it cannot be determined from the court's decision whether the subject condominium had a functioning board of managers when the accident occurred.

demonstrating a point with which we do not disagree, namely, that each owner of an individual condominium unit is an "owner" of the condominium's common elements. Based on this undisputed premise, the dissent argues that 41 West 72 LLC, the sponsor of this building's condominium conversion, should be subject to personal liability under Labor Law § 240(1) for an accident that occurred within the building's common elements because 41 West 72 LLC does not deny that, at the time of the accident, it continued to own a number of units in the building.[6] The problem with this reasoning is that, as the dissent admits, it leads to the conclusion that, where an accident occurs within the common elements of a condominium, each and every owner of a unit in the building may be personally sued on a statutory cause of action that lies against "the owner" of real property.[7] We think that such a result would be sharply at odds with the expectations of

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[6]The dissent's pressing of this point is difficult to understand, given that, in view of our grant of summary judgment to plaintiff as against the Hermitage board, plaintiff has disclaimed any interest in the theoretical viability of his claim against 41 West 72 LLC.

[7]We take little comfort in the fact, noted by the dissent, that the unit owners in this condominium, other than 41 West 72 LLC, have not been sued in this action. If we were to adopt the dissent's position that every individual unit owner is a proper defendant on a Labor Law claim arising from a condominium's common elements, the plaintiffs' bar could be expected to begin naming individual unit owners as defendants in such suits.

buyers of condominium units, who are led to believe that risks and liabilities arising from the common elements will be handled on their behalf by the board of managers, a body that, as noted by the dissent, is funded entirely by common charges and assessments paid by the unit owners.

Our dissenting colleague's valid point that, even if only the board of managers is sued on a claim, the unit owners will still "bear financial responsibility" for that claim, demonstrates the lack of basis for her concern that our holding "will disincentivize the board of managers from obtaining sufficient liability insurance to protect the unit owners' interests." Surely, unit owners in a condominium can be expected to demand that the board of managers act prudently to protect the board's owner-funded bank accounts from judgment creditors, regardless of whether the owners' respective units, personal bank accounts, insurance policies and other assets can be reached.[8] Finally, as to the dissent's objection that we are "carv[ing] out

[8]If the dissent is correct in suggesting that the inability to sue individual unit owners directly on a claim arising from the common elements creates a risk that the board of managers will not purchase adequate liability insurance, the same risk arises whether a claim is based on a statute imposing liability on "the owner" or on common-law negligence. The dissent, however, appears to concede that individual unit owners could not be sued upon a common-law negligence claim arising from the operation or condition of the common elements.

a common-law exception that does not exist in the statutory scheme," as previously discussed, existing case law already establishes that an individual unit owner is not a proper defendant on a claim arising from the common elements of a condominium. The dissent offers no compelling reason for departing from these precedents, the holdings of which we believe to be consistent with the understanding and expectations of those who buy condominium units in New York. We therefore adhere to these precedents and hold that 41 West 72 LLC's ownership of certain individual condominium units in the building at the time of the subject accident in the common elements does not render 41 West 72 LLC a proper defendant in this action.

Finally, we have considered defendants' remaining contentions and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) as against defendant Bar Construction, and denied defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against defendant 41 West 72 LLC and the Labor Law §§ 200, 240(1), and 241(6) claims as against Property Markets, should be modified, on the law, to grant

defendants' motion for summary judgment as to the aforesaid claims against defendants 41 West 72 LLC and Property Markets, and, upon a search of the record, to grant plaintiff summary judgment as to liability on his Labor Law § 240(1) claim as against defendant the Hermitage board, and otherwise affirmed, without costs.

All concur except Gische, J. who dissents in part in an Opinion.

GISCHE, J. (dissenting in part)

I write in partial dissent because I disagree with the majority's grant of summary judgment to 41 West 72 LLC, dismissing the claims against it.

Plaintiff's claims are grounded in the Labor Law, for an accident occurring in the boiler room of a building owned as a condominium. It is undisputed that the boiler room is a common element of the condominium. Labor Law § 240(1) sets out a nondelegable duty on contractors, owners of real property and their agents to furnish ladders and other safety devices to employees so they may safely perform their work. Labor Law § 241(6) also imposes a non-delegable duty requiring that all contractors and owners and their agents comply with certain safety requirements in connection with construction, excavation and demolition work. 41 West 72 LLC, the sponsor of the condominium, is one of several named defendants in this action. It is alleged to be the owner of the real property in which plaintiff's underlying accident occurred.

41 West 72 LLC does not deny that the deed to the real property, a residential building located at 41 West 72nd Street, is titled in its name. Certainly, it is a bedrock principle of law that ownership of real property is proven by title conveyed pursuant to a valid deed (*see e.g.* Warren's Weed New York Real

Property, ch 37, Deeds [5th ed 2004]; *Jackson v Schoonmaker*, 2 Johns 230 [1807]; *see also Wood v Chapin*, 13 NY 509 [1856]). Under the Labor Law, title ordinarily suffices as a basis for statutory liability (*see Gurev v Tomchinsky*, 20 NY3d 194 [2012]).

41 West 72nd LLC nonetheless claims, however, that it is not an "owner" on the sole argument that the deed was "superceded" by the filing of a Declaration Establishing a Plan for Condominium Ownership dated August 9, 2001 (Declaration). This argument is legally incorrect because, although a declaration of condominium must be filed in accordance with the Condominium Act (Real Property Law [RPL], article 9-B), such filing does not constitute a conveyance of real property and does not in any way "supercede" a deed. A declaration does not convey ownership of the common elements to a condominium board of managers; it only subjects the property to the jurisdiction of the Condominium Act (Real Property Law [Condominium Act Art 9-B] § 339-d *et seq*.). Consistent with the Condominium Act, the Declaration in this case expressly provides that title to the property remains with 41 West 72nd LLC both before and after the filing of the Declaration. Declaration Article 3 states that 41 West 72nd Street LLC is the owner in fee of the real property. Significantly, Article 6.3 expressly provides that upon the filing of the Declaration, 41 West 72nd LLC shall continue to be

the fee owner of the property. It states that as of the filing of the Declaration "fee simple absolute title shall automatically vest in Declarant [41 West 72nd LLC] in all Units, individually and collectively." Consequently, 41 West 72nd LLC, as movant, simply failed to satisfy its prima facie burden of establishing that it is not an owner and its motion for summary judgment was correctly denied (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).[1]

A fundamental principle of condominium ownership is that the units and an undivided interest in the common elements are real property, that is individually owned (RPL § 339-g ["Each unit, together with its common interest, shall for all purposes constitute real property"]). At its inception, the sponsor holds title to the entire fee, which is then deeded out in parcels, directly from the sponsor to the individual unit owners. The deeds issued are not only for the individual units purchased, but

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[1]The majority takes this conclusion to task because it relies on the January 2001 deed as seemingly "conclusive." The January 2001 deed, however, is the only deed in the record before the court. Although the majority speculates that a title search would include later deeds issued to individual unit owners, this court's decision on appeal can only be based upon the record as developed by the parties. Significantly, 41 West 72nd LLC could have, but did not, put before the court the results of a title search. Having failed to put any ownership document other than the January 2001 deed before the court, the majority has no basis for criticizing this dissent's reliance on the only ownership document before it.

also represent the common ownership interest appurtenant to each unit (RPL §§ 339-g, 339-i, 339-o). Consequently, each unit owner holds a real property interest in its unit along with an undivided interest in the common elements of the condominium (*Caprer v Nussbaum*, 36 AD3d 176, 183 [2nd Dept 2006]; *see also Frisch v Bellmarc Mgt*, 190 AD2d 383, 387 [1st Dept 1993]). Unless and until a sponsor sells 100% of the units, it continues to hold the unsold units and the appurtenant interest in the common elements as well.

The unit owners in a condominium, including a sponsor who continues to hold title to any unsold units, have a mutual interest in the common profits and expenses of the condominium, which are distributed among and charged to each owner, according to their relative common interests (RPL § 339-m; *Caprer v Nussbaum, supra*). In order to ensure the orderly administration of the collective ownership of the common elements, the Condominium Act has governance requirements that must legally be adhered to by every condominium. By law, every condominium must have a board of managers (RPL § 339-v). A board of managers, however, does not take title to individual units.[2] No separate

[2]An exception only occurs when the board of managers may exercise its right of first refusal, in which case it can become a deed owner of a particular unit and the appurtenant common elements. In such circumstances, however, the board then acts as

deed for just the common elements is issued and the condominium board of managers is never a titled owner of those common elements. In fact, the Condominium Act expressly prohibits separating common elements from the unit to which it appertains (RPL § 339-i[2]).

The board of managers does have responsibility to manage the common elements. But that responsibility is not the same as titled ownership. The relationship of the board of managers to the condominium is that it serves as a fiduciary, answerable to the unit owners (*Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322 [2nd Dept 1993]). Given this relationship, established by the Condominium Act itself, some of the concerns raised by the majority (albeit not argued by the parties) are easily addressed.

The condominium board of managers, which exercised control over the common elements where the accident occurred, is a party that can be separately sued under the Labor Law. The Labor Law clearly provides that agents of the owner, as well as the owners themselves, are proper defendants (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). There is nothing in the Labor Law or in case law that restricts a plaintiff to suing only one defendant.

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a unit owner and not the condominium manager.

Although a plaintiff may sue the agent of the owner, this does not prohibit a lawsuit against the owner as well (*see e.g. Miranda v NYC Partnership Housing Dev. Fund Co. Inc.*, 122 AD3d 445, 446 [1st Dept 2014] [plaintiff granted summary judgment against owners and other defendants because they did not provide him with adequate safety device]; *Markey v C.F.M.M Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008] [both owner and general contractor were liable for any Labor Law violation because contractor fulfilled the role of "owner" by contracting to have work performed]; *Draiss v Salk Constr. Corp.*, 201 AD2d 698, 699 [2d Dept 1994] [general contractor and titled owner both held liable for the plaintiff's injuries because neither defendant provided safety equipment]).

To the extent that the majority expresses concern over the potential for individual unit owner liability, two important points need to be made. The easiest point is that in this case the concern is nonexistent because the individual unit owners were not sued. To the extent the majority is generally concerned that in future cases the unit owners may have to bear financial responsibility for accidents occurring in the common elements, I only point out that unit owners will bear financial responsibility whether sued directly or through their fiduciary, the board of managers. A condominium board of managers has no

independent economic viability. It does not own the real property or the common elements it manages. It does not exist as a separate economic entity that operates to financially profit itself. Financially, it is solely reliant on common charges and assessments paid by the individual unit owners in order to meet any of its financial obligations. The majority seeks to carve out a common-law exception that does not exist in the statutory scheme.[3]

Finally, I disagree with the majority's reliance on *Pekelnaya v Allyn* (25 AD3d 111 [1st Dept 2005]), for the broad proposition that only the board of managers may be sued for injuries occurring on the common elements of a condominium.

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[3]The majority has not fully considered the possible ramifications of this carve out, specifically whether it will disincentivize the board of managers from obtaining sufficient liability insurance to protect the unit owners' interests. For instance, owners of other kinds of real property usually obtain insurance to protect their interests and investments. The Condominium Act even contemplates that the board of managers will obtain insurance for the protection and benefit of the individual owners in certain circumstances (RPL §§ 339-bb, 339-cc). Applying the principles of the majority's decision, the real owners in interest would have no potential liability and the board of managers has very little by way of assets that would need to be protected, warranting different insurance needs. While the majority concludes that the board of managers will obtain insurance, it does not consider the concern that the amount of insurance needed is a function of risk and that the majority's decision results in risk limitations for condominiums. Certainly, these potential ramifications were not presented, let alone fleshed out, by the parties themselves either in their briefs or the underlying motion, which was very narrow in scope.

Pekelnaya involved an issue of ordinary negligence. As this Court specifically held in that case, "In the absence of any statutory basis for recovery, control rather than the unit owners' common interest is the operative criterion upon which liability is predicated" (*id.* at 113) At bar, however, the Labor Law provides a statutory basis for strict liability against the owner and possibly others.[4] There is no basis to disregard our jurisprudence on who is an owner in this case just because the party sued is the sponsor.

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

ENTERED: JULY 28, 2016

CLERK

[4]Although in *Araujo v Mercer Sq. Owners Corp.* (95 AD3d 624 [1st Dept. 2012]) and *Fayolle v East W. Manhattan Portfolio LP,* (108 AD3d 476 [1st Dept. 2013], *appeal dismissed* 33 NY3d 879 [2013], *lv dismissed in part, denied in part* 24 NY3d 1079 [2014]), this Court held that a condominium unit owner is not an owner under New York City's sidewalk Law (Administrative Code of City of New York § 7-210), no analysis is offered for this conclusion.