SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 15, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3960 Eleanor P. Vale, Index 114155/05
Plaintiff-Appellant,

-against-

Jeremy Isaacs,
Defendant-Respondent.

Lewis S. Sandler, New York, for appellant.

Herrick Feinstein LLP, New York (William R. Fried of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 21, 2007, which denied plaintiff's motion for partial summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In this litigation between owners of cooperative apartments at Hampshire House on Central Park South, plaintiff failed to raise issues of fact precluding summary judgment for defendant concerning the application of the lease to the parties' right to use the terrace. Pursuant to the identical proprietary leases at hand, "A lessee of an apartment having direct access to a terrace shall have and enjoy the exclusive use of the portion of such terrace which immediately adjoins the apartment." Plaintiff

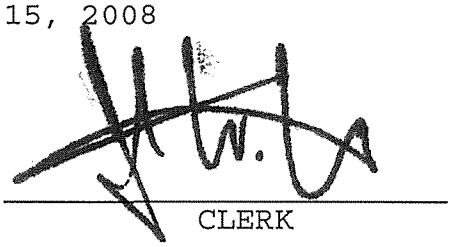
failed to show she had any "direct access" to the terrace. Defendant, on the other hand, did establish his direct access to the terrace through the door in his apartment immediately adjoining the terrace. Even assuming there is ambiguity in the proprietary lease with regard to the parties' rights to the use of the terrace, defendant established as a matter of law that he has the exclusive right to its use, supported, inter alia, by evidence from his predecessors that they had exclusive use of the terrace (*cf. Washburn v 166 E. 96th St. Owners Corp.*, 166 AD2d 272 [1990]).

M-2799 *Eleanor P. Vale v Jeremy Isaacs*

Motion seeking leave to vacate oral argument and to set new time for argument denied.

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

ENTERED: JULY 15, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on July 15, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David Friedman
John W. Sweeny, Jr.
Karla Moskowitz, Justices.

x

Beechwood Winchester Building Corp., et al.,
Plaintiffs-Respondents,

Index 601661/06

-against-

QBE Insurance Corporation,
Defendant-Appellant,

3491

Blau Mechanical Corporation,
Defendant.

x

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about November 19, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 23, 2008,

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

ENTER:

Clerk.

Friedman, J.P., Nardelli, Gonzalez, McGuire, JJ.

495-
495A The People of the State of New York, Ind. 5705/01
Respondent,

-against-

James Conroy,
Defendant-Appellant.

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 25, 2004, convicting defendant, after a jury trial, of grand larceny in the first degree (three counts), tampering with physical evidence (two counts), and conspiracy in the fourth degree, and sentencing him to concurrent terms of 4 to 12 years on the larceny convictions and 1 to 3 years on the tampering and conspiracy convictions, unanimously modified, on the law, to the extent of vacating the tampering convictions and dismissing those two counts of the indictment, and otherwise affirmed. Appeal from order (same court and Justice), entered on or about March 15, 2004, which denied defendant's CPL 330.30 motion to set aside the verdict, unanimously dismissed as taken from a nonappealable paper, and as subsumed in the appeal from the judgment. The matter is remitted to Supreme Court, New York County, for further proceedings

pursuant to CPL 460.50(5).

The verdict convicting defendant of three larcenies from Evergreen Securities Fund, a fund managed by Martin Boelens -- who also was convicted of various federal and state fraud crimes -- of $5 million, $9.7 million and $13 million, was based on legally sufficient evidence and was not against the weight of the evidence. Boelens first met in late October or early November of 1999 with both William Zylka, the central player in the fraudulent scheme charged in the indictment, and defendant, a lawyer at a well-known law firm in Manhattan with expertise in corporate matters and sophisticated financial transactions. By that time, defendant had lost his partnership position at the firm, was earning much less than he had in prior years and was having financial difficulties. The jury heard compelling evidence, independent of Boelens, from which it reasonably could have concluded that defendant knew, even before the first meeting with Boelens, that Zylka was a virtually impecunious swindler and not the magnanimous billionaire he professed to be. Among other things, the jury heard evidence that Zylka had failed to repay defendant the substantial sums of money he had loaned to Zylka, in steadily decreasing amounts; evidence that defendant had swindled an elderly woman, Guna Munters, out of some $200,000 representing the proceeds of a refinancing of her home that she invested in a supposed shipping venture in Latvia that Zylka

promised would be repaid, along with an immense, $5 million profit when the Latvian deal went through; evidence that defendant had falsely represented that Ms. Munters had been employed by an entity controlled by Zylka in letters defendant prepared in connection with another refinancing of her home arising out of a looming foreclosure caused by Zylka's failure to keep his promise to make the mortgage payments; evidence that defendant knew that Zylka had managed to persuade Ms. Munters to give him the $30,000 proceeds from the refinancing; and evidence that defendant represented Zylka in Zylka's unsuccessful efforts to borrow $1 million from a Russian man named Finkel on highly favorable terms (18% interest with the loan to be repaid after one year and a $500,000 bonus to be paid three years later) that was to be collateralized by a property Zylka owned in Connecticut, a property that defendant knew had been appraised at only $150,000.

With respect to the first theft, of $5 million, from Evergreen, there was a wealth of evidence from which the jury reasonably could have concluded that defendant knew that Zylka was seeking to steal $5 million from Evergreen by falsely representing that the collateral being offered by Zylka to back the $120 million guarantee by a Zylka-controlled entity of Evergreen's obligations was worth only about $1 million rather than the hundreds of millions of dollars that Zylka assured

Boelens it was worth. That evidence included evidence from which the jury reasonably could have concluded that: (1) the collateral, a limestone property in Montana known as MGM Land, was not even owned by Zylka when he first claimed to own it, contrary to his representations that it had been in the ostensible Zylka trust structure for decades; (2) defendant, on account of his role in the negotiations with the actual owner of MGM that led to its acquisition by the Zylka entity issuing the guarantee, knew that it was worth, at most, little more than the $1 million dollars Zylka agreed to pay to the owner; (3) defendant not only made a false representation to the owner that his law firm had already received the first installment payment (of $250,000) due to the owner from Zylka to induce the owner to transmit to defendant the stock certificates for MGM, but made that false representation for the purpose of advancing Zylka's scheme; (4) defendant knew that the $5 million "loan" that Evergreen was providing to MGM in exchange for the guarantee was not being used exclusively by MGM in mining operations (as was required by documents defendant drafted) but instead was being used in part to finance the acquisition of MGM for $1 million, the very asset that supposedly was so valuable as to constitute more than adequate collateral for the $120 million guarantee; (5) defendant well knew, contrary to Zylka's representations to Boelens, that he, defendant, was not the trustee of a Zylka

family trust created by defendant that owned the limestone property; (6) defendant falsely assumed the role of a cautious trustee, not merely a lawyer, with his own decision-making authority over the potential deal with Evergreen, and thereby added an air of respectability and legitimacy that Zylka would not have had on his own; (7) defendant prepared two different escrow agreements for the $5 million, the one that Boelens received that made clear that Evergreen had an interest in the $5 million and the one submitted to defendant's law firm that made no mention of Evergreen and stated that the money would be held solely for MGM; and (8) defendant personally received $50,000 of the $5 million with his law firm receiving $100,000.

From this and other evidence, the jury reasonably could have concluded that defendant shared Zylka's larcenous intent and committed various acts that were intended to aid and did aid Zylka in the commission of a $5 million larceny by false pretenses from Evergreen. Although the assistance defendant provided to Zylka in the commission of the other two larcenies was less extensive, from all the evidence the jury reasonably could have determined that defendant continued to act with the requisite intent "to deprive another of property or to appropriate the same to himself or to a third person" (Penal Law § 155.05[1]). Weighing the "relative probative force of conflicting testimony and the relative strength of conflicting

inferences that may be drawn from the testimony" (*People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that the verdict convicting defendant of the three larceny counts and the conspiracy count was not against the weight of the evidence.

The People's position at trial was that defendant was guilty of three of the larceny counts, the ones for which he was convicted, on either a false pretenses or an embezzlement theory of larceny (*see* Penal Law § 155.05[2][a]). We need not determine whether the evidence was legally sufficient to establish defendant's guilt on the embezzlement theory. Rather, defendant's conviction for the three larceny crimes can and should be sustained on the basis of the legally sufficient evidence that provided compelling proof of his guilt of larcency by false pretenses (*see People v Ponnapula*, 229 AD2d 257, 273 [1997] ["when disjunctive theories of criminality are submitted to the jury and a general verdict of guilt is rendered, a challenge based on evidentiary insufficiency will be rejected as long as there was sufficient evidence to support any of the theories submitted"]; *see also Griffin v United States*, 502 US 46, 59-60 [1991]).

Defendant also contends that the larceny convictions should be reversed because the testimony of Boelens, whom the trial court found to be an accomplice as a matter of law, was not corroborated as required by CPL 60.22(1). This claim, however,

is not preserved for review as defendant never raised this objection when moving to dismiss either at the close of the People's case or after all the evidence was before the jury (CPL 470.05[2]; *People v Sala*, 95 NY2d 254, 260-261 [2000]). As an alternative holding, we reject this claim on the merits as there were numerous items of evidence, each of which was sufficient to satisfy the requirement that there be "some basis for the jury to conclude the accomplice testimony is credible" (*People v Besser*, 96 NY2d 136, 143 [2001]).

The court properly instructed the jury that it was not required to be unanimous as to whether defendant committed larceny by false pretenses or by embezzlement (*see e.g. People v Ponnapula*, 229 AD2d at 273), and we reject defendant's constitutional argument in this regard (*see Schad v Arizona*, 501 US 624, 630-645 [1991] [plurality opinion]; *see also id.* at 648-652 [Scalia, J., concurring]). In *People v Mateo* (2 NY3d 383, 406 [2004], *cert denied* 542 US 946 [2004]), the Court of Appeals rejected the claim that "due process requires that the command theory [of murder] be considered by the jury apart from the actual killer theory, and that the jury be unanimous on one theory or the other." In so holding, the Court relied on New York's "long history of treating actual killers and commanders as moral equivalents" (*id.* at 408). The same moral equivalence obtains with respect to thieves who steal by false pretense and

those who steal by embezzlement. Indeed, as the People point out, beginning in 1942 the Penal Law defined larceny as the wrongful taking, obtaining or withholding of property with the requisite larcenous intent *"by any means whatever"* (former Penal Law § 1290 [L 1942, ch 732] [emphasis added]). Even assuming that the false pretenses and embezzlement theories should be viewed, under the facts of this case, as involving divergent views of defendant's conduct, he was not entitled to an instruction that the jurors must unanimously choose one theory or the other (*see People v Sullivan*, 173 NY 122 [1903]).

Defendant's other complaint about the court's charge -- that it was "confusing" in instructing the jurors that they did not have to be unanimous on the theory of larceny but were required to be unanimous that all the elements of a particular larceny had been proven beyond a reasonable doubt -- is unpreserved as defendant voiced no objection on this ground; we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits. The court's instructions made clear what the term "elements" meant, and the jury expressed no confusion on this score. Moreover, during the charge, the court instructed the jury that it also had to be unanimous with respect to "all the facts necessary to substantiate each element." In isolation, this instruction is unclear, but on its face it imposes a burden on the prosecution, and it thus is not

surprising that defendant did not object to it; nor does defendant complain about it on appeal. The court immediately went on to instruct the jury, as it did during the prosecutor's summation, that it had to be unanimous with respect to any particular false representation alleged by the prosecution. The prosecutor correctly opposed this instruction as an inaccurate statement of the law (*see People v Mateo*, 2 NY3d at 408-409). Accordingly, when the instruction to which defendant belatedly objects is viewed in context, i.e., with the accompanying instructions to which he never objected, it is clear that the charge as a whole conferred a benefit upon defendant to which he was not entitled.

The court properly exercised its discretion in admitting uncharged crime evidence -- i.e., the evidence relating to Ms. Munter's dealings with Zylka and Zylka's efforts to obtain a loan from Mr. Finkel -- that was highly relevant to the critical issue of the extent of defendant's knowledge of Zylka's actual financial situation (*see People v Alvino*, 71 NY2d 233, 245 [1987]). The probative value of this evidence outweighed any prejudicial effect, which was minimized by the court's clear and repeated instructions to the jury explaining the proper use of the evidence.

The court also properly exercised its discretion in denying defendant's mistrial motion made on the basis of a remark made by

the prosecutor at the end of the recross-examination of defendant, since the court's curative actions were sufficient to prevent any prejudice. Defendant's other claims of prosecutorial misconduct are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject these claims on the merits and find no basis for reversal.

Finally, defendant's challenge to the sufficiency of the evidence underlying the convictions for the two counts of tampering with physical evidence has merit. Although the evidence supports the conclusion that the two false documents at issue were created by defendant to protect Zylka from his creditors, there is no valid line of reasoning nor any permissible inferences to support the additional and necessary conclusion that defendant's conscious objective in creating either document was that it "be used or introduced *in* an official proceeding or a prospective official proceeding" (Penal Law § 215.40[1][a] [emphasis added]). To the contrary, the only reasonable inference from the evidence is that defendant's intent was to deceive Zylka's creditors. If that effort were successful, neither document would be used or introduced in either of the two official proceedings, the Wheaton foreclosure action and the all but inevitable Evergreen bankruptcy, that the court instructed the jury without objection by the prosecution were at issue. In light of our determination with regard to the

sufficiency of the evidence, we need not and do not reach either defendant's challenge to the weight of the evidence or his claim that his retrial on the tampering counts was barred by double jeopardy on the ground that the evidence at the first trial was legally insufficient on these same counts.

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

ENTERED: JULY 15, 2008

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, JJ.

2096-
2097 Miliha Ferluckaj, Index 120760/04
Plaintiff-Respondent-Appellant,

-against-

Goldman Sachs & Co.,
Defendant-Appellant-Respondent,

Henegan Construction Co., Inc.,
Defendant.

- - - - -

Goldman Sachs & Co.,
Third-Party Plaintiff-Appellant,

-against-

American Building Maintenance Co.,
Third-Party Defendant-Respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Christine Bernstock of counsel), for appellant-respondent/appellant.

Michael J. Gaffney, Staten Island, for respondent-appellant.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered March 20, 2007, which, upon reargument, granted the motion of defendant Goldman Sachs (Goldman) for summary judgment to the extent of dismissing plaintiff's Labor Law § 240(1) claim as against it, and granted third-party defendant American Building Maintenance Co.'s motion to dismiss Goldman's third-party claim against it for indemnification, modified, on the law, to deny Goldman summary judgment dismissing plaintiff's Labor Law § 240(1) claim as against it, and otherwise affirmed, without

costs. Order, same court and Justice, entered August 24, 2006, to the extent not superseded by the March 20, 2007 order, which, to the extent appealed from, denied Goldman summary judgment dismissing the complaint as against it, modified, on the law, to grant Goldman summary judgment only to the extent of dismissing the claims pursuant to Labor Law §§ 200, 202 and 241(6) as against it, and otherwise affirmed, without costs.

Mazzarelli and Saxe, JJ. concur in a memorandum by Mazzarelli, J. as follows:

Defendant Goldman leased several floors in the building at 32 Old Slip Road in Manhattan, including the 29th floor. Its lease provided that the building's owner, which is not a party to this action, would furnish cleaning services, including window washing. The owner contracted with plaintiff's employer, third-party defendant American Building Maintenance Co. (ABM), to provide those cleaning services. The agreement between the owner and ABM required ABM to clean the exterior and interior of the building's windows every three months. It further provided for ABM, at the owner's request, to perform the initial cleaning of all interior windows at no extra charge "prior to tenant occupancy." From time to time, Goldman purchased cleaning services not covered by its lease directly from ABM. The services Goldman states it purchased directly from ABM were

pantry maintenance and carpet care. Goldman maintains that it never purchased any exterior window cleaning (including cleaning of the interiors of such windows) directly from ABM.

It is unclear from the record when Goldman's lease commenced or when Goldman initially took occupancy of the 29th floor. It is undisputed, however, that between January and March 2001, defendant Henegan Construction Co. performed a complete build-out of several floors leased by Goldman in the building. This was pursuant to an agreement with Goldman and included the 29th floor. Plaintiff's accident occurred on March 22, 2001. By that date, Henegan had completed its construction work on the 29th floor, although some minor punch-list work may have been outstanding. Indeed, on the morning of the accident, plaintiff noticed some "construction material" and tools on the 29th floor and observed that it was "dusty."

On March 22, 2001, plaintiff was directed to go to the 29th floor to assist in cleaning the window interiors. The windows in the offices on the 29th floor rose from a point three feet above the floor and extended upward an additional six feet. Plaintiff was equipped with nothing other than a hand cloth to clean the windows. She stated in an affidavit submitted in support of her motion for summary judgment on her Labor Law § 240(1) claims that she was "cleaning dust off the windows that was from the construction." Plaintiff took instructions related to the window

cleaning exclusively from her ABM supervisor.

To clean the top of a window in one of the offices, plaintiff climbed on top of a desk adjacent to the windows. As she was moving along the width of the window, she fell off the desk to the floor, injuring herself. Plaintiff testified at her deposition that she knew at the time of the accident that there was a step stool with two steps in a supply closet maintained by ABM in the building but that she never asked for it. Plaintiff was not asked at her deposition, nor does the record otherwise reveal, how high the step stool was. Plaintiff further testified that her supervisor was aware that the cleaning staff stood on office desks to reach the tops of the windows.

Supreme Court initially denied plaintiff's motion for summary judgment on her Labor Law § 240(1) claim and Goldman's cross motion for summary judgment dismissing the complaint in its entirety as against Goldman. The court found that the window cleaning could only be protected activity under the Labor Law if it was incidental to the construction work performed by Henegan, but found that an issue of fact existed regarding the nature of the work. Upon ABM's motion for reargument, however, the court dismissed plaintiff's § 240(1) claim. The court did not revisit the issue of whether Goldman and Henegan were, respectively, an owner and contractor for purposes of Labor Law liability. Rather, the court found that, because she did not avail herself

of the step stool, plaintiff was the sole proximate cause of her accident. The court also dismissed Goldman's claim against ABM for indemnification. Goldman had argued that ABM had a duty to indemnify it in accordance with ABM's agreement with the owner that ABM would indemnify the owner in connection with actions arising out of, inter alia, "any sub-contracted operations."

We modify Supreme Court's orders to reinstate plaintiff's claim against Goldman pursuant to Labor Law § 240(1) and to dismiss plaintiff's claims against Goldman pursuant to Labor Law §§ 200, 202 and 241(6). In its initial order, the court stated that plaintiff could only recover under Labor Law § 240(1) upon a showing that the window cleaning was incidental to construction work. Since that finding, however, the Court of Appeals has clarified the law, holding that "'cleaning' is expressly afforded protection under § 240(1) whether or not incidental to any other enumerated activity" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]). Moreover, it was error to dismiss the complaint on the basis that plaintiff was the sole proximate cause of her accident. On their own motions, defendants did not establish as a matter of law that the step stool would have been sufficient to permit plaintiff to avoid the accident (*see Balbuena v New York Stock Exch., Inc.*, 45 AD3d 279 [2007]).

Indeed, on plaintiff's motion, defendants failed to even raise a triable issue of fact regarding sole proximate cause (*see*

id). It is "unclear," as Justice Nardelli's concurrence concedes, whether a step stool would have been provided to plaintiff had she asked for one. This lack of clarity is not the result of conflicting factual allegations; rather, it is because defendants failed to set forth any evidence regarding the availability of the step stool. Furthermore, even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device.

The statement in Justice Nardelli's concurrence that an issue of fact exists as to whether plaintiff's inattentiveness was the sole proximate cause of her accident is similarly unavailing. The sole proximate cause defense does not apply where plaintiff was not provided with an adequate safety device as required by the Labor Law (*see Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 290 [2003]). Here, the desk that plaintiff was working on at the time of her accident did not constitute an adequate safety device.

Nevertheless, we decline to award summary judgment to either party at this juncture. A question exists as to whether Goldman, as a lessee, is liable here pursuant to Labor Law § 240(1). That provision enumerates only contractors, owners and their agents as persons charged with providing protective devices to workers.

However, a lessee may have liability as an "owner" under the Labor Law when it had the right or authority to control the work site (*see Bart v Universal Pictures*, 277 AD2d 4, 5 [2000]). Goldman argues that it had no authority over plaintiff's window cleaning because the work was being performed strictly pursuant to ABM's agreement with the owner. The dissent agrees, submitting that the contract between ABM and the building owner is prima facie evidence that Goldman did not request the work. However, the contract is not dispositive on its face. Accordingly, Goldman did not meet its prima facie burden merely by placing it in the record.

For the contract to have had any probative value for purposes of summary judgment, Goldman would have had to establish that the work that plaintiff was performing at the time of her accident was pursuant to one of two provisions in the contract: the provision requiring quarterly window cleaning or the provision requiring ABM, at the owner's request, to perform a one-time window cleaning prior to a tenant's occupancy. Goldman's own witness eliminated the first possibility (at least for summary judgment purposes) by testifying that the quarterly cleanings were only for in-possession tenants and that he did not know when Goldman occupied the space. Moreover, plaintiff presented some evidence that her accident occurred pre-occupancy, by stating that construction tools and construction-related

materials and dust were still present. As for the second provision, the dissent criticizes as "oblique" plaintiff's statement that "[t]here has been no testimony that [the building owner] requested the cleaning of the interior windows"; however, that statement, when one is cognizant of the fact that the burden was on Goldman, is entirely appropriate and correct. We further note that Goldman's witness was not even aware of the provision, and that, moreover, Goldman did not offer the testimony or affidavit of anybody with personal knowledge regarding whether plaintiff's work was being performed pursuant to it.

Regardless of Goldman's status, plaintiff's Labor Law § 241(6) claim against it should have been dismissed. The two Industrial Code sections cited by plaintiff in her brief - 12 NYCRR 23-1.15 and 23-1.16 - apply only where a worker was provided with safety railings and safety belts (23-1.17) in the first instance (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337-338 [2006]). Plaintiff's Labor Law § 200 claim should also have been dismissed, since Goldman did not supervise plaintiff's work and any dangerous condition resulted from her employer's methods (*see Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]). Finally, the court should have dismissed plaintiff's claim pursuant to Labor Law § 202, which requires owners, lessees, agents and managers of buildings and contractors to provide "safe means for the cleaning of the windows and of exterior surfaces."

Contrary to Goldman's argument, that section does apply to the cleaning of interior windows (*see Bauer v Female Academy of Sacred Heart*, 250 AD2d 298, 301 n * [1998]). However, in order to properly plead a Labor Law § 202 claim, a plaintiff must point to the violation of a specific provision of the Industrial Code (*see Brown v Christopher St. Owners Corp.*, 2 AD3d 172, 173 [2003], *lv dismissed* 1 NY3d 622 [2004]). As we have held herein, plaintiff has failed to invoke any relevant Industrial Code provision.

Goldman's claim against ABM for indemnification was properly dismissed as precluded by Workers' Compensation Law § 11, since Goldman did not have a written indemnification agreement with ABM and there are no allegations of grave injury (see *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). The provision in the contract between ABM and the owner relied on by Goldman cannot be read to cover work performed by ABM pursuant to a direct contract with Goldman.

Nardelli, J. concurs in a separate memorandum as follows:

NARDELLI, J. (concurring)

I concur in the result, but I also find that issues of fact exist as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident, thereby precluding summary judgment in her favor.

Labor Law § 240(1), which is commonly referred to as the scaffold law, provides, in pertinent part, that:

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, *cleaning* or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders ... which shall be so constructed, placed and operated as to give proper protection to a person so employed" (emphasis added).

The Court of Appeals has often observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers, who are not in a position to protect themselves (*Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]; *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]). Consistent with this objective, the Court of Appeals has stated that the statute places absolute liability upon owners,

contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]).

The application of "absolute liability" in section 240(1) cases has, apparently, generated some confusion. Accordingly, in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 286-287 [2003]), the Court of Appeals clarified the use of the words strict or absolute liability in conjunction with the statute, noting that those terms do not appear in the current, or any former variation of the statute but, rather, were first used by the Court of Appeals in 1923 to describe an employer's duty under that section. The Court in *Blake* went on to caution that:

> "[i]t is imperative ... to recognize that the phrase 'strict (or absolute) liability' in the Labor Law § 240(1) context is different from the use of the term elsewhere. Often, the term means 'liability without fault' (*see generally* 3 Harper, James and Gray, Torts § 14.1 et seq. [2d ed 1986]), as where a person is held automatically liable for causing injury even though the activity violates no law and is carried out with the utmost care" (*id.* at 287-288).

The Court of Appeals further commented that:

> "[g]iven the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of

> litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise" (*id.* at 288).

In sum, to prevail on a § 240(1) cause of action, the plaintiff must demonstrate that the statute was violated and that such violation was a proximate cause of the injuries sustained (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]).

Initially, I agree with Justice Mazzarelli's conclusion that, in view of the recent Court of Appeals decision in *Broggy v Rockefeller Group, Inc.* (8 NY3d 675, 680 [2007]), the interior window cleaning being performed by plaintiff on the 29th floor of a 40-story office building is expressly afforded protection under section 240(1), regardless of whether it is incidental to any of the other activities delineated in the statute.

The Court in *Broggy*, however, went on to state that:

> "liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.
>
> "*The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff*" (emphasis added) (*id.* at 681).

In this matter, I find that there is a plausible view of the

evidence, sufficient to raise issues of fact, that no statutory violation occurred, and/or that plaintiff's own acts or omissions were the sole cause of the accident. Plaintiff testified that she was aware of the availability of step stools but neglected to request one, and it is unclear if one would have been provided had she so requested. It is also unclear if the section of the desk on which plaintiff was standing, which was located directly in front of the window, could have been removed, or was left in place because it was a convenient platform from which plaintiff could perform her task. What is clear is that the desk did not move, shift or wobble, but remained stable. Moreover, plaintiff testified that at the time of her fall off the desk, she was not looking where she was going or how far it was to the end of the desk, and that a fellow worker called her name immediately prior to her fall, possibly distracting her as she simply stepped off the end of the desk.

I disagree with Justice Mazzarelli's conclusion that "even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device," for, as the Court of Appeals in *Broggy* made clear, "[t]he burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (*Broggy*, 8 NY3d at 681).

Moreover, while Justice Mazzarelli succinctly states that a desk does not constitute an adequate safety device, a point with which I agree, the use of a desk to wash windows, depending on the facts presented, also does not, in and of itself, preclude summary judgment in defendants' favor (*see generally Broggy v Rockefeller Group, Inc.*, 8 NY3d 675 [2007], *supra*).

I also find this Court's recent decision in *Miro v Plaza Constr. Corp.* (38 AD3d 454 [2007]), and the Court of Appeals' subsequent modification of that decision (9 NY3d 948 [2007), to be instructive. In *Miro*, the plaintiff was allegedly injured when he slipped and fell from a ladder that was partially covered with sprayed-on fireproofing material, which purportedly caused him to lose his footing. Plaintiff was aware of the undesirability of the ladder, but failed to request a clean replacement, although it was clear that there was no replacement on the job site and that one would have to have been delivered from an off-site storage area. The three-Justice majority, in dismissing plaintiff's section 240(1) claim, concluded that "a plaintiff who knowingly chooses to use defective or inadequate equipment, notwithstanding being aware that he or she could request or obtain proper equipment, has no claim under Labor Law § 240(1)" (38 AD3d at 455). The two dissenting Justices would have granted plaintiff partial summary judgment on the issue of liability under section 240(1), finding, inter alia, that there

was no replacement ladder on site and that plaintiff had testified that he complained to a superintendent about the condition of the ladder, but the superintendent simply shrugged.

The Court of Appeals modified, reinstated the section 240(1) claim, and held, in its entirety, that "[a]ssuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured" (9 NY3d at 949). Here, assuming the desk was unsafe, plaintiff was aware of the availability of a step stool and failed to request one, although it is unclear if one would have been provided had she done so.

Accordingly, I find that a jury could conclude that either plaintiff's admitted inattentiveness, which caused her to step into midair, or her failure to request a step stool, was the sole proximate cause of the accident. Summary judgment, therefore, in either plaintiff's or defendant's favor, is not warranted.

Tom, J.P. dissents in part in a memorandum as follows:

TOM, J.P. (dissenting in part)

The issue dividing this Court is whether there is any basis under Labor Law § 240(1) for imposing liability on a tenant because an employee of a cleaning service company, engaged by the building's owner, sustained injury while performing work specified in the contract between the owner and the cleaning company. The tenant, defendant Goldman Sachs & Co., is a stranger to the contract, and the injured plaintiff has failed to provide any proof to establish that Goldman either contracted for, or exercised control over, the window cleaning work. Thus, there is no basis upon which liability may be imposed on Goldman, and its cross motion to dismiss plaintiff's Labor Law § 240(1) claim was properly granted.

Defendant Goldman was the tenant of the 29th floor of a building owned by non-party Paramount Group, Inc. Paramount engaged third-party defendant American Building Maintenance Co. (ABM), plaintiff's employer, to perform cleaning services for the building. The 29th floor had been undergoing renovation work by defendant Henegan Construction Co., hired by Goldman. On March 22, 2001, plaintiff was assigned to work overtime by an ABM supervisor. She was directed to proceed to the 29th floor of the building, located at 32 Old Slip Road in Manhattan, to clean interior office windows. Plaintiff was supplied with only a rag to clean the windows, and she found it necessary to climb onto

office desks "to reach the top of the windows." She sustained injury while "she was cleaning the window in front of her and was moving to the left and fell off the desk on to the floor."

Plaintiff sought summary judgment as to liability against Goldman and Henegan on her Labor Law § 240(1) claim. Goldman cross-moved to dismiss the claims asserted by plaintiff against it under the Labor Law. Henegan also moved for summary judgment dismissing the complaint, adopting the arguments advanced by Goldman. Henegan additionally sought dismissal of Goldman's cross claims against it.

To recover under Labor Law §§ 200, 240 and 241 as a member of the special class for whose protection these provisions were enacted, it must be established that the plaintiff was hired by the owner, general contractor or an agent of the owner or general contractor (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]; *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Liability will not be imposed under Labor Law § 240 merely because injury was sustained in the vicinity of an ongoing construction project, even if the injured party was performing a function related to that project (*see Martinez v City of New York*, 93 NY2d 322 [1999] [entity for which plaintiff acted not engaged to perform statutorily protected activity]; *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991] [same]). As this Court has noted, "A lessee is liable under the

statute only where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor" (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1999], citing *Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1993]).

In support of its motion, Goldman submitted the service contract executed by ABM and Paramount. The contract provides that ABM, as contractor, will perform all window cleaning, encompassing the cleaning of "all interior and exterior windows and frames," to be performed "every three (3) months." The contract further states:

> "Prior to tenant occupancy, contractor shall provide the initial cleaning o[f] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant. Work to be performed upon request of Paramount Group Inc."

The cleaning service contract unambiguously provides that, at Paramount's request, ABM will clean all interior windows prior to tenant occupancy. Plaintiff has conceded that, as of the date of her injury, March 22, 2001, Goldman had not yet taken occupancy of the 29th floor. Her supporting affidavit states that Goldman's employees "moved in their personal items to the 29th floor on March 23 and 24, 2001." She further restated in her opposition to the cross motion that Goldman's "employees had not moved into the 29th floor." Thus, on the motion, plaintiff did not raise any factual issue as to whether the work in which

she was engaged at the time of her accident was performed pursuant to ABM's contract with Paramount requiring a one-time cleaning of the interior windows prior to tenant occupancy.

On its cross motion, Goldman also submitted the transcript of deposition testimony given by Robert Barriero, its vice president for corporate services, to demonstrate that it did not independently order window cleaning services from ABM. Barriero stated that Goldman received "base building cleaning services from Paramount as part of our lease," which services were provided by Paramount's vendor, ABM. He noted that Goldman was required to use the base building cleaning services contractor, and he acknowledged that Goldman's agent, Hines Interests, Ltd., contracted directly with ABM for cleaning work that was not included in the base cleaning services provided under the lease. The supplemental cleaning services he described were limited to "[p]antry maintenance, some carpet care, shampooing."

In her opposition to the cross motion, plaintiff did not address the significance of the contract between Paramount and ABM except to concede that ABM "had been hired by Paramount Group, the owner . . . to do cleaning for the tenants in the building." Plaintiff also acknowledged that Goldman had directly contracted with ABM for "extra services . . . such as cleaning pantries, stripping and waxing floors and shampooing carpets." She cited the deposition testimony of Al Hoti, an ABM employee,

who stated that the cleaning ABM performed directly for Goldman consisted of the activities plaintiff described as well as "cleaning refrigerators [and] providing plastic liners," presumably for trash receptacles. Thus, the record is clear that any extra cleaning services provided to Goldman by ABM did not include the cleaning of windows.

The dispositive evidence in this matter consists of the testimony of Robert Barriero, Goldman's vice president for corporate services, the testimony of Al Hoti, ABM's employee, and the contract between ABM and Paramount. Thus, Goldman provided evidence from persons with personal knowledge of the facts to establish that plaintiff was hired by ABM, as agent for the building's owner, Paramount Group. No proof was offered by plaintiff, in rebuttal, to support the intimation that she might have been hired by Goldman or its agent, Henegan. Thus, there is no basis for imposing vicarious liability on Goldman on the ground that plaintiff was hired either by it or by its general contractor.

It should be emphasized that the sole theory of recovery against Goldman advanced by plaintiff before the motion court was that Goldman is an "owner," as defined under the Labor Law, because it hired Henegan to perform renovation work at the leased premises. Because she was performing cleaning that was "incidental" to Henegan's construction work, plaintiff reasoned

that she is therefore covered by the Labor Law, irrespective of who hired her, and that Goldman is vicariously liable under Labor Law § 240(1). Significantly, plaintiff did not contend that Goldman hired ABM to perform the *window* cleaning in which she was engaged at the time of her fall. In fact, she failed to identify any cleaning work that she, as an employee of ABM, performed for Goldman, either directly or at the behest of Goldman's agent, Hines.

Throughout this litigation, plaintiff has never claimed that Goldman is subject to liability under Labor Law § 240(1) because it exercised, or had authority to exercise, control over the work she was performing at the time she sustained injury or because Goldman contracted, either directly or through its agent, with ABM for the window cleaning work in which she was engaged. On appeal, plaintiff continues to assert that Goldman's liability under Labor Law § 240(1) is vicarious, contending that Henegan's duties as construction manager "determine its status as a contractor or agent of Goldman"; that Goldman and Henegan failed in their statutory duty to provide any safety devices to plaintiff, "a cleaner at a construction site"; that her activities were related to the construction work and therefore covered under Labor Law § 240(1); and that Goldman is liable for her injuries, which were proximately caused by its breach of the statute. The defect in plaintiff's position is that Henegan did

not hire or request plaintiff to clean the subject windows, and therefore Goldman cannot be held vicariously liable to plaintiff for her injuries. Furthermore, plaintiff's Labor Law § 240(1) claim against Henegan has since been dismissed, and this avenue of recovery is unavailing as against either party to the renovation contract.

Plaintiff now obliquely asserts, for the first time on appeal, that "[t]here has been no testimony that Paramount requested the cleaning of the interior windows." She adds, "Goldman has just made the assumption that Paramount requested the cleaning of the interior windows." She goes on to state that "Henegan had laborers on site at 32 Old Slip through March 28, 2001," six days after her accident. Plaintiff intimates that Henegan or Goldman might have requested ABM to assist in cleaning up the 29th floor, but she points to no evidence to support such a theory.

In view of plaintiff's concession that she was employed by ABM and that window cleaning was undertaken just prior to Goldman's occupancy of the 29th floor, the only explanation for her work on the date of the accident is ABM's performance of its contract with Paramount providing for the preoccupancy cleaning of interior windows at the building owner's request. Goldman therefore demonstrated its prima facie entitlement to summary judgment, placing the burden upon plaintiff to come forward with

evidence in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Although Goldman squarely raised the issue in its opposing papers, plaintiff failed to come forward with any evidence in rebuttal to demonstrate that either Goldman or Henegan had entered into a contract for window cleaning services with ABM. This omission is notable in view of Barriero's testimony that both Goldman and its agent, Hines, maintained a record of any funding request made in connection with ABM's provision of services outside those provided under the lease in accordance with ABM's contract with Paramount.

This Court has consistently observed the rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" (*Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988], citing *Huston v County of Chenango*, 253 App Div 56, 60-61 [1937], *affd* 278 NY 646 [1938]; *see e.g. Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]). As stated in *Cohn v Goldman* (76 NY 284, 287 [1879]), "It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error." Plaintiff should not be heard to argue, for the first time, that Goldman is liable for her injuries because it might have had the

authority to exercise control over the work site, and, indeed, plaintiff makes no such argument.

This is precisely the theory of recovery postulated by the majority on plaintiff's behalf, relying on this Court's decision in *Bart v Universal Pictures* (277 AD2d 4 [2000]). It should be noted, however, that the lessee in *Bart* was *contractually* obligated to control the work site and to ensure that the work was safely performed (*id.* at 5-6; *see also Shun Jian Ke v Hsu & Assoc., Inc.*, 300 AD2d 140 [2002]). There is no proof that Goldman had a contract with ABM for window cleaning services, let alone that Goldman was under a contractual obligation to ensure the safety of the work site. Moreover, the majority has cited no case in which liability under Labor Law § 240 has been predicated on a tenant's mere right to reenter the premises rather than on the basis of its actual control over the work being performed (*cf. Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987] [owner with right of reentry and inspection liable for injury due to defect on premises under Multiple Dwelling Law § 78]).[1]

The majority takes the position that the evidence is insufficient to entitle Goldman to summary judgment dismissing plaintiff's Labor Law 240(1) claim against it because it failed

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[1] It is clear that the majority finds no liability based on Goldman's actual control over the premises because it agrees that there is no basis for common-law liability under Labor Law § 200.

to offer evidence by someone with personal knowledge of the facts that plaintiff's window cleaning work was performed pursuant to the contract between ABM and Paramount. Quite apart from ignoring substantial evidence, this supposition presumes that Goldman was capable of contracting directly with ABM for the window cleaning work, a proposition that is simply untenable. As a matter of fact, it defies credulity that Goldman would contract with ABM for the same window cleaning services ABM was obligated to provide for Goldman's benefit under its agreement with Paramount. More significantly, as a matter of law, Goldman could not contract with ABM for window cleaning services ABM was already obligated to provide under its existing contract with Paramount (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212-213 [1991] ["one cannot be induced to tender a performance which is required as a part of a preexisting contractual obligation"]). As the Court of Appeals has succinctly observed, "A covenant to do what one is already under a legal obligation to do is not sufficient consideration for another contract" (*Ripley v International Rys. of Cent. Am.*, 8 NY2d 430, 441 [1960]).

That the window cleaning work was performed pursuant to the agreement between ABM and Paramount is confirmed by explicit contract language. It is further supported by Barriero's testimony that Goldman was obligated under its lease to use ABM's services. Barriero and Hoti both stated that supplemental

cleaning services provided directly to Goldman by ABM did not include window cleaning. Thus, there is both documentary and testimonial evidence supporting Goldman's contention that plaintiff's presence at the work site was due to ABM's obligation to provide initial cleaning of interior windows under its contract with the building owner.

While the opponent of a summary judgment motion may normally offer an excuse for the failure to present opposing proof in admissible form (*Zuckerman*, 49 NY2d at 562), where the opposing party has likewise moved for summary judgment, this option is unavailable. By moving for an accelerated disposition, plaintiff represented that the record proof was sufficient to warrant judgment in her favor. As this Court observed in *News Am. Mktg., Inc. v Lepage Bakeries, Inc.* (16 AD3d 146, 149 [2005]):

> "By moving for accelerated judgment, a party submits the case for disposition on the record evidence, and the propriety of the court's decision will be reviewed on the basis of that same evidence. It is settled that an appellate court is bound by the record (*Block v Nelson*, 71 AD2d 509 [1979]), and, absent matter that is subject to judicial notice, review is limited to the evidence before the motion court (*Broida v Bancroft*, 103 AD2d 88, 93 [1984]; *see also Becker v City of New York*, 249 AD2d 96, 98 [1998]). As we stated in *Ritt v Lenox Hill Hosp.* (182 AD2d 560, 562 [1992]), 'If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be

submitted.'"

Having moved for judgment on the record, plaintiff cannot now assert, contrariwise, that the record does not support the motion court's disposition on the evidence before it.

Finally, plaintiff has not proffered any excuse for her failure to submit admissible opposing evidence in opposition to the cross motion to warrant trial of an issue of fact. Thus, she has offered neither proof to controvert Goldman's evidence demonstrating that she performed window cleaning in accordance with Paramount's contract with her employer nor an excuse for her failure to do so, and her opposition fails to meet the requirements to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562). The intimation that Goldman might have directly hired ABM to do unspecified cleaning work, for reasons not even suggested, is speculative and does not suffice to meet her obligation "to submit evidentiary facts or materials, by affidavit or otherwise, rebutting the prima facie showing . . . and demonstrating the existence of a triable issue of ultimate fact" (*Indig v Finkelstein*, 23 NY2d 728, 729 [1968]). It is settled that "mere conclusions, expressions or hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

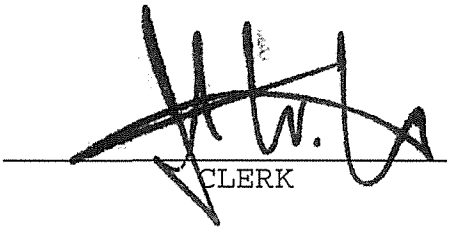
Accordingly, plaintiff failed to rebut Goldman's prima facie

showing that it did not hire her employer to perform window cleaning work, and her Labor Law § 240(1) claim against said defendant was properly dismissed.

The Decision and Order of this Court entered herein on April 10, 2008 is hereby recalled and vacated (*see* M-2390 decided simultaneously herewith).

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

ENTERED: JULY 15, 2008



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

3144 In re 900 West End Avenue Tenants Association, et al., Petitioners-Respondents, Index 115791/05

-against-

New York State Division of Housing and Community Renewal, Respondent-Appellant,

Atlantic Realty Apartments Co., LLC, Intervenor-Respondent-Appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for DHCR, appellant.

Tuchman, Korngold, Weiss, Lippman & Gelles, LLP, New York (Jennifer Polovetsky of counsel), for Atlantic Realty Apartments Co., LLC, appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David S. Hershey-Webb of counsel), for respondents.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 8, 2007, which granted the petition to annul the determination of respondent Division of Housing and Community Renewal (DHCR) granting intervenor Atlantic Realty (landlord) major capital improvement (MCI) rent increases, unanimously reversed, on the law, without costs, the petition denied, DHCR's determination reinstated and confirmed, and the proceeding dismissed.

In a January 2000 order, DHCR's Rent Administrator granted landlord's application to substitute security services for those provided by five elevator operators. The order granted

permission to replace two manually operated elevators with automatic units on condition that landlord install security cameras, a telephone system and storage lockers, which "installations" would not qualify for MCI rent increases. Tenants brought a Petition for Administrative Review (PAR), which DHCR's Deputy Commissioner denied, finding the conditions imposed by the Rent Administrator to comprise an adequate substitution of services and noting the absence of any basis for addressing MCI increases with respect to the elevator upgrade.

After completion of the project, landlord applied for an MCI rent increase for its "non-conversion related costs of the elevator upgrade" (viz., the cost of replacing old elevator components that had outlived their useful, 75-year life span). By order dated June 29, 2004, the Rent Administrator denied the application, reasoning that the original January 2000 order barred any MCI rent increases in connection with the elevator replacement project. Landlord filed a timely PAR, and in a December 2004 order and decision, the agency reversed the Rent Administrator's determination. The Deputy Commissioner ruled that the January 2000 order's proscription against MCI increases was limited to the listed "installations," that is, "telephone based intercom system, video surveillance system, and locked cabinet."

Tenants commenced this article 78 proceeding challenging the

Deputy Commissioner's disposition. They argued, as they do on appeal, that MCI rent increases were addressed by the Rent Administrator's January 2000 order, barring further consideration of such rent increases by DHCR. By stipulation of the parties, the matter was remanded to the agency, resulting in a third order by the Deputy Commissioner that affirmed his December 2004 decision, ruling that it was consistent with agency precedent and rejecting tenants' contention that stare decisis required DHCR to uphold the Rent Administrator's June 2004 order.

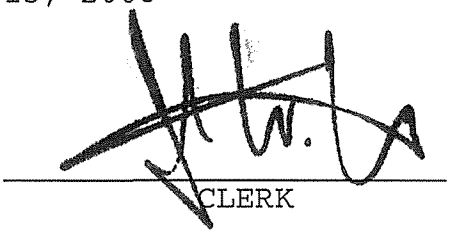
In vacating the Deputy Commissioner's determination, Supreme Court improperly expanded the scope of the Rent Administrator's January 2000 order to encompass elevator replacement costs. It is clear that the original order bars only MCI rent increases for items landlord was directed to install to maintain security, as reflected in both the Deputy Commissioner's January 2000 order, which specifically states that it does not address the issue of MCI rent increases in connection with elevator replacement, and his subsequent December 2004 order.

DHCR's grant of landlord's MCI application has a rational basis in the record and is neither arbitrary nor capricious (*see Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370 [2004]). Moreover, the

agency's interpretation of its operational practices and controlling authority is entitled to deference (*see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

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

ENTERED: JULY 15, 2008



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JUL 15 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
John T. Buckley
James M. Catterson, JJ.

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In re Tuck-It-Away Associates, L.P.,
Petitioner-Respondent,

-against-

Empire State Development Corporation,
Respondent-Appellant.

- - - - - - - - - - -

In re West Harlem Business Group,
Petitioner-Respondent,

-against-

Empire State Development Corporation,
Respondent-Appellant.

Respondent Empire State Development Corporation appeals from orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 3, 2007, and on or about August 23, 2007, which, insofar as appealed from, granted petitioners' applications pursuant to the Freedom of Information Law to compel it to release certain documents.

Carter Ledyard & Milburn LLP, New York (Ethan I. Strell, Jean M. McCarroll and Pamela Shelinsky of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel), Norman Siegel, New York, and Philip R. Van Buren, New York, for respondents.

CATTERSON, J.

In these two related but separate appeals, we examine the Freedom of Information Law and the principles underpinning it in order to determine how strictly the law's exemptions should be construed. Specifically, we focus on the issue of what materials may be considered as exempt intra or inter-agency documents when a government agency hires a consultant that is also working for an entity with an interest in the outcome of the government agency's determination.

Almost 100 years ago, United States Supreme Court Justice Brandeis commented on the value of disclosure by government, observing that "sunshine is said to be the best of disinfectants." Other People's Money and How the Bankers Use It (1914). The New York Legislature subsequently codified that precept in the Freedom of Information Law (hereinafter referred to as "FOIL"). See Public Officers Law § 84, et seq. The Legislative declaration of section 84 states unequivocally that "government is the public's business and that the public individually and collectively and represented by a free press, should have access to the records of government." Public Officers Law § 84. Nevertheless, there are exemptions under FOIL, which are enumerated in Public Officers Law § 87(2), and which lie at the crux of these two appeals.

The question presented is whether an intra-agency or inter-agency exemption attaches to the government agency's communications with a firm hired as a consultant by that agency whose approval is required for the project, when the same firm was also hired by the entity promoting the project in question.

The issue arises in connection with a proposed development of a new 17-acre campus by Columbia University in the Manhattanville section of West Harlem. The proposal includes plans for building 17 high-rise towers housing 4.7 million square feet of space and a single 2.1 million square foot, seven story-deep "bathtub" under most of the area. In order to realize its plan, Columbia needs the approval and participation of a number of government agencies including respondent Empire State Development Corporation (hereinafter referred to as "ESDC"). Specifically, it requires ESDC's approval because the plan involves the taking of private and public property through the power of eminent domain with transfer of the property to Columbia. Columbia also needs ESDC's power to override local law to build its proposed "bathtub" because transferring the land beneath the city streets would require amending the New York City map.

Petitioner Tuck-It-Away Associates (hereinafter referred to as "TIA") is a business located in the area that is intended to

be part of Columbia's project. TIA is a member of petitioner West Harlem Business Group (hereinafter referred to as "WHBG") which was formed in 2004 by businesses within the area targeted by Columbia in order to protect their property rights against Columbia's plans to have their property condemned through the exercise of eminent domain.

In June 2004, Columbia hired the firm of Alee, King, Rosen and Fleming (hereinafter referred to as "AKRF") to assist in its planning, and to act as its agent in seeking approvals and determinations from various agencies necessary to realize its expansion plan. AKRF participated in ESDC planning meetings in connection with the project, together with Columbia officials, Columbia's attorneys and other Columbia contractors, as well as representatives of other agencies. In addition, Columbia hired AKRF to prepare a City Map Override Proposal which involved site surveys, map and drawing preparation, and planning of the below grade "bathtub" as well as relocation of an existing MTA bus depot, Con Edison substation, and existing underground utilities and services. Columbia also hired AKRF to prepare an Environmental Impact Statement (hereinafter referred to as "EIS").

Further, Columbia applied to the New York City Planning Commission (hereinafter referred to as "CPC") under section 197-c

of the New York City Charter for re-zoning of a 35-acre area that included the proposed project area. As a result, the New York City Department of City Planning (hereinafter referred to as "DCP") became the lead agency for purposes of environmental review under the State Environmental Quality Review Act (hereinafter referred to as "SEQRA") and the City Environmental Quality Review (hereinafter referred to as "CEQR"). The EIS was also to be used for ESDC's possible condemnation and local law override actions.

On July 30, 2004, Columbia entered into an agreement with ESDC to cover ESDC's costs of preparatory work in connection with ESDC's potential participation in Columbia's expansion plan. The agreement provided, inter alia, that Columbia pay for AKRF to execute a blight study. The study was to be undertaken by the firm of Carter, Ledyard and Milburn, LLC (hereinafter referred to as "CLM"). ESDC was to retain CLM as outside counsel. A blight study was determined necessary to provide ESDC with a basis to find that the area at issue was "substandard and insanitary" as required for ESDC's participation in the project and for the exercise of its eminent domain and local law override powers. See McKinney's Uncons. Laws of NY §6260[c][1] (Urban Development Corporation Act § 10[c], as added by L 1968 ch 174, §1, as amended).

Specifically, ESDC retained AKRF as a subconsultant in connection with the preparation of a neighborhood conditions study. ESDC staff initiated communications with AKRF in March 2006. During its preliminary discussions with AKRF, ESDC contends that it was made clear to AKRF that it would need to maintain separation between the team working on the neighborhood conditions study and the team assigned to the work being performed on Columbia's behalf (i.e., the environmental impact review under SEQRA and CEQR). ESDC maintains that it "always considered its communications with AKRF concerning the neighborhood conditions study to be confidential, and AKRF assured ESDC that such communications would not be disclosed to outside parties, including Columbia University."

On June 15, 2006, WHBG made a FOIL request, which sought various documents in the period from November 1, 2005 through June 15, 2006. On October 13, 2006, TIA also made a FOIL request seeking various documents from the same time period. These FOIL requests are the subjects of the instant cases.

The WHBG foil request sought any and all records pertaining to the proposed Columbia agreement, from November 1, 2005 through June 15, 2006. The TIA FOIL request similarly sought any and all records in possession and control of ESDC pertaining to the Manhattanville Project, related planning activities, and related

actions by Columbia University including, but not limited to, "[t]he final forms of the above referenced agreement between ESDC and Columbia for which Columbia agreed to pay certain costs in its letter to ESDC of July 30, 2004."

The TIA FOIL request further sought

> "[a]ny extension of this agreement, modification of its terms, or any related or subsequent agreement between ESDC and Columbia relating to the Manhattanville Project, Columbia's 197c application ... for the commissioning, evaluation or comment on any study of blight in the Manhattanville area, or for the scoping, or drafting of an Environmental Impact Statement ... for either an ESDC condemnation action, adoption of a General Project Plan or for the New York City Department of Planning rezoning of the area."

Additionally, it sought, inter alia, "[a]ll 'Transactional Documents' including restrictive deeds, land acquisition and disposition agreements between ESDC and Columbia and all necessary and appropriate documents related thereto drafted, reviewed or negotiated by ESDC."

ESDC responded to the FOIL requests and provided several documents but maintained that it did not possess the records requested or that responsive records could not be found after a diligent search. ESDC further maintained that some of the documents which were responsive were exempt because disclosure would impair present or imminent contract awards or collective bargaining negotiations.

ESDC affirmed its initial determination after an administrative appeal and WHBG filed a petition, dated November 8, 2006, pursuant to article 78 of the CPLR challenging ESDC's final determination. TIA also filed an article 78 petition, dated May 24, 2007. They both maintained that ESDC's determinations denying their administrative appeals were arbitrary and capricious, an abuse of discretion, and were affected by an error of law. Specifically, TIA maintained that the applicability of the inter-agency and intra-agency exemption to agency consultants is inappropriate when the consultant also represents an applicant seeking the benefit of the agency's decision in the same matter. It also maintained that ESDC failed to sufficiently specify a particularized basis to establish that the records withheld were in fact inter-agency or intra-agency or that they did not contain factual data, instructions to staff or final agency policy or determinations as required by Public Officers Law §87(2)(g).

WHBG also asserted that ESDC failed to offer particularized and specific justification for denying access to the demanded documents since it failed to indicate "the nature of the records it is withholding, what present or imminent contract award is at risk of impairment, [or] how disclosure of these records could impair such contract."

WHBG and TIA sought declarations that ESDC's denial of their requests for documents and written communications relating to the Columbia project violates FOIL. WHBG further sought an order directing ESDC to provide the responsive documents and to deliver to the court for its inspection all documents which ESDC claimed were exempt as well as an award for its costs and fees incurred in connection with this action. TIA sought an order directing ESDC to deliver to it all of the documents responsive to its request; and directing ESDC to search the paper and electronic files of an additional 34 ESDC current and former officers and employees identified in its petition for records responsive to its request, directing it to provide additional specific and particular reasons establishing the inter-agency or intra-agency status of records claimed as exempt. In the alternative, TIA requested an order directing ESDC to deliver to the court for an in camera review certain documents withheld on the ground that they were subject to the inter-agency or intra-agency exemption.

ESDC moved to dismiss the petitions on the ground that it had provided all responsive documents that are not exempt under FOIL or privileged, and that it had fully satisfied its obligations under FOIL.

In the WHBG matter, Supreme Court issued an interim order entered May 8, 2007, in which it properly directed an in camera

review of the documents at issue. Thereafter, in the order appealed from, the court directed that certain of the documents, or parts thereof, be disclosed. The court divided the documents to be disclosed into five sections: (I) "redact and release" which included documents not covered by the agency or privilege exemptions, with redactions to protect portions that fall within those exemptions; (II) documents that are not intra-agency or inter-agency and/or were disclosed to unidentified persons or non-agency individuals[1]; (III) documents that constitute instructions to staff that affect the public, which is an exception to the agency exemption; (IV) an attachment not provided to the court thus requiring the court to find that ESDC failed to meet its burden of demonstrating that it is subject to an exemption; and (V) documents that are intra-agency or inter-agency, but not deliberative.[2]

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[1]The court noted that "[a] document that has been disclosed to a third party, outside of the agency or agencies, generally is not covered by the agency exemption." It found that ESDC "did not properly invoke the agency exemption for written communications between respondent and a consultant [AKRF], prior to its retention by respondent on November 11, 2006." However, as noted above, AKRF began working for ESDC in March 2006, well prior to its actual retention.

[2]On appeal, no arguments are specifically asserted by respondent-appellant for documents in section I (where appellant claimed attorney-client privilege) or section IV (an attachment not provided to the court).

The application court made the following determinations in the WHGB petition: With regard to documents in section II, the court held that the agency exemption did not apply due to AKRF's role as a consultant to Columbia. Specifically, it stated:

> "in order for a consultant to fall under the agency exemption, the consultant must not represent an interest of its own, or the interest of any other client, when it advises the agency .... For the consultant's documents to fall under the agency exemption, its only obligations must be to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do. The rationale for the consultant exception falls apart where the consultant acts in their own interest or on behalf of any person or group whose interest might be affected by the Government action addressed by the consultant" (internal quotation marks and citation omitted).

The court held that "while acting for Columbia, AKRF has an interest of its own in the outcome of respondent's action, as AKRF, presumably, seeks to succeed in securing an outcome that its client, Columbia, would favor." As a result, it further found that AKRF "lacks sufficient neutrality for the court to find that AKRF does not represent an interest of its own, or the interest of any other client, when it advises [ESDC]" (internal quotation marks omitted).

Additionally, the court found that "[t]he 'Chinese wall' exception that [ESDC] would like the court to recognize is not

sanctioned by any judicial precedent, and it does not eliminate AKRF's representation of potentially rival interests." It noted that given the "presumption in favor of disclosure under FOIL, and [that] the burden is on the agency to demonstrate that the material falls squarely within the exemption, any doubts about the neutrality of AKRF must be resolved in favor of disclosure."

With regard to documents in section III, the application court determined that the documents constituted "instructions to staff that affect the public," which is an exception to the agency exemption. See Public Officers Law § 87(2)(g)(ii). With regard to section V documents, the court stated that "[n]ot every document that travels within or between agencies is exempt from disclosure under FOIL." It explained that to qualify for the exemption, a "document must be 'predecisional,' which means it must be prepared to assist the policy maker in making a decision and it must be 'deliberative,' which means actually related to the process by which policy is formulated." The court found that the documents at issue "do not contain deliberations about policy and, therefore, they are outside the agency exemption." It noted that most of the documents "are emails discussing the availability of staff for the purpose of scheduling meetings."

In the TIA matter, the court decided the matter in accordance with its decision in WHBG and directed ESDC to use the

criteria set forth in that decision in responding to the FOIL request."

For the reasons set forth below, we modify, affirming the order for disclosure of any documents contained in section II, and reversing the order as it applies to documents contained in sections III and V.

At the outset, we reiterate that the purpose of FOIL is "to promote open government and public accountability" with the law imposing "a broad duty on government to make its records available to the public." Matter of Gould v. New York City Police Dept., 89 N.Y.2d 267, 274, 675 N.E.2d 808, 811, 653 N.Y.S.2d 54, 57 (1996). All documents are presumptively available for review unless they fall under one of the exemptions pursuant to Public Officers Law § 87(2). See Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).

We note, however, that in addition to the exemptions enumerated under Public Officers Law § 87(2), there are certain other exemptions from disclosure under FOIL, that have arisen as a result of a more encompassing interpretation of the "inter-agency and intra-agency" exemption. As the Court of Appeals has explained, "[o]pinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the

Freedom of Information Law (FOIL) as 'intra-agency materials' do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant." Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 131-132, 490 N.Y.S.2d 488, 489, 480 N.E.2d 74, 75 (1985), quoting Public Officers Law § 87[2][g].

Many of the provisions of FOIL, including the exemption at issue here, were patterned after the Federal analogue (the Freedom of Information Act and thus, as the Court of Appeals has noted, federal case law on the scope of this exemption is therefore instructive. Matter of Sea Crest Const. Corp. v. Stubing, 82 A.D.2d 546, 548-549, 442 N.Y.S.2d 130, 132 (2d Dept. 1981).

In Department of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Assn. (532 U.S. 1, 8, 121 S.Ct. 1060, 1065, 149 L.Ed.2d 87, 95 (2001)), the Supreme Court noted that the limited exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective." With respect to the specific exemption at issue in that case, the Court noted that the "deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated'" and that the deliberative process

privilege's "object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government." Id. at 9; 121 S.Ct. at 1066, 149 L.Ed. at 95-96, quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-151, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29, 47 (1975). In cases where the exemption has been extended to consultants performing work on behalf of an agency, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." Klamath, 532 U.S. at 10, 121 S.Ct. at 1067, 149 L.Ed. at 97. The Court further stated:

> "the consultants in these cases were independent contractors and were not assumed to be subject to the degree of control that agency employment could have entailed; nor do we read the cases as necessarily assuming that an outside consultant must be devoid of a definite point of view when the agency contracts for its services. But the fact about the consultant that is constant in the typical cases is that *the consultant does not represent an interest of its own, or the interest of any other client,* when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do. (emphasis added). Id. at 10-11, 121 S.Ct. at 1067, 149 L.Ed. at 97.

Stated another way, the Court explained that "consultants whose communications have typically been held exempt have not

been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." Id. at 12, 121 S.Ct. at 1067-1068, 149 L.Ed. at 98.

Thus, such communications lose their exemption if there is reason to believe that the consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant. See Id.

ESDC is correct in asserting that Klamath is facially distinguishable because it involved a situation where the documents sought were communications between a government agency (the Department of the Interior's Bureau of Reclamation) and Indian tribes, not a consultant, regarding the allocation of water from Klamath River among competing uses and users, including the tribes themselves. Although the Bureau alleged that it had a consulting relationship with the tribes, the Court held that the exemption did not apply because the tribes were "self-advocates" whose interests were in competition with other nontribal complainants. Id. at 12, 121 S.Ct. at 1068, 149 L.Ed. at 98. Nonetheless, Klamath is instructive.

ESDC maintains that AKRF is not Columbia's advocate, but rather, its consultant, retained to use its good judgment and

expertise to serve its client's needs truthfully and objectively. That mischaracterizes the problem. More accurately put, the question to be answered is whether the fact that AKRF represents both ESDC and Columbia, albeit, allegedly in separate areas related to the same massive project, constitutes a conflict such that AKRF is not capable of rendering a truthful, objective expert study of neighborhood conditions irrespective of its impact on Columbia's plan. We agree with Supreme Court and hold that such a relationship creates an inseparable conflict for purposes of FOIL, and therefore for the purposes of invoking the agency exemption.

There is no question that Columbia is an interested party in the question of whether ESDC adopts its General Project Plan (hereinafter referred to as "GPP"). The GPP was tailored around Columbia's own expansion plan, and drafted by Columbia's attorneys to its specifications. The GPP calls for ESDC to, if necessary, exercise eminent domain power to take both public and private property and convey it to Columbia. The GPP also entails ESDC's override of local law to amend the New York City Map to enable development of the below-grade "bathtub."

More importantly, Columbia's interest in ESDC's adoption of its GPP is adverse to the interest of other parties affected by ESDC's eventual decision on the project. Any action by ESDC in

Columbia's favor would likely result in the property owners in the expansion plan area having their property taken against their will. Furthermore, it would prevent them from developing their own property. Similarly, it would be contrary to Community Board 9's plan for diversified development in Manhattanville. Indeed, the record reflects that Community Board 9 has specifically expressed its opposition to ESDC's use of eminent domain in Manhattanville.

It is undisputed that AKRF has worked to promote ESDC's adoption of Columbia's GPP. AKRF has been participating in project planning since at least June of 2004 through meetings with ESDC. While in Columbia's employ, AKRF has studied technical, engineering and environmental issues, helping thereby to determine the size, shape and configuration of the proposed project. Similarly, AKRF has prepared surveys, maps, and drawings for the proposed project. AKRF also prepared a City Map Override Proposal which defined the extent, shape, and program of uses of the below-grade development. AKRF has consistently acted as an advocate for Columbia in seeking ESDC's adoption of Columbia's proposal.

Of course, this was not the limit of AKRF's service for Columbia. AKRF acted as Columbia's consultant, agent and representative in all phases of environmental review under SEQRA.

ESDC's adoption of a GPP is also subject to SEQRA. Thus, AKRF's work in the project's environmental review is ultimately necessary for ESDC to grant Columbia's application for adoption of the GPP. ESDC could not proceed in condemnation without having completed environmental review under SEQRA. See EDPL 204[3][b]. Therefore, AKRF's work in preparing an EIS, in addition to supporting Columbia's applications to DCP, can only be viewed as serving an advocacy function for Columbia while supporting ESDC's decision with regard to the GPP.

AKRF has also acted as Columbia's agent before other agencies in preparation for proceeding with the project. AKRF, on Columbia's behalf, has sought determinations from OPRHP and LPC. In that capacity, AKRF has prepared surveys of architectural resources throughout the project area and surrounding area, and sub-contracted the performance of archaeological site documentary study.

Finally, we concur with Supreme Court that Columbia's interest in an agency finding of blight is virtually inseparable from its interest in ESDC's adoption of its GPP. A mere confidentiality agreement is an instrument insufficient to solve the inherent conflict in serving two masters on matters of the highest importance to both. Supreme Court clearly had reason to doubt AKRF's independence, objectivity and "sense of what good

judgment calls for" (Klamath, 532 U.S. at 11, 121 S.Ct. at 1067, 149 L.Ed. at 97) because AKRF has also been retained by the applicant whose proposed project is the subject of the agency's study to assist the applicant in the planning of the project, including environmental review, and to act on the applicant's behalf in seeking approvals and determinations from various agencies. Thus, the communications between ESDC, the agency and AKRF, an outside consultant retained by the agency to prepare a neighborhood conditions (blight) study in connection with a proposed condemnation and a related City Map override, are not subject to FOIL's intra-agency exemption. Thus, the exemption does not apply to any documents contained in section II.

Contrary to the view expressed by the dissent, this does not amount to our acceptance of mere allegations of "the appearance of bias," but rather it demonstrates that FOIL is not blind to the extensive record of the tangled relationships of Columbia, ESDC and their shared consultant, AKRF. It is clear from the record outlined above that the gargantuan size of the project, the layers of conflict between Columbia and ESDC and the difficulty of offering perfectly objective advice while serving two masters elevates this FOIL appeal beyond the average agency-consultant relationship that the FOIL exemptions are designed to foster and protect.

The intra-agency communications in section III concerning how the agency should respond to an inquiry from a member of the public about its role in the proposed project were not, as the application court found, instructions to staff that affect the public subject to disclosure under Public Officers Law § 87(2)(g)(ii). Rather, it is clear from the communications in question that the agency had not yet determined how to respond to the inquiry about its role in the project if only because it was not yet certain what its role would be, and that no final instructions were given as to how to respond to the inquiry.

Finally, the intra-agency documents in section V that the court directed to be released as "not deliberative" are for the most part e-mails discussing the scheduling of meetings involving the project. While disclosure of such mundane communications would certainly not be contrary to the purpose of the intra-agency exemption "to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure" (Matter of New York Times Co. v City of N.Y. Fire Dept., 4 N.Y.3d 477, 488, 796 N.Y.S. 2d 302, 308, 829 N.E.2d 266, 272 (2005)), nevertheless, the communications were not factual in nature (Public Officers Law § 87[2][g][i]) and do not otherwise fall within the specifically enumerated statutory exceptions to the intra-agency exemption.

Thus, the application for disclosure of materials in the foregoing two sections should be denied.

Accordingly, the orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 3, 2007, and on or about August 23, 2007, which, insofar as appealed from, granted petitioners' applications pursuant to the Freedom of Information Law to compel respondent Empire State Development Corporation to release certain documents should be modified, on the law, to deny the applications for documents in sections III and V and to vacate the portions of orders requiring disclosure of those documents, and otherwise affirmed, without costs.

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

BUCKLEY, J. (dissenting in part)

Inter-agency and intra-agency materials that are deliberative in nature (communications exchanged for discussion purposes and not constituting final policy decisions) are exempt from disclosure under the Freedom of Information Law (FOIL), while materials that are factual in nature are subject to disclosure (*see* Public Officers Law § 87[2][g]; *Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993]). The deliberative materials exception is designed "to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure," whether the "comments [are] made in official policy meetings and well-considered memorandums" or "offered with little chance for reflection in moments of crisis" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488 [2005]).

The Federal Courts have identified three reasons for the rule, which also applies to the Federal Freedom of Information Act (FOIA), upon which FOIL was patterned:

> "it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination

> of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.
>
> . . .
>
> "The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States Gas Corp. v Department of Energy*, 617 F2d 854, 866 (DC Cir 1980); *see Providence Journal Co. v United States Dept. of the Army*, 981 F2d 552, 557 (1st Cir 1992); *Grand Central Partnership, Inc. v Cuomo*, 166 F3d 473, 481 (2d Cir 1999); *Schell v United States Dept. of Health & Human Servs.*, 843 F2d 933, 939 (6th Cir 1988); *King v Internal Revenue Serv.*, 684 F2d 517, 519 (7th Cir 1982); *Federal Trade Commn. v Warner Communications, Inc.*, 742 F2d 1156, 1161 (9th Cir 1984); *Trentadue v Integrity Comm.*, 501 F3d 1215, 1226 (10th Cir 2007); *Moye, O'Brien, O'Rourke, Hogan & Pickert v National R.R. Passenger Corp.*, 376 F3d 1270, 1277 (11th Cir 2004).

Thus, the courts must consider not only "any potential impact public disclosure might have on the employee-advisor," but also "the agency decisionmaker, and the public" (*Providence Journal Co.*, 981 F2d at 557).

The three prongs of the rule (encouragement of uninhibited advice by the employee-advisor, permitting the agency to guard against premature disclosure, and avoidance of confusing and

misleading the public) are designed to contribute to an unfettered solicitation and discussion of ideas. Just because an idea is proposed does not mean that the agency will adopt it; in fact, the rationale is that there should be no limitations on the number or content of ideas, since the more options presented to the agency, and the more extensive the discussion, the better the final determination will be. Indeed, the privilege is grounded in "the policy of protecting the decision making processes of government agencies," and has as its "ultimate purpose . . . to prevent injury to the quality of agency decisions" (*National Labor Relations Bd. v Sears, Roebuck & Co.*, 421 US 132, 150-151 [1975] [internal quotations marks and citation omitted]; *see Kheel v Ravitch*, 93 AD2d 422, 427-428 [1983], *affd* 62 NY2d 1 [1984]).

The inter-agency/intra-agency deliberative materials rule has been extended to outside consultants hired by governmental agencies, since "[i]t would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies" (*Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133 [1985]).

The majority would enable a FOIL applicant to evade the

deliberative materials rule merely by alleging the appearance of a bias, in this instance a conflict of interest, on the part of consultants retained by an agency. Under such an approach, it would be of no consequence whether the consultants were the most qualified, lacked an actual conflict or bias, or gave the best possible advice. The result would be to deter agencies from eliciting recommendations from consultants and to inhibit good-faith consultants from rendering frank advice; that, in turn, would negatively impact on the quality of agency decisions.

The majority's position, at most, would pertain to the first of the three rationales outlined in *Coastal States Gas Corp. v Department of Energy* (617 F2d 854 [DC Cir 1980], *supra*): encouraging advice givers to be candid in their recommendations. However, that focus ignores the other two interests at stake, the impact premature disclosure might have on agencies and the public.

Furthermore, the majority approvingly cites the Supreme Court's acknowledgment that outside consultants can, and often do, possess a "definite point of view," and its statement that such viewpoints do not, alone, abrogate the inter-agency deliberative materials disclosure protection (*see Department of Interior & Bureau of Indian Affairs v Klamath Water Users Protective Assn.*, 532 US 1, 10-11 [2001]). Drawing a distinction

between those who advance a position out of fervent belief and those who are driven by mercenary considerations may have a moral appeal, but does little to advance the goal of affording agencies with as many options as possible. Moreover, the *Klamath* court reached its conclusion based, in part, on a faulty premise: that employees always give disinterested advice. While employees are certainly expected to do so, and would face disciplinary, if not criminal, consequences if they took payment from another party, they, like consultants, may hold a "definite point of view," which could color their advice. Therefore, other than an easily recognizable bright line, there is no reason to distinguish between consultants and employees who give counsel with a view to a particular outcome. Indeed, the majority's decision ultimately rests upon the thesis that only objective advice should be entitled to the FOIL deliberative materials exemption. If the arbitrary bright lines between consultants with apparent conflicts of interest and consultants with honestly held agendas, or between consultants and employees, are erased, that thesis can be fulfilled, but at the cost of embroiling the courts in an examination of the bona fides of every advice giver when presented with a FOIL request. That, in turn, could cause agencies to limit the field of advisers they choose to consult, and thereby deprive them of potentially valuable counsel.

It bears noting that the denial of a FOIL request before an agency reaches a determination does not preclude anyone from lobbying the agency while it is considering action or from challenging a decision after it is reached, nor does it absolve the agency from any regulatory obligations to hold pre-decisional hearings or to provide post-decisional explanations.

Because I believe that the majority's ruling will ultimately harm the quality of agency decisions, I dissent from that part of the order directing disclosure of deliberative materials prepared by the consultant Alee, King, Rosen and Fleming on behalf of the respondent agency.

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

ENTERED: JULY 15, 2008