SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 9, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3851 The People of the State of New York, Respondent, Ind. 1350/05

-against-

George Davis,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered February 7, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury rejected defendant's testimony, in which he asserted an agency defense, and we find no basis for disturbing the jury's credibility determinations.

With respect to defendant's contention that Supreme Court erred in failing to submit to the jury the offense of criminal

possession of a controlled substance in the seventh degree as lesser included offense of criminal sale of a controlled substance in the third degree, the decision of the Third Department in *People v Cogle* (94 AD2d 158 [1983]) is the leading case decided after *People v Glover* (57 NY2d 61 [1982]) holding that possession offenses are not lesser included offenses of crimes prohibiting the sale of controlled substances. As the Third Department observed, the term "sell" includes an "offer or agree[ment]" to sell (Penal Law § 220.00[1]), and "it is not necessary to possess a controlled substance in order to offer or agree to sell it" (94 AD2d at 159; *see also People v Harrison*, 136 AD2d 469, 470 [1988], *lv denied* 71 NY2d 897 [1988]). For that reason, the Court concluded that it was theoretically possible to commit the greater offense of sale of a controlled substance without at the same time committing the lesser offense of possession (*id.*).

The validity of that conclusion is not undermined by the holding in *People v Mike* (92 NY2d 996, 998 [1998]) that a conviction for criminal sale under an offer to sell theory (Penal Law § 220.00[1]) requires proof that the defendant "had both the intent and the ability to proceed with the sale." Regardless of whether someone who is not in actual possession of a controlled substance can have the "ability to proceed with [a] sale" without

being in constructive possession of the contraband (*see People v Manini*, 79 NY2d 561, 573 [1992] [constructive possession requires proof that "the defendant exercised 'dominion and control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized"]), a person can be convicted of an actual sale of a controlled substance even though he is neither in actual nor constructive possession of a controlled substance. As the People correctly argue, a person who knows where drugs may be purchased but has no possessory interest in them may direct a buyer to the source of the drugs and make a profit on the ensuing sale by acting as a middleman without ever coming into actual possession of the drugs. Such a middleman is guilty of selling the drugs (*see People v Argibay*, 45 NY2d 45, 53 [1978], *cert denied sub nom. Hahn-DiGuiseppe v New York*, 439 US 930 [1978]).

Pursuant to Penal Law § 20.10, this seller would not be guilty "as an accessory to the resulting possession by the purchaser" (*People v Manini*, 79 NY2d at 571). This hypothetical middleman, moreover, need not have "solicit[ed], request[ed], command[ed], importun[ed], or intentionally aid[ed]" (Penal Law § 20.00) the possession crime committed by the actual seller (*cf. People v Feliciano*, 32 NY2d 140 [1973]). Accordingly, it is not impossible in all circumstances to commit the crime of criminal sale of a controlled substance without concomitantly, and by the

same conduct, committing the lesser crime of criminal possession of a controlled substance in the seventh degree (*People v Glover*, 57 NY2d at 63). Thus, criminal possession of a controlled substance in the seventh degree is not a lesser included offense of criminal sale of a controlled substance in the third degree.

Defendant also contends that an exception to the statutory definition of the term "lesser included offense" (CPL 1.20[37]) should be recognized pursuant to which criminal possession of a controlled substance in the seventh degree would be deemed a lesser included offense of criminal sale of a controlled substance when, as a defense to the sale charge, the agency defense properly is submitted to the jury. As defendant stresses, the agency defense "is not a complete defense" (*People v Lam Lek Chong*, 45 NY2d 64, 74 [1978], *cert denied* 439 US 935 [1978]). Rather, "[e]vidence that the defendant was acting solely as an agent of the buyer is properly employed to determine whether he is guilty of possession, instead of sale" (*id.*).

Although defendant's attorney did not expressly argue before the trial court that such an "exception" should be recognized, counsel did maintain that the simple possession charge should be submitted as a lesser included offense because the agency defense was being submitted to the jury. We need not determine, however, whether that protest was sufficient to preserve defendant's contention for review. Even assuming without deciding both that

defendant did preserve his contention that such an exception should be recognized and that this contention otherwise has merit, this Court should not be the one to recognize it. The Court of Appeals has recognized an exception to the impossibility test of CPL 1.20(37) pursuant to which "lower mental states" are deemed to be "necessarily included in the higher forms of mental culpability" (*People v Green*, 56 NY2d 427, 432 [1982]). But whether another exception to the statutory definition of the term "lesser included offense" should be recognized on account of the agency defense, which itself is of judicial origin (*see People v Roche*, 45 NY2d 78, 82-83, n 1 [1978], *cert denied* 439 US 958 [1978]), is a matter best left to the Court of Appeals. We note, moreover, that a panel of the Third Department has rejected the claim that such an exception should be recognized (*People v Van Buren*, 188 AD2d 887, 888 [1992], *lv denied* 82 NY2d 760 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 9, 2008

CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3902-3903 The People of the State of New York, Respondent,

-against-

Jermar McDaniel, Defendant-Appellant.

Ind. 1875/03

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered May 2, 2005, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, affirmed. Order, same court and Justice, entered on or about October 28, 2005, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning identification and credibility. The People proved beyond a reasonable doubt that defendant displayed what appeared to be a firearm (Penal Law § 160.15[4]). As defense counsel's own pre-charge comments make clear, the victim's demonstrations during her testimony established that defendant made an objective display that could

reasonably be perceived as of a firearm and that the victim actually perceived that display (*see People v Lopez*, 73 NY2d 214, 220 [1989]; *People v Baskerville*, 60 NY2d 374, 381 [1983]).

Defendant's challenges to the prosecutor's summation and the court's failure to charge a lesser included offense are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

On the existing record, to the extent it permits review, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).
Counsel advanced a persuasive, though ultimately unsuccessful, defense of misidentification.

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

CATTERSON, J. (dissenting in part)

I am compelled to dissent because I believe that for the first time, this Court is adopting a wholly subjective test to establish the elements of robbery in the first degree (Penal Law § 160.15[4]) in derogation of the Court of Appeals' holdings in People v. Lopez (73 N.Y.2d 214, 538 N.Y.S.2d 788, 535 N.E.2d 1328 (1989)) and People v. Baskerville (60 N.Y.2d 374, 469 N.Y.S.2d 646, 457 N.E.2d 752 (1983)).

Inexplicably, the majority contends that the People proved beyond a reasonable doubt that the defendant displayed what appeared to be a firearm. However, the record demonstrates that the defendant never displayed anything at all. The victim testified that the defendant held one hand at her neck, threatened to kill her if she did not give him her money (but said nothing about shooting her), and held his other hand "under the arm," apparently near his waist. Although the victim testified that she feared that the defendant had a gun in his coat and would use it, she did not explain the basis for that fear. Nor did she testify that the defendant even threatened to use a gun. Of course, the mere threat to use a firearm is insufficient to sustain a conviction; "it is the 'display' of what appears to be a firearm, not the mere threat to use one, which is required." Lopez, 73 N.Y.2d at 221, 538 N.Y.S.2d at 791, 535 N.E.2d at 1331.

While her testimony was unclear as to what the defendant was doing with the hand that was not holding her by the neck, she simply never testified that the defendant kept a hand under his coat or in a pocket, or that he otherwise gestured to the presence of a firearm. "Although the display element focuses on the fearful impression made on the victim, it is not primarily subjective. The People must show that the defendant consciously displayed something that could reasonably be perceived as a firearm... and that the victim actually perceived the display." People v. Lopez, 73 N.Y.2d at 220, 538 N.Y.S.2d at 791, 535 N.E.2d at 1331; see also People v. Baskerville, 60 N.Y.2d at 381, 469 N.Y.S.2d at 650, 457 N.E.2d at 756; People v. Copeland, 124 A.D.2d 669, 670, 507 N.Y.S.2d 914, 916 (1986), lv. denied, 69 N.Y.2d 710, 512 N.Y.S.2d 1036, 504 N.E.2d 404 (1986).

In Lopez, the defendant confronted the victim and announced that it was a "stick up." He then put his hand in his vest pocket as he demanded the victim's radio. The Court held that such action on the part of the defendant was sufficient: "[a]ll that is required is that the defendant, by his actions, consciously manifest the presence of an object to the victim in such a way that the victim reasonably perceives that the defendant has a gun." 73 N.Y.2d at 222, 538 N.Y.S.2d at 792, 535 N.E.2d at 1332.

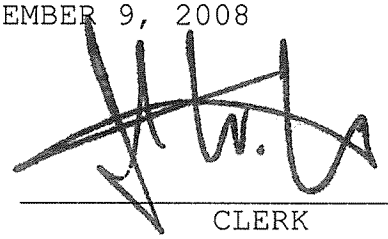
By comparison, the victim in this case testified that the

defendant demanded money, put one hand to her throat and the other hand "under the arm." This amounts to nothing more than a subjective impression that the defendant might have had a gun. There is no evidence of a conspicuous and conscious display of a weapon, or what appeared to the victim to be a weapon, by the defendant.

Accordingly, I would reduce the conviction to robbery in the third degree, and remand for resentencing.

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

ENTERED: SEPTEMBER 9, 2008



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Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3905-
3905A Ramon Vargas, Index 25842/01
Plaintiff-Respondent, 42033/01
83323/03

-against-

New York City Transit Authority,
Defendant-Respondent-Appellant.

- - - - - -

New York City Transit Authority,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Halmar Builders of New York,
Third-Party Defendant-Appellant-Respondent.

- - - - - -

Granite Halmar Construction Company, Inc.,
formerly known as Halmar Builders of New York, Inc.,
Second Third-Party Plaintiff-Appellant-Respondent,

-against-

Grand Mechanical Corp., et al.,
Second Third-Party Defendants-Respondents,

Atlantic Rolling Steel Door Corp.,
Second Third-Party Defendant-Respondent-Appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Kisha Augustin of counsel), for New York City Transit Authority, respondent-appellant/respondent-appellant.

Alexander J. Wulwick, New York, for Ramon Vargas, respondent.

Mound Cotton Wollan & Greengrass, New York (Todd A. Bakal of counsel), for Granite Halmar Construction Company, Inc., appellant-respondent/appellant-respondent.

Cerussi & Spring, PC, White Plains (Peter Riggs of counsel), for Atlantic Rolling Steel Door Corp., respondent-appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Grand Mechanical Corp., respondent.

Rende Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Miller Proctor Nickolas, Inc., respondent.

Orders, Supreme Court, Bronx County (Janice Bowman, J.; Barry Salman, J.), entered June 12, 2007 and February 19, 2008, which, to the extent appealed from, granted motions for summary judgment dismissing the complaint only to the extent of dismissing the cause of action under Labor Law § 200 while denying such motions insofar as addressed to the causes of action under Labor Law § 240(1) and § 241(6) and common-law negligence, denied the motion by defendant/third-party plaintiff-respondent-appellant New York City Transit Authority (NYCTA) for summary judgment on its third-party claim for contractual defense and indemnification against third-party defendant/second third-party plaintiff-appellant-respondent Granite Construction Northeast, Inc. f/k/a Granite Halmar Construction Company, Inc. f/k/a Halmar Builders of New York, Inc. (Granite), denied Granite's motion for summary judgment on its third-party claims for contractual defense and indemnification against second third-party defendant-respondents Grand Mechanical Corp. (Grand Mechanical) and Miller Proctor Nickolas, Inc. (Miller Proctor), denied the motion by second third-party defendant-respondent-appellant Atlantic Rolling Steel Door Corp. (Atlantic) for summary judgment dismissing Granite's third-party claim and all cross claims against it, and granted Grand Mechanical's and Miller Proctor's respective cross motions for summary judgment dismissing Granite's third-party claims and all cross claims against them,

unanimously modified, on the law, to dismiss the cause of action for common-law negligence, to grant NYCTA summary judgment as to liability on its third-party claim against Granite for contractual defense and indemnification, to grant Granite summary judgment as to liability on its third-party claim for contractual defense and indemnification against Grand Mechanical, to grant Atlantic summary judgment dismissing Granite's third-party claim and all cross claims against it, and to deny Grand Mechanical's cross motion to the extent it sought dismissal of Granite's third-party claim for contractual defense and indemnity against it and dismissal of NYCTA's cross claims against it for contractual defense and indemnity and breach of contract, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Miller Proctor and Atlantic dismissing the second third-party complaint and all cross claims as against them.

The subject incident occurred in the course of the construction of a bus maintenance facility owned by NYCTA. Granite, the project's general contractor, hired Grand Mechanical as the HVAC subcontractor. Grand Mechanical hired Miller Proctor to commission, or start up, the facility's boilers. In March 2001, after the boilers had been commissioned, Grand Mechanical called Miller Proctor to address a leak in one of them. Plaintiff, the Miller Proctor employee sent to respond to the

call, alleges that, because his employer did not provide him with a ladder, and no others were available at the site, he borrowed one from employees of Atlantic, the project's rolling door subcontractor. Plaintiff further alleges that, because the A-frame ladder provided by Atlantic, when opened, was not tall enough to enable him to reach the top of the boiler, he climbed the ladder while it was closed and leaning on the spherical boiler. Plaintiff was injured when the ladder collapsed while he was climbing it in this fashion.

As plaintiff does not challenge the dismissal of his cause of action under Labor Law § 200, and as section 200 is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]), we modify to dismiss plaintiff's causes of action against the owner and general contractor for common-law negligence. However, the motions to dismiss the causes of action under Labor Law § 240(1) and § 241(6) were correctly denied. The record does not establish, as a matter of law, that plaintiff's acts were the sole proximate cause of the accident, given the evidence that the unsecured ladder on which he was standing collapsed and that no other safety devices were provided (*see Vega v Rotner Mgt. Corp.*, 40 AD3d 473 [2007], citing *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [2004]), although there was also countervailing evidence.

Contrary to the arguments of NYCTA and the third-party defendants, Labor Law § 240(1) expressly covers "repairing" a building or structure. As to Labor Law § 241(6), Industrial Code (12 NYCRR) § 23-1.21(b)(4)(iv) is both applicable and sufficiently specific to support a claim under the statute (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [2004]).

Regarding the third-party claims, the record establishes that NYCTA is entitled to contractual indemnification and defense from Granite, and that Granite is entitled to contractual indemnification and defense from Grand Mechanical, in each case pursuant to the plain terms of the applicable written agreement between the two parties. Since the record contains no evidence that plaintiff's injuries resulted from negligence on the part of either NYCTA or Granite, there is no statutory bar to enforcement of these indemnity agreements. We note, however, that Granite's claim for indemnity and breach of contract against Miller Proctor was correctly dismissed, since Granite and Miller Proctor were not in contractual privity with each other, and the purchase orders constituting the agreements between Grand Mechanical and Miller Proctor do not make Granite a third-party beneficiary thereof, nor do such agreements incorporate by reference the terms of the subcontract between Granite and Grand Mechanical. We reject Grand Mechanical's argument that plaintiff's injuries did not arise from Grand Mechanical's work for the project, since

the record establishes that Miller Proctor sent plaintiff to the work site at Grand Mechanical's request, pursuant to the purchase orders between Grand Mechanical and Miller Proctor. Since Grand Mechanical has not taken an appeal, we are without power to grant its request that its cross claim against Miller Proctor be reinstated in the event we reinstate Granite's third-party claim against Grand Mechanical (*see Hecht v City of New York*, 60 NY2d 57 [1983]). We note that no argument has been advanced in favor of the viability of a claim for common-law indemnity or contribution against Miller Proctor, which appears to be immunized from such liability by Workers' Compensation Law § 11, given that plaintiff does not allege a "grave injury" under that statute.

After Grand Mechanical was impleaded into the action, NYCTA asserted cross claims against it for contractual defense and indemnity and for breach of contract, the latter based on Grand Mechanical's alleged failure to procure contractually required insurance coverage for NYCTA. We agree with NYCTA's argument that Supreme Court erred in dismissing these cross claims against Grand Mechanical. The subcontract between Granite and Grand Mechanical expressly incorporated by reference the terms of the prime contract between NYCTA and Granite and made Granite's obligations under the prime contract binding on Grand Mechanical. Accordingly, such cross claims by NYCTA against Grand Mechanical

are reinstated.

Finally, Atlantic was entitled to dismissal of all claims against it. The record establishes that Atlantic, the rolling door subcontractor, was not in contractual privity with plaintiff's employer, that it had no supervision, direction or control over plaintiff's work, and that it had no duty to provide him with equipment adequate for the performance of his work. Accordingly, plaintiff's injuries did not arise from Atlantic's work, and were not caused by any fault attributable to Atlantic.

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

ENTERED: SEPTEMBER 9, 2008

CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3916 Antoni Lelek, Index 100377/04
Plaintiff-Appellant-Respondent, 590736/04

-against-

Verizon New York, Inc., et al.,
Defendants-Respondents-Appellants.
- - - - - - - - -
Verizon New York, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

LVI Services, Inc.,
Third-Party Defendant-Respondent.

Perecman & Fanning, PLLC, New York (Barry S. Huston of counsel), for appellant-respondent.

Conway, Farrell, Curtin & Kelly, P.C., New York (Darrell John of counsel), for Verizon New York, Inc., respondent-appellant/respondent-appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains (Adam R. Bialek of counsel), for Slattery Skanska, Inc. and Air Rail Construction Joint Venture, respondents-appellants.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for LVI Services, Inc., respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 12, 2007, which denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), denied those branches of the respective cross motions of defendant Verizon New York, Inc. (Verizon) and of defendants Slattery Skanska, Inc. and Air Rail Construction Joint Venture, a Joint Venture composed of Slattery Skanska, Inc., Perini

Corporation, Koch Skanska, Inc. and Skanska (USA) Inc. (collectively, the Joint Venture defendants), that sought summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims, denied that branch of the Joint Venture defendants' cross motion that sought summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them, denied that branch of Verizon's cross motion that sought summary judgment on its claim for contractual indemnification against third-party defendant LVI Services, Inc. (LVI), granted that branch of Verizon's cross motion that sought summary judgment on its cross claim for common-law indemnification against the Joint Venture defendants, and denied that branch of the Joint Venture defendants' cross motion that sought summary judgment dismissing LVI's cross claims against them for indemnification or contribution, unanimously modified, on the law, to grant Verizon conditional summary judgment on its claim for contractual indemnification against LVI, and to deny Verizon summary judgment on its claim for common-law indemnification against the Joint Venture defendants, and otherwise affirmed, without costs.

In connection with the demolition of an overpass, plaintiff, an asbestos handler, was instructed to descend from the overpass's partially demolished roadway onto a wooden deck approximately three feet below, where he was to erect a decontamination chamber for the removal of asbestos from a pipe

traversing the overpass. Plaintiff was required to step from the roadway, from which rebar was protruding, onto a foot-wide I-beam about nine inches below the roadway and from the I-beam to the decking about a foot and a half below the top of the beam. The decking was placed to catch debris falling from the roadway. While attempting to make this descent, plaintiff lost his footing, fell from the roadway onto the I-beam, and landed on one foot in the concrete debris on the deck. On this record, an issue of fact exists as to whether plaintiff's injuries resulted from a violation of Labor Law § 240(1). Accordingly, plaintiff is entitled to a trial on his cause of action under Labor Law § 240(1) against the Joint Venture defendants, the project's general contractors, and Verizon, the owner of the pipe from which asbestos was to be abated. The height differential at issue - approximately two and a half to three feet - does not alter this result (*see Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163 [2003]).

The cross motions by the Joint Venture defendants and Verizon were correctly denied to the extent they sought summary judgment dismissing plaintiff's cause of action under Labor Law § 241(6). The demolition-related asbestos abatement work in which plaintiff was engaged was within the statute's coverage. Further, given that he was injured when, as a result of his fall, he struck his foot on debris from the roadway demolition that had

accumulated on the deck, where the abatement work was to be conducted, plaintiff has raised an issue of fact as to whether his injury resulted from a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2), which requires that "[w]orking areas" be "kept free from accumulations of . . . debris and from scattered . . . materials." Plaintiff has also raised an issue as to whether his injury resulted from a violation of Industrial Code § 23-1.7(f), which requires that "[s]tairways, ramps or runways . . . be provided as the means of access to working levels above or below ground" where possible, and, where this is not possible, that "ladders or other safe means of access . . . be provided."

In view of the construction superintendent's testimony that the exposed rebar should have been cut down to an inch or two and that the concrete debris piled on the deck was between eight inches and a foot high, and plaintiff's supervisor's testimony that she spoke to someone at Slattery Skanska about cleaning up the debris, issues of fact as to negligence on the part of the Joint Venture defendants preclude summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them (*see generally Mendez v Union Theol. Seminary in City of N.Y.*, 17 AD3d 271 [2005]). Further, defendant Slattery Skanska is not immune from these claims on the ground that its work was performed on behalf of the Joint Venture defendants (*see Pedersen v Manitowoc Co.*, 25 NY2d 412, 419 [1969]).

Verizon's motion for contractual indemnification should have been conditionally granted against third-party defendant LVI, the company Verizon hired to conduct the asbestos abatement operation in which plaintiff was engaged when he was injured. Verizon is entitled to such indemnification whether plaintiff was employed by LVI directly or by a nonparty subsidiary, since, under the abatement services agreement between LVI and Verizon, LVI agreed to indemnify Verizon for claims based on injuries "resulting from [LVI's] acts or omissions or those of persons furnished by [LVI] while performing work for [Verizon] pursuant to this Agreement," and for claims "resulting directly or indirectly from the Services under this Agreement whether caused by the negligence of [LVI] or anyone acting on behalf of [LVI]." LVI has not raised a factual issue as to whether the work in question was performed pursuant to the services agreement between Verizon and itself.

The Joint Venture defendants' motion to dismiss LVI's cross claim against them for common-law indemnification or contribution was correctly denied, given the existence of issues of fact as to whether negligence of the Joint Venture defendants was a cause of plaintiff's injuries. However, because the record does not establish as a matter of law that negligence of the Joint Venture defendants was a cause of plaintiff's injuries, the grant of summary judgment to Verizon on its cross claim against the Joint Venture defendants for common-law indemnification was erroneous.

We have considered the parties' remaining claims for affirmative relief and find them unavailing.

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

ENTERED: SEPTEMBER 9, 2008

CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3974 Robert Williams, Index 103244/04
Plaintiff-Respondent,

-against-

7-31 Limited Partnership, et al.,
Defendants,

Independent Aerial Equipment,
Defendant-Appellant.

- - - - -

Independent Aerial Equipment, Index 590477/04
Third-Party Plaintiff-Appellant,

-against-

Enclos Corp.,
Third-Party Defendant-Respondent.

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

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Robert Williams, respondent.

Nicoletti Hornig & Sweeney, New York (Jana Sperry of counsel), for Enclos Corp., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered December 31, 2007, which, inter alia, denied defendant/third-party plaintiff Independent Aerial Equipment's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it and in its favor on its claim for contractual indemnification against third-party defendant Enclos Corp., and granted Enclos's motion for summary judgment dismissing Independent's indemnification claim

against it, unanimously modified, on the law, Independent Aerial Equipment's motion granted to the extent of severing and dismissing plaintiff's claim pursuant to Labor Law § 200, and otherwise affirmed, without costs.

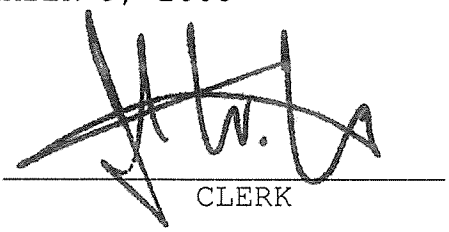
While issues of fact exist as to whether Independent was negligent in supplying a defective or unsafe scissor lift to Enclos for plaintiff's ultimate use (*see Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225, 226 [2004]), plaintiff's Labor Law § 200 claim should have been dismissed (*Greco v Archdiocese of N.Y.*, 268 AD2d 300, 301 [2000]). While § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work, Independent, as simply a lessor of equipment to one of the subcontractors, is not an owner, general contractor, or agent thereof for purposes of imposing liability under the statute and had no authority to control the activity that brought about plaintiff's alleged injury (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *Urbina*, 12 AD3d at 226). Since the sole potential basis for liability on Independent's part is its own negligence, the contractual provision by which Enclos agreed to indemnify Independent for losses arising from an action on account of injury occasioned by the use of such equipment is

unenforceable (General Obligations Law § 5-322.1; *see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178-179 [1990]).

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

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

ENTERED: SEPTEMBER 9, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4022N C&E 608 Fifth Avenue Holding, Inc., etc., Plaintiff-Respondent, Index 100245/06

-against-

Swiss Center, Inc., Defendant-Appellant.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for appellant.

Peter Axelrod & Associates, P.C., New York (Osman Dennis of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 18, 2006, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, affirmed, with costs.

The express language of the lease did not give defendant landlord unfettered discretion to ignore the tenant's requests for approval of signage. And if the landlord's conduct as alleged is eventually established, it may also demonstrate a violation of the implied covenant of good faith and fair dealing (*see Just-Irv Sales v Air-Tite Bus. Ctr.*, 237 AD2d 793 [1997]).

All concur except Moskowitz and DeGrasse, JJ. who concur in a separate memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (concurring)

Because the lease at issue does not by its express terms require a response from the landlord, I cannot agree with the majority that there is a breach of a lease provision. However, I agree that plaintiff has stated a cause of action for breach of the covenant of good faith and fair dealing. Therefore, I concur.

Defendant Swiss Center, Inc. is the landlord of 608 Fifth Avenue in Manhattan. Plaintiff Chalano & Co. leases ground level retail space in the premises pursuant to a standard form store lease. This litigation involves a sign that plaintiff erected in the upper windows of the leased premises.

Article 41 of the lease governs plaintiff's use of signage on the interior and exterior of the premises and states in relevant part:

> "Except as hereinafter provided in this article, TENANT shall not erect, place, or maintain any sign, advertisement or notice visible from the exterior of the demised premises except on the window glass and the entrance door or doors of the demised premises. Any such sign, advertisement, or notice shall be of such size, color, content and style as LANDLORD shall prior to the erection or placing thereof have approved in writing . . .
>
> "TENANT may at its own cost and expense erect a dignified sign or symbol in conformity with the architectural design of the exterior of the building to be placed on the exterior of the demised premises. Before erecting any such sign or symbol TENANT shall secure LANDLORD's approval, in writing of the design, material, size and location thereof, which approval shall not be unreasonably withheld or delayed, and

> TENANT shall likewise secure LANDLORD's approval in writing of the manner of its attachment to the building so it does not damage the exterior marble."

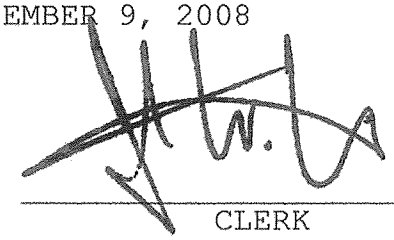
Pursuant to the first paragraph above governing interior signs, plaintiff sought approval from defendant on at least five occasions, but allegedly received no response. Eventually, plaintiff installed the signs in the upper windows of the premises, as it had proposed to defendant. On or about December 28, 2005, defendant served plaintiff with a notice of default, alleging that plaintiff's failure to obtain prior written approval was a breach of the lease.

It is true that the lease required written approval from defendant before plaintiff could erect an interior sign. It is also true that the language restricting defendant from unreasonably withholding its approval for exterior signs does not appear in the first paragraph governing interior signs. Therefore, we cannot read into the contract language a requirement that defendant respond to plaintiff's request (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms. We have also emphasized this rule's special import in the context of real property transactions where commercial certainty is a paramount concern"] [internal quotation marks and citations omitted]).

However, "exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits" (*Hirsch v Food Resources, Inc.*, 24 AD3d 293, 296 [2005]). While the express language of the lease did not *prohibit* defendant from unreasonably withholding or delaying its approval for interior signs, the lease also did not give defendant the right to ignore plaintiff's requests for approval (*see Zurakov v Register.Com, Inc.*, 304 AD2d 176, 179 [2003] [claim for good faith and fair dealing viable even where contract's express terms did not prohibit offending conduct]).

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

ENTERED: SEPTEMBER 9, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
John T. Buckley
James M. Catterson, JJ.

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Metropolitan Steel Industries, Inc.,
doing business as Steelco,
Plaintiff-Appellant,

-against-

Perini Corporation, et al.,
Defendants-Respondents.

[And a Third-Party Action]

Plaintiff appeals from an order of the Supreme Court, New York County (Herman Cahn, J.), entered February 16, 2007, which granted defendants' motion for an order finding that plaintiff's claim identified as X-32A had been dismissed pursuant to an order of the same court and Justice entered December 1, 2004.

Milber Makris Plousadis & Seiden, LLP, White Plains (Leonardo D'Alessandro, Mark Seiden and Thomas H. Kukowski of counsel), for appellant.

Peckar & Abramson, P.C., New York (Stephen A. Stallings and Richard L. Abramson of counsel), for respondents.

BUCKLEY, J.

At issue on this appeal is one work order, denominated X-32A, arising out of a construction project, and the applicability of the law of the case doctrine. Defendant Perini Corporation (Perini), the prime contractor on the project, hired plaintiff Metropolitan Steel Industries, Inc. (Steelco) as a subcontractor. Both the prime contract and the subcontract contained a no-damage-for-delay clause, which precluded Steelco from obtaining extra compensation for delays in the project unless specifically allowed by the owner. Steelco began work, but was terminated by Perini before completing its subcontract, and therefore commenced this action to recover the balance on the subcontract, a 5% retainage, and damages for extra work based on 27 outstanding change work orders.

Defendants, Perini and its sureties, moved for partial summary judgment to dismiss the claims for delay damages, as barred by the no-damage-for-delay clauses of the prime contract and subcontract. Perini argued that the 27 change order proposals listed in the complaint fell into two categories: (1) change orders for additional work, and (2) change orders regarding delays. Perini's motion papers stated:

> "Due to Steelco's failure to provide discovery regarding a full, accurate and complete accounting of its claims, it cannot be precisely determined

> which of the 27 outstanding change order proposals represent Steelco's claims for delay damages. As best Perini can assess, Change Order Proposal Nos. X-22A, X-23, X-28A, X-29, X-31A, X-32A, X-37, X-43, X-44, X-45 and X-47 represent Steelco's claims for delay damages."

Thus, Perini took the position that at least 11 of the 27 change order proposals represented claims for delay damages, and specifically enumerated the 11 change orders it was able to identify as pursuing delay damages. In opposition, Steelco argued only that the contracts did not contain a no-damage-for-delay clause, and even if they did, there were issues of fact whether such provisions were enforceable; nowhere did Steelco challenge Perini's characterization of the 11 identified order proposals as delay claims.

Supreme Court (Herman Cahn, J.) granted Perini's motion to dismiss the claims for delay damages. Cognizant of Perini's contention that possibly more than the 11 specified claims were for delay damages, Justice Cahn noted that "approximately 11 [of the claims] are for alleged delay damages." The dissent essentially argues that, because the order did not expressly list the dismissed claims, and because it used the terms "approximately" and "alleged," Supreme Court offered merely a theoretical, advisory opinion, that decided nothing concrete. Any ambiguity was removed when Steelco asserted, for the first

time in its motion for reargument or renewal, that 4 of the 11 work proposals listed in Perini's summary judgment motion (X-28A, X-29, X-31A and X-37)[1] were not for delay damages, but rather for increased costs caused by Perini. The motion for reargument/renewal expressly conceded that another 4 of the 11 proposals (X-43, X-44, X-45 and X-47) did seek delay damages. The dissent points out that Steelco did not explicitly mention work proposals X-22A, X-23 or X-32A, the remaining 3 of the 11 proposals set forth in the original motion. However, all of the work proposals discussed in Steelco's motion for reargument or renewal were among the 11 argued in Perini's original motion. Thus, Steelco evinced its understanding that Perini had argued that the 11 identified proposals were for delay damages. Justice Cahn denied reargument and renewal. Subsequently, this Court affirmed Justice Cahn's orders (*Metropolitan Steel Indus., Inc. v Perini Corp.*, 23 AD3d 205 [2005]).

Thereafter, the parties proceeded to trial before a different Justice. At the outset of trial, the parties contested

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[1]Although Steelco's motion papers refer to X-28, rather than X-28A, the complaint alleges a claim based only on X-28A, and makes no mention of an X-28; thus, Steelco could only have been referring to X-28A. Indeed, Steelco made a similar typographical error in its reargument/renewal motion papers, in which it interchangeably discussed an X-31, which does not appear in the complaint, and X-31A.

whether Steelco should be permitted to include work orders X-22A and X-23, in light of Justice Cahn's orders; no mention was made of order X-32A. The trial court informed Steelco: "it is your opening and it's your trial. I will let you use it." Steelco was permitted to present evidence on all three work orders. During the charge conference, the issue arose again, but the trial court ruled:

> "As far as what was subsumed under Justice Cahn's . . . decision, I don't know what he did or not. It seems to me we can resolve that after the verdict."

The jury returned a verdict in Steelco's favor on those three claims, as well as other claims, and Perini moved, inter alia, to set aside the verdict on those three claims on the ground that they had previously been dismissed by Justice Cahn. The trial court denied the motion, on the ground that Justice Cahn's orders had not explicitly recited that he was dismissing the three claims, but directed that Perini could "seek clarification" of those orders by moving before Justice Cahn.

In conformity with the trial court's instructions, Perini moved before Justice Cahn for clarification whether his prior orders had dismissed claims X-22A, X-23 and X-32A. While that motion was pending, the parties appealed an order disposing of certain post-trial motions. Among the arguments raised on appeal

was that Justice Cahn's orders had dismissed claims X-22A and X-23. Notwithstanding the absence of a specific reference to those claims in Justice Cahn's prior orders, an absence which the dissent in the instant appeal finds significant, this Court held:

> "Defendants are correct that the introduction of claims X-22A and X-23 in evidence was error insofar as those estimates constituted delay claims previously dismissed in an order affirmed by this Court (23 AD3d 205 [2005]), and those claims are hereby rejected" (*Metropolitan Steel Indus. v Perini Corp.*, 36 AD3d 568, 570 [2007]).

Shortly thereafter, Justice Cahn rendered a decision on the clarification motion. If any doubts lingered, Justice Cahn, the one most familiar with his own prior rulings,[2] unequivocally held that his two prior orders had dismissed as delay claims "the 11 Steelco claims identified by Perini as delay claims," including "claims X-22A, X-23 and X-32A." Justice Cahn added: "Accordingly, [Perini's] motion is granted, and an order will be issued modifying the Dismissal Order by clarifying that Steelco claims X-22A, X-23 and X-32A were part of the 11 Steelco delay claims that were previously dismissed."[3] The fact that Justice

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[2]The dissent's *deus ex machina* is thus a *non sequitur*.

[3]The dissent finds confusion in the final paragraph of the clarification order, in which Justice Cahn specifically lists only 10 delay claims, inadvertently omitting work order X-47 from the list of 11 claims that had been identified by Perini and dismissed by his prior orders. Confusion can only be obtained by ignoring Justice Cahn's clear and repeated statements that Perini

Cahn "note[d]" the second appeal (discussing claims X-22A and X-23) does not mean, as the dissent suggests, that Justice Cahn looked to this Court to ascertain what he himself had directed in his prior orders.

Since Justice Cahn dismissed claim X-32A in the original order, and adhered to that decision on reargument/renewal, his ruling became binding on the trial judge, a judge of coordinate jurisdiction (*see Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295, 296 [2001]). The dissent acknowledges the principle of the law of the case, but would allow the parties to do what the judge cannot: "waive," i.e., disregard, an order of another judge of coordinate jurisdiction in the course of earlier proceedings. However, the doctrine applies equally to the parties (*see id.*).

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered February 16, 2007, which granted defendants' motion for an order finding that plaintiff's claim

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had identified 11 work orders as seeking delay claims, and that all 11 had been dismissed on that basis. Furthermore, the dissent does not explain how a proofreading failure concerning claim X-47 can cast doubt on Justice Cahn's explicit ruling, restated several times, that claim X-32A, the claim at issue on this appeal, had been dismissed.

identified as X-32A had been dismissed pursuant to an order of the same court and Justice entered December 1, 2004, should be affirmed, with costs.

All concur except Catterson, J. who dissents in an Opinion:

CATTERSON, J. (dissenting)

Because neither the courts below nor this Court have ever specifically denominated plaintiff's work order X-32A as a delay damages claim and, because the plaintiff submitted claim X-32A in the underlying trial without objection by the defendants, I must respectfully dissent. The defendants waived any objections concerning work order X-32A when they remained silent at trial and then compounded the omission by failing to include it as an issue in their appeal to this Court. Consequently, I believe the motion court's decision and order should be reversed, and the jury finding in the plaintiff's favor on claim X-32A reinstated.

This action and third-party action arise from the design and construction of a multi-storied bus depot located on 100th Street and Madison Avenue in New York City (hereinafter referred to as "the Project"), owned and operated by the New York City Transit Authority (hereinafter referred to as "the NYCTA"). On or about May 1, 2000, defendant, Perini Corporation, (hereinafter referred to as "Perini") entered into a $90 million design-build prime contract with the Metropolitan Transportation Authority for the design and construction of the bus depot.

Perini then entered into a subcontract with the plaintiff, Metropolitan Steel Industries (hereinafter referred to as "Steelco") for $9,630,000 pursuant to which Steelco was to

furnish the goods and services for the fabrication and erection of structural steel and a metal deck necessary for construction of the Project. Because of the complexity of the construction, the parties contemplated that delays and change orders would occur while construction was ongoing. To this end, the parties agreed that while Steelco would be compensated for certain changes and modifications of the design plans, it was not entitled to any extra compensation as a result of delay. Specifically, the parties executed a no-damage-for-delay-clause, which reads:

> "Subcontractor shall not be entitled to any extra compensation for any suspension, delay or acceleration not specifically allowed and paid for by owner."

On March 1, 2001, Steelco commenced erection of the structural steel. For reasons not clear in the record, on November 15, 2001, Perini terminated Steelco, and completed Steelco's remaining work.

In March 2002, Steelco commenced the underlying action against Perini and its sureties, seeking, inter alia, contract damages in the amount of $2,400,000, based on 27 alleged outstanding change order requests. Steelco contended that during its performance of the contract, Perini "substantially altered, changed, modified and interfered with [its work] causing delay, inefficiency and additional cost to plaintiff in the performance

of the work."

In May 2004, following some discovery, Perini moved for partial summary judgment and argued that, pursuant to the contract, Steelco was not entitled to damages caused by delay. Perini asserted that some of the work orders submitted by Steelco were "delay claims" rather than work modification claims, and thus exempt from damages. Specifically, as to these claims, Perini stated:

> "Due to Steelco's failure to provide discovery regarding a full, accurate and complete accounting of its claims, it cannot be precisely determined which of the 27 outstanding change order proposals represent Steelco's claims for delay damages. *As best Perini can assess*, Change Order Proposal Nos. X-22A, X-23, X-28A, X-29, X-31A, X-32A, X-37, X-43, X-44, X-45, and X-47, represent Steelco's claims for delay damages"(emphasis added).

Steelco opposed the motion on various grounds but did not contest the allegation that the 11 enumerated work orders were delay damages claims.

In a decision and order of November 30, 2004 (hereinafter referred to as the "first order"), the court granted Perini's motion for partial summary judgment dismissing claims for delay damages, on the ground that such claims were barred by the relevant provisions of the prime contract and subcontract. The first order however did not specifically identify any of these claims by their work order numbers. Nor did it effectively

establish, as the defendants now argue, that there were 11 such claims. Specifically, the motion court referred to the number of claims that were allegedly delay claims only in its narration of the facts: "Steelco commenced this action against Perini, seeking contract damages based on certain outstanding Steelco-prepared change order requests, of which *approximately 11 are for alleged delay damages*" (emphasis added).

The first order did not explain how that number was arrived at, or from where it materialized. Most certainly, the first order did not make any independent determination as to which of the work orders were, in fact, claims for delay damages rather than *alleged* delay damages. The remaining seven pages of the 11-page decision focused on the enforceability of contractual "no-damages-for delays" provisions. Consequently, the order dismissed Steelco's delay claims generally but never identified them specifically by work order number.

Thereafter, Steelco moved to reargue and renew, asserting, inter alia, that various of the claims designated by Perini as delay claims were, in fact, work change claims. Steelco acknowledged that four of the work orders alleged by Perini to be delay claims - X-43, X-44, X-45 and X-47 - were indeed "seek[ing] recovery for alleged delay damages." Steelco referred to four other claims - X-28, X-29, X-31A, and X-37 - as claims for

increased costs "because of Perini's acts and/or omissions." No mention whatsoever was made of work orders X-22A, X-23 or X-32A.

In March 2005, the court denied the motion for reargument without reference to any of the specific work orders or claims but simply on the ground that since Steelco had failed to object to the designations in reply to Perini's motion for partial summary judgment, it was barred from doing so on a motion to reargue and renew. Steelco appealed.

On November 10, 2005, this Court affirmed the motion court's first and second orders to the extent that it affirmed the dismissal of delay claims on the ground that the no-damages-for delays provision was unambiguous and binding on Steelco (23 A.D.3d 205 [2005]).

However, the specific work orders affected by this provision were not identified by this Court. The extent of our ruling as to the delay claims was as follows:

"Steelco's claims for delay damages were properly dismissed. The no-damage-for-delay clauses in both the prime contract and subcontract are unambiguous and binding on Steelco, and there is no evidence sufficient to raise an issue of fact as to whether, as Steelco claims, the delays were not contemplated at the time of the subcontract and were caused by Perini's breach of a fundamental obligation expressly imposed by the subcontract, bad faith, willful misconduct or gross negligence"(id. at 206).

In the meantime however, on April 4, 2005, with the appeal pending, the parties proceeded to trial. In Steelco's opening

statement, counsel stated that claims asserted by Steelco arising out of work orders X-22A, X-23 and X-32A were not claims for delay damages. Prior to opening statements, Perini's counsel objected to the inclusion of two of the work orders, X-22A and X-23 but did not mention X-32A. Steelco was ultimately permitted to present evidence on all three.

In the charge conference, Perini's counsel again objected to work orders X-22A and X-23 on the verdict sheet, and argued they should not be included in the jury charges but did not mention work order X-32A.

On April 14, 2005, the jury rendered a unanimous verdict in Steelco's favor on all of the claims. With regard to claim X-32A, the jury awarded Steelco $48,792. On or about May 9, 2005, Perini moved, pursuant to CPLR 4404(a), to set aside the verdict on the grounds, inter alia, that as the three work orders - X-22A, X-23, X-32A - had already been dismissed by the motion court's first order, they should not have been submitted to the jury.

In March 2006, the trial court denied Perini's motion to set aside the verdict on the grounds that the motion court's order as to which of the claims were delay claims was far from clear; and that there had been no specific reference to the three work orders which the defendants were claiming had already been

dismissed. Specifically the trial court observed that:

> "While the plain language of [the motion court's] decision... dismissed all proposals for delay claims, it fails to hold that Change Order Proposals X-22A, X-23 and X-32A were in fact delay claims. Should the movant seek clarification..., the movant may seek relief before [that motion court]."

Thereafter, the defendants moved for clarification from the motion court in the form of an order finding that work orders X-22A, X-23 and X-32A had been dismissed as delay claims pursuant to the motion court's first order.

The defendants also appealed the denial of their motion for a judgment notwithstanding verdict, asserting, inter alia, that the introduction of various claims into evidence at trial was error since the claims had been dismissed by the prior order of the motion court. However, they challenged only *two* work orders in the appeal to this Court, X-22A and X-23; X-32A was not mentioned.

Thus, there was no mention of work order X-32A in this Court's decision on the second appeal (36 A.D.3d 568 [2007]). Specifically, we held: "Defendants are correct that the introduction of claims X-22A and X-23 in evidence was error insofar as those estimates constituted delay claims previously dismissed in an order affirmed by this Court, and those claims are hereby rejected." Id. at 570 (internal citation omitted).

This Court's specificity notwithstanding, the original motion court's decision issued just two weeks later brought work order X-32A back as a deus ex machina. Aiming to clarify its prior two orders the motion court held that,

> "[b]ecause this Court has already issued two orders confirming the dismissal of *the 11 Steelco claims* identified by Perini as delay claims, the dismissal of claims X-22A, X-23, and X-32A is the law of the case. As such it could not have been placed before the jury in this action" (emphasis added).

This third appeal ensued. As limited by its briefs, Steelco's appeal focuses solely on its claim based on the single work order, X-32A. Steelco makes a two-prong argument. It contends that: (a) the motion court's prior orders may have dismissed its "delay claims," but never held that X-32A was one of the delay claims; and (b) X-32A is an "extra work" claim, not a delay claim, so it was not covered by the prior adjudications, and was properly submitted to the jury.

The defendants argue that the claim was expressly the subject of their initial partial summary judgment motion that was resolved in the first and second orders of the motion court and affirmed by this Court, so that the plaintiff had no right to continue to challenge the dismissal of the claim. The defendants contend that the reference to "approximately 11" change orders related to delay damages is a direct reference to their own list

of 11 work orders which, "as best [they could] assess," were all of the delay claims asserted by the plaintiff.

The defendants do not reach the merits of the plaintiff's argument that X-32A was an "extra work" claim rather than a delay claim, and argue that the Court should similarly refuse to reach the merits of an argument that, according to the defendants, has already been resolved in their favor by five orders, including two by this Court. Both sides appear to agree that if X-32A was dismissed by the first order, then the claims arising from it were lost, on "law of the case" grounds. Ayala v. S.S. Fortaleza, 40 A.D.3d 440, 441, 836 N.Y.S.2d 584, 585 (1st Dept. 2007) ("It is axiomatic that one judge may not review or overrule an order of another judge of co-ordinate jurisdiction in the same action or proceeding"). It would follow that, if the first order dismissed claims arising from X-32A, then the trial judge erred in permitting evidence of claims arising from that work order to be admitted at trial, and in allowing the jury to render a verdict on those claims.

However, in my view, Steelco convincingly argues that the defendants did not believe X-32A was covered by the first order, as demonstrated by the defendants' failure to object to evidence of claims arising from X-32A at trial, and on appeal. Moreover, that failure to object, in my opinion, renders a "law of the

case" argument moot since essentially it constituted a permissible waiver of any favorable determination as to X-32A by the motion court. See Hadden v. Consolidated Edison Co. of N.Y., 45 N.Y.2d 466, 469 (1978) (absent transgression of public policy all rights and privileges to which one is legally entitled may be waived).

Indeed, the defendants' ambivalence toward this single work order is perhaps the most striking aspect of this case, followed only by the motion court's decisions and orders which from start to finish have kept work order X-32A mired in confusion. A simple read-through of the order being appealed from shows that Steelco is correct.

The motion court held that:

> "[b]ecause this Court has already issued two orders confirming the dismissal of *the 11 Steelco claims* identified by Perini as delay claims, the dismissal of claims X-22A, X-23, and X-32A is the law of the case. As such it could not have been placed before the jury in this action" (emphasis added).

It should seem clear by now that the two orders of the motion court did not dismiss *the 11* claims but simply referred to "approximately 11" work orders that are for "*alleged* delay damages" (emphasis added). Indeed, the use of the terms "approximately" and "alleged" suggests that the issue of whether these claims are all delay damages claims or indeed, if any of

them are delay damages claims is far from settled. Undoubtedly the reference to "11" came from the defendants' own assessment in their motion for summary judgment but neither of the motion court's orders specified the work order numbers that were deemed delay claims. Thus, neither could this Court's affirmance of those orders, in November 2005, specify which of the "approximately 11" work orders were deemed delay claims. Consequently, in March 2006 when the trial court denied the defendants' motion for judgment notwithstanding verdict there was neither law of the case on the work orders at issue nor a binding appellate court determination as to precisely which work orders were deemed claims arising out of delay damages.

Nevertheless, the motion court continues its February 16, 2007 decision and order as if the imprecision of the two prior orders resolved itself through passage of time:

> "This Court's decision, which effectively dismissed Change Order Proposals X22-A, X-23 and X-32A, among others, as delay claims, is the law of the case."

The motion court purports to find support for this determination by relying on this Court's ruling:

> "in a decision dated, January 30, 2007, the Appellate Division ruled that the introduction of claims X-22A and X-23 in evidence 'was error insofar as those estimates constituted delay claims previously dismissed in an order affirmed by this Court and those claims are hereby rejected'" (citation omitted).

However the question then arises as to how the motion court segued into the following conclusion that includes not the two claims whose dismissal is affirmed by this Court in its January 30, 2007 ruling but the three for which dismissal is sought by the defendants:

> "Accordingly, defendant's motion is granted, and an order will be issued modifying the Dismissal Order by clarifying that Steelco claims X-22A, X-23 *and X-32A* were part of the 11 Steelco delay claims that were previously dismissed"(emphasis added).

It is true that this Court refers to work orders X-22A and X-23 within the group of "delay claims *previously dismissed* in an order affirmed by this Court" (emphasis added) (36 A.D.3d at 570). However, that does not, as the defendants argue, bring work order X-32A within the umbrella of those delay claims. All it does is bring the issue back squarely to the question of which of the work orders precisely was dismissed in the first order that referred to "*approximately* 11" (emphasis added). In my opinion, this question has only become more difficult in view of the motion court's concluding paragraph which presumably is intended to clarify all preceding decisions, but which states:

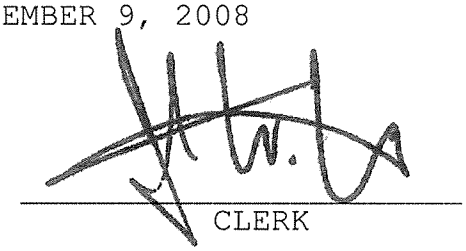
> "Ordered that defendants' motion for partial summary judgment is granted and Steelco's claims for delay damages *identified as claims X-22A, X-23, X-28A X-29, X-31A, X-32A, X-37, X-43, X-44 and X-45* are dismissed."

Inexplicably, the total of claims identified by the motion

court as delay damages claims numbers 10 not 11. Thus, if the motion court were to be affirmed, I believe it would leave this issue in the same confusion that was engendered by the motion court's use of the phrase "approximately 11" in its first order. Further, given the ambivalence of the defendants towards this single work order, particularly their failure to preserve the issue through objections at trial and their failure to raise the issue of X-32A at all on appeal, I would reverse that part of the motion court's order that dismisses X-32A as a delay claim and would reinstate the jury finding in plaintiff's favor on the claim.

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

ENTERED: SEPTEMBER 9, 2008



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