SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 25, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Williams, Moskowitz, Acosta, JJ.

3888 John Sanginity, et al., Plaintiffs-Appellants, Index 23262/06

-against-

National Grange Mutual Insurance Company, Defendant-Respondent.

Litchfield Cavo LLP, New York (Vincent J. Velardo of counsel), for appellants.

Law Office of Eric N. Wolpin, New York (Thomas G. Connolly of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 30, 2007, which denied plaintiffs' motion for summary judgment, unanimously affirmed, without costs.

There are unresolved questions of fact as to whether the business purpose of and work performed by plaintiffs excluded them from coverage under defendant's policy.

The Decision and Order of this Court entered herein on June 10, 2008 is hereby recalled and vacated (*see* M–3285 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 25, 2008

CLERK

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

4010-
4010A-
4010B

Robert Bradley, et al.,
Plaintiffs-Appellants-Respondents,

Index 108416/04
590989/04
591184/04

-against-

IBEX Construction, LLC,
Defendant-Respondent,

Home Depot U.S.A. Inc., et al.,
Defendants-Respondents-Appellants,

Ruttura & Sons Construction Co.,
Defendant.

- - - - -

IBEX Construction, LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Sage Electrical Contracting, Inc.,
Second Third-Party Defendant-Respondent.

[And A Third-Party Action]

Harry I. Katz, P.C., New York (Paul F. McAloon of counsel), for appellants-respondents.

French & Rafter, LLP, New York (Howard K. Fishman of counsel), for IBEX Construction, LLC, respondent-appellant.

D'Amato & Lynch, LLP, New York (Arturo M. Boutin of counsel), for Home Depot U.S.A., Inc. and 23rd St. Properties, LLC, respondents-appellants.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for Sage Electrical Contracting, Inc., respondent.

Judgment, Supreme Court, New York County (Walter J. Relihan, Jr., J. at trial and post-trial motion to set aside verdict;

Louis B. York, J. on post-trial motion to dismiss third-party action and cross claims), entered December 5, 2007, after a jury verdict in favor of defendants on the issue of liability under Labor Law § 240(1), unanimously modified, on the law, plaintiffs' motion to set aside the verdict granted, judgment directed in favor of plaintiffs on the issue of liability pursuant to § 240(1), the claims and cross-claims for indemnification against second third-party defendant Sage Electrical Contracting, Inc. reinstated, the matter remanded for trial on damages and apportionment of fault among defendants, and otherwise affirmed, without costs. Appeals from orders, same court (Rosalyn Richter, J.), entered June 8, 2006, and (Walter J. Relihan, J.), entered December 15, 2006, which, to the extent appealed from as limited by the briefs, denied plaintiffs' respective motions for partial summary judgment on their § 240(1) claim, and to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly denied plaintiffs' motion for partial summary judgment. Plaintiffs established a prima facie case that defendants and second third-party defendant violated Labor Law § 240(1) by failing to ensure the proper placement of the ladder due to the condition of the floor, but a triable issue of fact was raised by the accident report, which indicated that plaintiff worker had tripped on the plastic-covered floor and did

not fall from the ladder (*see e.g. Potter v NYC Partnership Hous. Dev. Fund Co., Inc.*, 13 AD3d 83, 85 [2004]; *cf. Klein v City of New York*, 89 NY2d 833, 835 [1996]). The court properly determined that the accident report was admissible as a business record (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [2007]). A proper foundation was established for admission of the accident report into evidence under the business record exception to the hearsay rule (*see Petrocelli v Tishman Constr. Co.*, 19 AD3d 145 [2005]). Accordingly, denial of plaintiffs' motion for a directed verdict on the issue of liability was proper because the accident report raised an issue of fact as to whether the alleged violation of § 240(1) proximately caused his accident (*see e.g. Holt v Welding Servs.*, 264 AD2d 562, 563 [1999], *lv dismissed* 94 NY2d 899 [2000]). The trial court properly charged the jury as to sole proximate cause (*see* PJI3d 2:217, at 1153 [2008]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

However, the motion court improperly denied plaintiffs' post-trial motion to set aside the verdict and for judgment notwithstanding the verdict. Since the jury determined that plaintiff worker fell off the ladder, it could not have reasonably concluded, in light of the evidence, that the ladder was placed and used so as to give him proper protection in the performance of his work. Other than the accident report, which

the jury clearly rejected, defendants and second third-party defendant failed to present any evidence controverting plaintiffs' version of the accident, i.e., that the ladder had slipped on the plastic-covered floor. Furthermore, there was no evidence to suggest that plaintiff worker's own actions were the sole proximate cause of his injury (*see Bonanno v Port Auth. of N.Y. & N.J.*, 298 AD2d 269 [2002]). The inconsistencies between his trial testimony and his prior statements were not material to the issue of how the accident occurred, and he consistently testified that he had fallen because the ladder had slipped on the plastic (*see e.g. Ernish v City of New York*, 2 AD3d 256, 257 [2003]).

The motion court properly granted second third-party defendant's motion to dismiss that third-party action and any cross claims for indemnification against it. The trial court clearly directed that any post-trial motions, including motions regarding indemnification, be submitted to the court within 15 days of the verdict. Since defendants IBEX, Home Depot and 23rd St. failed to move within the 15 days or to assert their indemnification claims in response to plaintiffs' timely motion as required by CPLR 4406, and failed to give an adequate reason for the delay, their claims were properly dismissed at that time (*compare Tesciuba v Cataldo*, 189 AD2d 655 [1993], *lv dismissed* 82 NY2d 846 [1993], with *Brown v Two Exch. Plaza Partners*, 146 AD2d

129, 140 [1989], *affd* 76 NY2d 172 [1990]). Nevertheless, our reinstatement of plaintiff's claims against defendants is a fundamental change in those circumstances, and the concomitant reinstatement of defendants' claims and cross-claims against Sage for indemnification, which arise out of those claims, is now warranted.

The Decision and Order of this Court entered herein on June 26, 2008 is hereby recalled and vacated (*see* M-3702 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 25, 2008

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4078 Sylvia Toyos, as Executrix of the Estate of Maria H. Cuevas, deceased, et al., Plaintiffs-Respondents-Appellants, Index 7008/89

-against-

The City of New York, Defendant-Appellant-Respondent,

Tony Martinez, et al., Defendants.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

Judgment, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 28, 2007, upon a jury verdict finding, inter alia, defendant City of New York 20% liable for plaintiffs' injuries, unanimously modified, on the law, to vacate the apportionment of fault for the injuries of plaintiff Avelino Toyos, the matter remanded for a new trial solely on that issue, and otherwise affirmed, without costs.

On a prior appeal in this action arising out of a motor vehicle accident, this Court affirmed the trial court's decision granting plaintiffs' motion to set aside the verdict and directing a new trial unless defendant City agreed to accept 15% of the responsibility for plaintiffs' injuries (304 AD2d 319 [2003]). We concluded that the evidence supported "the jury's

finding that plaintiffs sustained their injuries in a collision caused in part by the City's negligent failure to provide turnouts or other places of refuge for disabled cars on the Harlem River Drive above 164th Street" (*id.* at 319). We further noted that "[f]ive years before the accident, the City had received a study recommending that shoulders be added to this section of the Harlem River Drive" (*id.*).

Following the retrial on the issue of liability, the jury apportioned 20% of the fault for the accident to the City, and the City now contends, in part, that plaintiffs failed to establish, prima facie, any liability on its part for their injuries. However, the evidence introduced during the retrial was essentially the same as that presented at the first trial, and this Court's determination that plaintiffs had established, prima facie, that their injuries were caused by, among other things, the fact that the City had not furnished any shoulders or other places for disabled cars to take refuge constitutes the law of the case (*see Matter of Pantelidis v New York City Bd. of Stds. and Appeals*, 43 AD3d 314 [2007], *affd* 10 NY3d 846 [2008]; *Combier v Anderson*, 34 AD3d 333, 334 [2006]). We further observe that ample evidence was adduced at the retrial showing that a dangerous condition had been created by the lack of a place of refuge at or near the area where the accident took place and that plaintiffs' injuries were caused, in part, by the City's

negligent failure to provide said places of refuge for disabled cars on the Harlem River Drive above 164th Street.

Plaintiff Avelino Toyos was standing in the roadway when he was injured in the accident, and the jury determined that Toyos acted negligently in the incident. Nonetheless, over the City's objection, the court instructed the jury to determine whether Toyos's negligence was a substantial factor in causing the *accident*, rather than whether Toyos's negligence was a substantial factor in causing his *injuries*.[1] Even plaintiffs do not dispute that this was error. Accordingly, we are compelled to remand for a new trial to apportion fault for the causation of Toyos's injuries.

We have considered the City's remaining arguments, including those regarding the sufficiency of plaintiffs' notices of claim and that the testimony of plaintiffs' expert lacked a proper foundation, and find them unavailing.

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

ENTERED: SEPTEMBER 25, 2008

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[1]Not surprisingly, the jury found that Toyos's negligence was not a factor in causing the accident.

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4114 The People of the State of New York, Ind. 5591/05
Respondent,

-against-

Timothy Harrell, also known as Tim Herrera,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Heller Ehrman LLP, New York and Bingham McCutchen, LLP, New York (Todd M. Beaton, Jr. of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

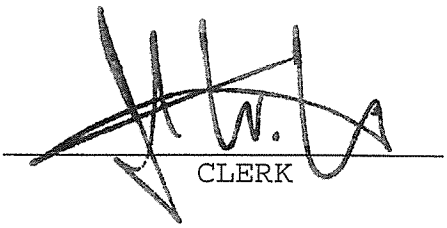
Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered October 3, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously reversed, on the law, and the matter remanded for a new trial.

In *People v George* (50 AD3d 455 [2008]), this Court reversed the codefendant's conviction on the ground that the trial court improperly denied a challenge for cause to a prospective juror who had expressed doubt about his ability to be impartial. We see no reason to reach a different result with regard to

defendant, who was similarly situated to the codefendant in all respects. We find it unnecessary to reach any other issue.

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4115 John Madtes, Index 115941/05
Plaintiff-Respondent,

-against-

Bovis Lend Lease LMB, Inc.,
Defendant-Appellant.

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

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 5, 2008, which granted plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

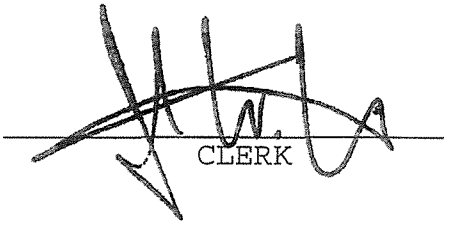
Plaintiff, a foreman steamfitter, was injured when he fell from a 10-foot ladder while working on the renovation of the Cadman Plaza Post Office in Brooklyn. In support of his motion for summary judgment, plaintiff presented evidence that he wanted to use a man lift to perform the pipe re-installation but was precluded from doing so because he could not use the elevators to transport the lift from the lower to the higher floors. Plaintiff also presented evidence that he could not get his employer's 14-foot A-frame ladders to the eighth floor because they would not fit in the building stairwell. In addition, plaintiff presented evidence that he was directed by defendant's

project manager to get the job done that day and make do with what equipment was available. With this evidence, plaintiff established his prima facie burden of entitlement to summary judgment.

Defendant's evidence was insufficient to raise a triable issue of fact as to whether plaintiff was the sole cause of the accident so as to defeat summary judgment. The affidavit of defendant's project manager was not adequate in this regard as it appears feigned to create an issue of fact in that it is inconsistent with his prior deposition testimony.

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

ENTERED: SEPTEMBER 25, 2008



Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4116-
4116A In re Anita L.,
Petitioner-Respondent,

-against-

Damon N.,
Respondent-Appellant.

Howard M. Simms, New York, for appellant.

The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), for respondent.

Appeal from order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered October 31, 2007, which granted petitioner mother sole legal and physical custody of her children and ordered that respondent father's access to the children be limited to supervised visitation, unanimously dismissed, without costs. Appeal from order, same court, Judge and date of entry, which granted petitioner an order of protection against respondent, unanimously dismissed, without costs.

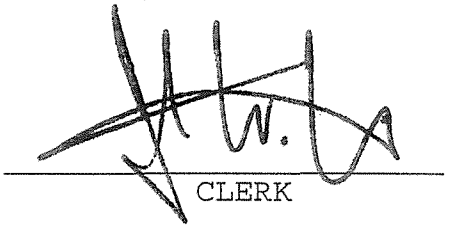
On October 31, 2007, respondent walked out of a hearing of petitioner's child custody and family offense petitions. This conduct was properly treated by the court as a knowing and willing default, as respondent previously had been warned against leaving the courtroom and other disruptive behavior. No appeal lies from an order entered upon an aggrieved party's default (CPLR 5511; *Figiel v Met Food*, 48 AD3d 330 [2008]).

Were we to consider the appeals, we would affirm both orders. As respondent was afforded, but chose not to avail himself of, the opportunity to be heard, his right to due process was not violated (*see Matter of Commissioner of Social Servs. of City of New York v Remy K.Y.*, 298 AD2d 261 [2002]). Moreover, even in the absence of a full hearing, the court had "sufficient information to render an informed decision" as to the best interests of the children (*Skidelsky v Skidelsky*, 279 AD2d 356, 356 [2001]). Given the undisputed evidence concerning respondent's behavior, separate fact-finding and dispositional hearings concerning the family offense petition were not required (*see Matter of Quintana v Quintana*, 237 AD2d 130 [1997]).

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

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4117 The People of the State of New York, Respondent, Ind. 6331/04

-against-

Fernando Ortiz, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about March 30, 2005, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

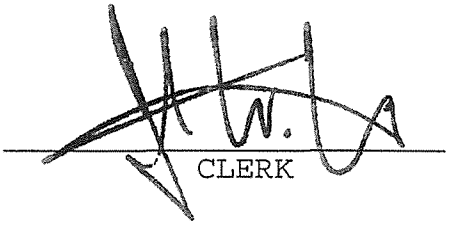
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4118 236 West 40th Street Corp., Index 104587/05
Plaintiff-Appellant,

-against-

Chicago Title Insurance Company,
Defendant-Respondent.

Bennett D. Krasner, Atlantic Beach, for appellant.

Herrick, Feinstein LLP, New York (M. Darren Traub of counsel), for respondent.

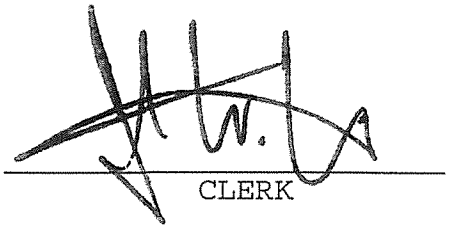
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 3, 2007, which granted defendant's motion for summary judgment, unanimously affirmed, with costs.

The policy exclusion regarding the "Rights of tenants or persons in possession" unambiguously applies to the suit by plaintiff insured's tenant, who claimed a right of first refusal based on the lease, since the dispute concerned a party in actual possession whose right was not of record (*see Herbil Holding Co. v Commonwealth Land Tit. Ins. Co.*, 183 AD2d 219, 225 [1992]). Plaintiff failed to raise a question of fact as to untimely disclaimer, unable to produce an affidavit from a knowledgeable witness or other admissible evidence that defendant insurer had been given notice by plaintiff of the tenant's action.

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

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4119 The People of the State of New York, Ind. 95050/05
Respondent,

-against-

Jisun Allah,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered February 1, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

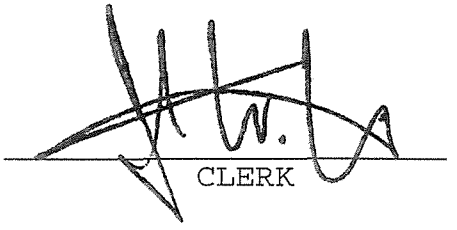
The court properly denied defendant's suppression motion in all respects. When, in response to the officers' inquiry about the whereabouts of a knife, defendant offered to show them the knife and led them into his apartment, defendant manifested his voluntary consent to a search of the premises for the purpose of recovering the knife (*see People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). Although the police took defendant back into the hallway outside the apartment, the officer's reentry into the apartment to recover the knife did not constitute a second, separate search; the search of the room from which the knife was

recovered was within the scope of defendant's consent. Although defendant was in custody, the inquiry about the knife's location was justified by public safety concerns and thus did not require *Miranda* warnings (*see New York v Quarles*, 467 US 649, 659 [1984]; *People v Allen*, 240 AD2d 418 [1997], *lv denied* 90 NY2d 1009 [1997]; *People v Waiters*, 121 AD2d 414 [1986], *lv denied* 68 NY2d 769 [1986]).

Defendant made a valid waiver of his right to counsel, after an extensive inquiry by the court that established his ability to represent himself and emphasized the dangers and disadvantages of proceeding without counsel (*see People v Providence*, 2 NY3d 579, 580-581 [2004]).

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

ENTERED: SEPTEMBER 25, 2008



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 September 25, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
David Friedman
Milton L. Williams
Karla Moskowitz, Justice

The People of the State of New York, Ind. 6352/05
Respondent,

-against- 4121

John Kerins,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about January 19, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:

Clerk.

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

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4122 Juanita Carmona, et al., Index 25879/03
Plaintiffs-Respondents,

-against-

Kevin Ross Mathisson, M.D., et al.,
Defendants-Respondents,

Maple Eye Associates LLP, et al.,
Defendants,

Alcon Laboratories Inc., et al.,
Defendants-Appellants.

Goldberg Segalla LLP, White Plains (Michael D. Shalhoub of counsel), for appellants.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Robert F. Garnsey of counsel), for Juanita and George Carmona, respondents.

Clausen Miller, P.C., New York (Afaf Sulieman of counsel), for Kevin Ross Mathisson, M.D. and Montefiore Medical Center, respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about March 21, 2008, which, to the extent appealed from, denied so much of the Alcon defendants' motion for summary judgment as sought dismissal of plaintiffs' causes of action for strict liability, negligent design and manufacture, and loss of consortium, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint against these defendants.

This action seeks damages for injuries allegedly sustained by plaintiff Juanita Carmona during cataract surgery. The

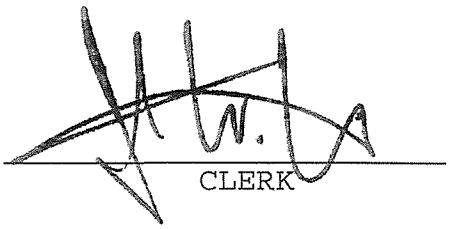
surgery was performed by defendant Mathisson at defendant Montefiore Medical Center, using an Alcon Series 20000 Legacy phacoemulsification machine manufactured by defendant Alcon.

On Alcon's motion for summary judgment, the court granted dismissal only as to causes of action for negligence for failure to warn and for breach of warranty. With respect to the claims alleging strict products liability and negligence based on manufacturing and design defects, Alcon submitted the affidavit of an engineer with expertise in the manufacture and design of the Alcon STTL and phacoemulsification devices and technology in general. This expert opined that the product was not defectively designed or manufactured, and that a product defect did not cause the patient's injuries, positing other possible causes related to human error. This opinion was neither speculative nor conclusory, as it was based on the internal safety features of the USDA approved device, the failure to find a defect upon inspection, the fact that no similar defect had ever been reported, and a study finding that phacoemulsification complications often resulted from surgical technique. After this expert vouched for the product's compliance with design and manufacturing standards in the industry and posited other possible causes of the injury, respondents failed to exclude all alternative causes for the injury in response (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008]).

All other substantive claims having been rejected, the derivative claim for loss of consortium as against appellants must also fall.

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4123 Doris Silva, Administratrix of the Estate of Annette Medina,
Plaintiff-Appellant,

-against-

Worby, Groner, Edelman, LLP, et al.,
Defendants-Respondents.

Index 20104/06

Gardiner & Nolan, Brooklyn (William Gardiner of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Neil W. Silberblatt of counsel), for respondents.

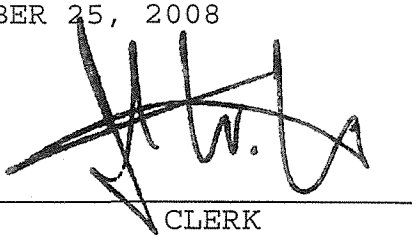
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 15, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The conflicting deposition testimony and affidavits submitted by the parties present a material issue of fact whether plaintiff instructed defendants to attempt to settle the case underlying this legal malpractice action for $1.25 million (*see Langhorn v K. Solo Serv. Corp.*, 302 AD2d 307 [2003]). As the record indicates that defense counsel in the underlying case was authorized and prepared to settle that case for the requested amount, a finding that plaintiff so instructed defendants would

show a settlement opportunity lost through their malpractice (*see* *Masterson v Clark*, 243 AD2d 411 [1997]).

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

ENTERED: SEPTEMBER 25, 2008



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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 September 25, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
David Friedman
Milton L. Williams
Karla Moskowitz, Justice

The People of the State of New York, Ind. 1056/07
Respondent,

-against- 4124

Andrew Ryerson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about November 1, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:

Clerk.

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

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4125-
4125A In re Sean LaMonte Vonta M.
and Another

Children Under the Age of
Eighteen Years, etc.,

Sean LaMonte M.,
Respondent-Appellant,

Commissioner of Administration for
Children's Services, et al.,
Petitioners-Respondents.

John J. Marafino, Mount Vernon, for appellant.

Joseph T. Gatti, New York, for Catholic Guardian Society, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Doneth Gayle of counsel), Law Guardian.

Orders, Family Court, New York County (Gloria Sosa-Lintner, J.), entered August 29, 2006, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship and that

nevertheless respondent failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). Respondent testified that he was aware of the elements of the service plan with which he was required to comply before the children could be returned to him. However, despite the agency's repeated, meaningful efforts to assist him, respondent failed to remain drug free, visit the children regularly, and timely complete a drug program, the principal barrier to his regaining custody of the children (*see Matter of Christina Jeanette C.*, 168 AD2d 351 [1990]).

A preponderance of the evidence at the dispositional hearing supports the determination that it is in the best interests of the children to terminate respondent's parental rights so as to facilitate the children's adoption by their foster mother, with whom they have lived for most of their lives and have developed a close relationship, and who has tended to their medical and developmental needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). Under the circumstances, a suspended judgment is not warranted (*see Matter of Shaka Efion C.*, 207 AD2d 740 [1994]).

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

ENTERED: SEPTEMBER 25, 2008

CLERK

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4126 The People of the State of New York, Respondent,

-against-

Andre Johnson, Defendant-Appellant.

Ind. 3036/99

- - - - -

4127 The People of the State of New York, Respondent,

-against-

Donald Johnson, Defendant-Appellant.

Ind. 3036/99

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for Andre Johnson, appellant.

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

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J.), rendered January 3, 2002, convicting defendant Andre Johnson, after a jury trial, of assault in the first degree, and sentencing him to a term of 9 years, unanimously affirmed. Judgment, same court and Justice, rendered December 18, 2001, convicting defendant Donald Johnson, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously affirmed.

The verdict as to each defendant was based on legally sufficient evidence and was not against the weight of the

evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of inconsistencies in testimony.

The court properly declined to dismiss the indictment on the ground that a prosecution witness revealed at trial that a portion of his grand jury testimony was untrue. There was no impairment of the integrity of the grand jury proceeding that warranted dismissal (*see* CPL 210.35[5]; *People v Darby*, 75 NY2d 449, 455 [1990]), since, rather than being based entirely on false testimony (*compare People v Pelchat*, 62 NY2d 97 [1984]), the indictment was amply supported by other evidence (*see People v Davis*, 256 AD2d 200, 201 [1998], *lv denied* 93 NY2d 898 [1999]). Moreover, there was no suggestion that the prosecutor had reason to believe this testimony was false.

The court properly denied, without granting a hearing, defendants' CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct. The moving papers did not contain "sworn allegations of all facts essential to support the motion," (CPL 330.40[2][e][ii]), and defendants were not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts. Defendants presented an affidavit from a dissatisfied juror who attempted to impeach the verdict with regard to the jury's deliberative process, rather than any

outside influences (*see People v Redd*, 164 AD2d 34, 38-39 [1990]). The affidavit, even when liberally construed, cannot be read as asserting that any juror was racially prejudiced against the defendants. The only reference to race is a claim that a fellow juror accused the juror-affiant of racial bias in *favor* of defendants, and accompanied the accusation with an inappropriate wisecrack. Furthermore, nothing was brought to the court's attention during jury deliberations or any other part of the trial that suggested any bias against defendants. Thus, defendants did not show any basis for a departure from the general rule against jurors' impeachment of their verdicts (*compare People v Leonti*, 262 NY 256 [1933]). Defendants' constitutional arguments regarding this issue are without merit.

We perceive no basis for reducing the sentences.

Defendants' remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: SEPTEMBER 25, 2008

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4128 The People of the State of New York, Ind. 47340C/05
Respondent,

-against-

Steven Basciano,
Defendant-Appellant.

James Kousouros, Kew Gardens, for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

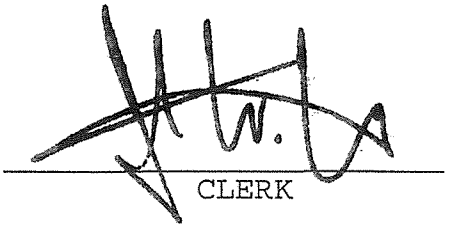
Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered June 17, 2007, convicting defendant, after a jury verdict, of assault in the second degree, and sentencing him to a term of 2½ years, unanimously affirmed.

The court properly granted the People's request to submit second-degree assault under Penal Law § 120.05(1)(causing serious physical injury) to the jury as a lesser included offense of first-degree assault under Penal Law § 120.10(1)(causing serious physical injury by means of a dangerous instrument). There was a reasonable view of the evidence (*see People v Negron*, 91 NY2d 788 [1998]) that defendant seriously injured the victim by means of his fist, rather than by means of an unidentified hard object as set forth in the indictment. Indeed, such a view was advanced by defendant in his cross-examination of the People's witnesses. Since the indictment necessarily contained the lesser included offense, there is no merit to defendant's arguments that the

court constructively amended the indictment or that the People impermissibly changed their theory of prosecution (*see People v Gouyagadosh*, 295 AD2d 246, 247 [2002]; *People v Udzinski*, 146 AD2d 245, 254 [1989], *lv denied* 74 NY2d 853 [1989]).

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4129 In re American Premier Underwriters, Inc., Petitioner-Respondent, Index 603973/06

-against-

Herbert B. Abelow, et al., Respondents-Appellants,

Gladys Gardstein Cash, Respondent.

Chitwood Harley Harnes LLP, Great Neck (John F. Harnes of counsel), for appellants.

Kaye Scholer LLP, New York (Myron Kirschbaum of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Helen E. Freedman, J.), entered July 31, 2007, insofar as appealed from as limited by the briefs, granting the petition and declaring the share price offered to the dissenting shareholders fair and that respondent Stanley Lane is not entitled to compensation for his shares, unanimously modified, on the law and the facts, to the extent of declaring Lane entitled to compensation, and otherwise affirmed, without costs.

In this post-merger proceeding to fix the fair value of the shares of the acquired company pursuant to Business Corporation Law § 623, the court properly exercised its discretion in finding the price fair based on its acceptance of petitioner's and

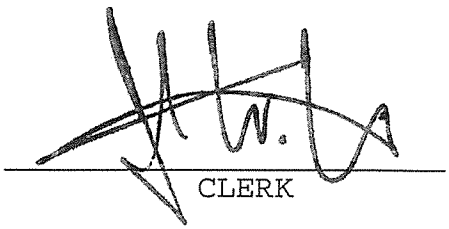
rejection of respondents' expert opinions (*see Matter of Cawley v SCM Corp.*, 72 NY2d 465, 470 [1988]). The court correctly found that certain assets were properly not considered in valuing the acquired entity, that the discount rate applied by petitioner's expert was fair and that respondents' expert's methodology was flawed in several respects. Neither the 1994 grant to the Metropolitan Transportation Authority of an option to purchase Grand Central Terminal and other property it subleased nor a 2006 agreement to sell certain assets to take effect immediately after the merger breached the 1873 ground lease between petitioner and the acquired entity whose shares were the subject of the valuation proceeding. Moreover, even if arguendo these were breaches, they did not warrant termination of the lease so as to trigger petitioner's obligation to pay the acquired entity the proceeds for assets sold over the years and to include such payment in the valuation.

However, we find that respondent Lane should have been accorded rights as a dissenting minority shareholder. The record does not show that petitioner requested proof of beneficial ownership of his shares despite ample opportunity to do so, and the only ground asserted in its letter to this respondent and in the petition was that he was not an owner of record.

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

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4130 The People of the State of New York, Respondent,

-against-

Alberto Sanchez, Defendant-Appellant.

Ind. 949/07

Edwin Ira Schulman, Kew Gardens, for appellant.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), entered October 18, 2007, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of 60 days, concurrent with 3 years probation and 50 hours of community service, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

The court properly admitted evidence of defendant's uncharged prior attacks on the victim. These acts "evince[d] defendant's intent to focus his aggression" on the victim (*People v Bierenbaum*, 301 AD2d 119, 150 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and provided the jury with necessary background information regarding the deteriorating relationship between the victim and defendant. The probative value of this evidence outweighed its prejudicial effect, which the court minimized by way of limiting instructions.

The court properly admitted the victim's mother's testimony that she overheard, by speakerphone, a telephone call in which the speaker apologized for hitting the victim. Although the mother, who was not familiar with defendant's voice, did not hear the speaker identify himself, there was sufficient circumstantial evidence to establish that defendant was the speaker (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]).

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]). Although defendant's attorney inadvertently elicited additional testimony identifying his client as the assailant, we conclude that under the circumstances of the case, this error was neither egregious nor prejudicial (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

The court correctly ruled that when defendant testified that he never struck the victim on any occasion, he opened the door to a previously precluded inquiry about an incident that occurred after the charged crime. Defendant's global denial of violence toward the victim was not limited to a denial of the acts charged and the prior uncharged acts already in evidence (*see People v McFadden*, 259 AD2d 279 [1999], *lv denied* 93 NY2d 1022 [1999]).

Defendant did not preserve his claim that inquiry about an

incident that was the subject of pending charges violated his right against self-incrimination, or his remaining claims regarding the prosecutor's cross-examination, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

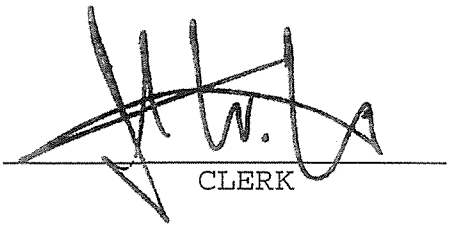
We perceive no basis for reducing the sentence.

M-4372 - People v Alberto Sanchez

Motion seeking leave to enlarge record and file supplemental Appendix granted.

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

ENTERED: SEPTEMBER 25, 2008



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Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4131 The People of the State of New York, Respondent, Ind. 5651/01

-against-

Angel Carrion, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Dewey & LeBoeuf LLP, New York (George E. Mastoris of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky III, of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered May 21, 2003, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, criminal sale of a controlled substance in the third degree, and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 5½ to 11 years, unanimously affirmed.

After the People rested their case and defendant rested without presenting any evidence, defendant, who had not previously mentioned an agency defense, successfully requested a jury charge on that defense. Accordingly, the court properly exercised its discretion regarding the order of proof (*see* CPL 260.30[7]; *cf. People v Whipple*, 97 NY2d 1 [2001]) when it permitted the People to reopen their case to introduce defendant's grand jury testimony, in which he denied taking part

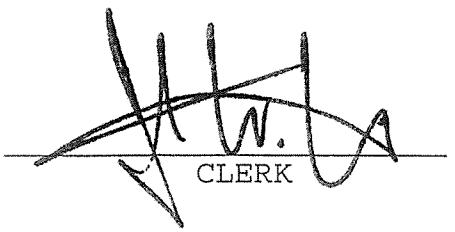
in any drug transaction and stated that no such transaction had occurred in his presence. Defendant's grand jury testimony was clearly relevant, because it "negate[d] the existence of an agency defense insofar as he denied any participation in the drug transaction" (*People v Alexander*, 172 AD2d 385, 386 [1991], *lv denied* 78 NY2d 961 [1991][citations omitted]; *see also* Prince, Richardson on Evidence § 8-201 [Farrell 11th ed] ["As a general rule, any declaration or conduct of a party which is inconsistent with the party's position on trial may be given in evidence against the party as an admission."]).

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: SEPTEMBER 25, 2008



Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4132 Marcos Mennis,
Plaintiff-Respondent,

Index 108714/05
590713/07
590122/08

-against-

Commet 380, Inc.,
Defendant-Respondent-Appellant,

Solow Management Corp.,
Defendant-Respondent,

TAG 380 LLC,
Defendant-Appellant-Respondent.

{And a Third-Party Action}

Mintzer, Sarowitz, Zris, Ledva & Meyers, LLP, New York (Souren A. Israelyan of counsel), for TAG 380 LLC, appellant-respondent, and Solow Management Corp., respondent.

Law Office of John P. Humphreys, New York (Eric P. Tosca of counsel), for respondent-appellant.

Pontisakos & Rossi, PC, Roslyn (Elizabeth Mark Meyerson of counsel), for Marcos Mennis, respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 29, 2008, which denied defendant Commet's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) claim against all defendants, unanimously modified, on the law, Commet granted conditional summary judgment on its contractual indemnity claim, and a declaration issued that defendant TAG's insurer has a duty to defend Commet in this action, and otherwise affirmed, without costs.

Plaintiff worker was injured in a fall from an affixed metal hatch ladder that led to the roof of the building Comet owned. TAG, Commet's long-term net lessee, had hired him to paint the support beams to the building's air conditioning cooling towers on the roof. Plaintiff's work supplies were stored in the room where the hatch ladder was located.

The argument by Commet and TAG that the affixed hatch ladder was not a safety device as defined under § 240(1) is raised for the first time on appeal, and is thus unpreserved. Contrary to TAG's assertion, the issue is not easily decided as a matter of law on the existing record (*cf. Chateau D'If Corp. v City of New York*, 219 AD2d 205 [1996], *lv denied* 88 NY2d 811 [1996]).

Plaintiff's unrefuted evidence that water regularly sprayed from the cooling towers onto the ladder's surface, that he repeatedly notified defendants of this condition prior to his fall, and that he fell when his hand slipped from the wet ladder, provided a sufficient basis for awarding him partial summary judgment as to liability on his § 240(1) claim. Under the circumstances, defendants' challenges to plaintiff's credibility, and their arguments with respect to plaintiff's conduct, inter alia, in carrying a paint can in one hand while climbing the ladder, do not warrant a different result. Evidence indicates that defendants had prompt notice of the accident and an opportunity to inspect, yet they offered no probative evidence to

refute plaintiff's claim of a wet, hazardous condition on the ladder.

Commet was liable under § 240(1) notwithstanding its out-of-possession status and asserted lack of active negligence in connection with plaintiff's injury (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 341 [2008]). It was entitled, however, to summary judgment on its indemnity claim, as the parties to the lease were sophisticated business entities who unmistakably indicated their intention to allocate risk of liability between them for the protection of third parties on the premises through the procurement of insurance (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). In light of these acts, there is no basis in the record for finding that the indemnity provision violated General Obligations Law § 5-321.

Commet alleges that the lease required TAG to procure insurance on Commet's behalf as a primary insured. However, it was sufficient to satisfy the lease requirements for TAG to procure insurance naming Commet as an additional insured on its policy covering the premises. In addition, TAG was obligated to defend Commet in this litigation. Where, as here, the net lease agreement obligates the tenant to make all repairs, both structural and nonstructural, and undertake full maintenance of the premises, and where the landlord has been named as an additional insured on the tenant's policy protecting against the

type of risk and injury at issue here, the tenant's insurer has a duty to defend the landlord in the action (*see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990 [1997]).

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

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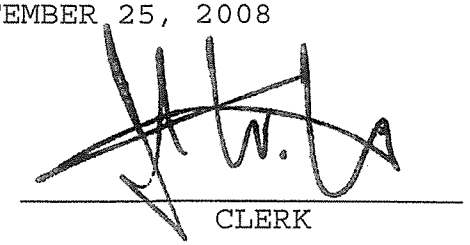

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