SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 18, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, McGuire, DeGrasse, JJ.

5393N Grand Manor Health Related Facility, Inc., Plaintiff-Respondent, Index 301880/08

-against-

Hamilton Equities Inc., et al., Defendants-Appellants.

Macron & Cowhey, P.C., Rockaway Park (John J. Macron of counsel for appellants.

Neiman & Mairanz, P.C., New York (Marvin Neiman of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 30, 2008, which, in an action for declaratory relief, granted plaintiff's motion to preliminarily enjoin defendants from commencing a proceeding to terminate plaintiff's tenancy pending resolution of this action, unanimously modified, on the law, the preliminary injunction and the court's determination that the subject lease be in effect pending disposition of this action vacated, and otherwise affirmed, without costs.

This appeal involves the July 30, 1974 commercial lease between defendant lessor Hamilton Equities, and Saul Liebman and Bert Liebman, doing business as plaintiff lessee. Defendants' February 22, 2008 notice to cure cites as lease violations plaintiff's occupancy of the premises without defendants' approval, its failure to keep the premises in good repair, and its default in paying rent and additional rent. Plaintiff moved for *Yellowstone* relief upon bringing this action to declare, among other things, its compliance with its obligations to pay rent. The IAS court granted the motion to the extent set forth in a stipulation so-ordered by the court on March 17, 2008. The first "whereas" clause of the stipulation recites the fact that plaintiff is tenant under the 1974 lease. The stipulation makes no other reference to plaintiff's status as a tenant. The pivotal operative clause of the stipulation provides:

> Pending determination of this action, defendants shall not take any steps to terminate the Lease based on any of the reasons set forth in the Notice of Default or based on any dispute concerning calculation of rent under the Lease, provided that [plaintiff] continues to pay rent consistent with the calculations of rent under the Lease.

Another operative clause provides: "This Stipulation shall not constitute an admission by, or waiver of any rights, claims or defenses of, any party, except as specifically set forth in this Stipulation."

Three months after entering into the stipulation, defendants served plaintiff with a 30-day notice to terminate plaintiff's purported month-to-month tenancy. Plaintiff then moved for an order "clarifying" the stipulation so as to interpret it as prohibiting any and all attempts by defendants to terminate plaintiff's leasehold interest and enjoining defendants from making such attempts. The IAS court granted the motion to the extent of deeming the 1974 lease in effect as between the parties pending the determination of this action, and preliminarily enjoining defendants from taking any steps to terminate the leasehold without leave of the court.

The court's ruling was erroneous because defendants did not stipulate to the existence of a lease between themselves and plaintiff. A stipulation should be construed as an independent contract subject to settled principles of contractual interpretation (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]). As noted above, the recital regarding plaintiff's tenancy is set forth only in the "whereas" clause of the stipulation. Although a statement in a "whereas" clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document (*Genovese Drug Stores v Connecticut Packing Co.*, 732 F2d 286, 291 [2d Cir 1984]). The stipulation, which is enforceable and provides appropriate *Yellowstone* relief, unambiguously omits

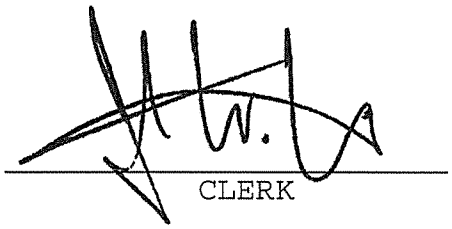
any recital that the 1974 lease was to be deemed in effect during the pendency of this action. Hence, defendants' service of the 30-day notice on the ground that no lease exists does not violate the stipulation, which only proscribes measures to *terminate* the lease on the grounds set forth in the notice of default. Therefore, the stipulation provides no basis for a conclusion that defendants precluded themselves from asserting that plaintiff occupies the premises as a month-to-month tenant.

The instant lease is typical of commercial leases that give landlords a right of termination subject to notice requirements set forth in their provisions. The IAS court's order also impermissibly revises the lease to make the landlord's right of termination subject to the additional condition of judicial approval. A court may not, under the guise of interpretation, make a new contract for the parties (*see Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 386 [1968]). Moreover, the *Yellowstone* injunction was devised to maintain the status quo with respect to the cure period while the underlying dispute is being litigated (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). Here, the court's revision of the lease effectively disturbs the status quo by requiring the

landlord to take an additional step before exercising its contractual right to seek termination of the lease on any ground.

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

ENTERED: AUGUST 18, 2009



CLERK

Gonzalez, P.J., Sweeny Buckley, Renwick, Freedman, JJ.

894 William McLaughlin, et al., Index 118362/06
Plaintiffs-Respondents,

-against-

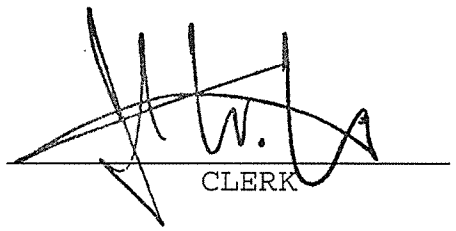
Plaza Construction Corporation, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about November 13, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 15, 2009,

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

ENTERED: AUGUST 18, 2009



CLERK

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

5096 Mandarin Trading Ltd., Index 602648/06
Plaintiff-Appellant,

-against-

Guy Wildenstein, et al.,
Defendants-Respondents.

Crowell & Moring LLP, New York (James Maisano of counsel), for appellant.

Schindler Cohen & Hochman LLP, New York (Steven R. Schindler of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 1, 2007, which granted defendants' motion to dismiss the complaint, affirmed, without costs.

Mandarin Trading Co. seeks damages for losses allegedly sustained as a result of its reliance on an appraisal letter, dated July 28, 2000, written by defendant Guy Wildenstein, president of Wildenstein & Co., Inc., estimating the value of Paysage aux Trois Arbres, an 1892 painting by Paul Gauguin, at between $15 and $17 million.

It is undisputed that sometime in July 2000 Patrick Blum, a director of Mandarin's parent company Phoenix Capital Reserve Fund, was approached about purchasing art for investment purposes. He was also advised by Amir Cohen that the owner of Paysage aux Trois Arbres was looking to sell it. The dissent is of the opinion that the first two causes of action for fraudulent

misrepresentation are sufficiently pleaded because Mandarin alleges that it sought an appraisal before purchasing the painting and that Wildenstein issued a misleading appraisal upon which Mandarin relied. However, missing from that conclusion is any basis for connecting Mandarin to Wildenstein. Mandarin alleges that Cohen represented to Blum that he could arrange the sale for a success fee that would be based on Mandarin's resale of the painting at auction. Cohen agreed to get an appraisal and recommended Wildenstein, a world renowned expert on Gauguin.

There is no indication who first approached Blum, although it most likely was Cohen, nor is there any allegation that Blum inquired as to who the unidentified owner was. Nor is there any allegation or evidence as to who Amir Cohen is and no allegation that he acted for or is in any way related to Guy Wildenstein. Likewise, there is no allegation or evidence as to who owned or controlled Calypso Fine Art Ltd., which actually delivered the painting to Mandarin in return for its payment of $11.8 million, or that it was in any way related to Wildenstein. Defendants presented documentary evidence that, on July 28, 2000, Guy Wildenstein wrote to Michel Reymondin, stating that the painting was well known to him since his firm had once sold it, and that he thought that in the current market the painting was worth between $15 million and $17 million. However, there is no allegation in the complaint or any evidence in the record as to

who Reymondin is; who, if anybody he represented; whether he is related in any way to Wildenstein; and whether Wildenstein knew or had reason to know that his opinion as to the value of the painting was being solicited for purposes of its sale to anyone, let alone Mandarin, or that Mandarin, or any other person, would rely upon his opinion in deciding to buy the painting. For all we know, an opinion as to the painting's value may have been solicited for purposes of insurance coverage or for tax reasons.

The dissent states that Mandarin alleges that the appraisal was prepared at its request. Again, however, Mandarin fails to allege or otherwise establish to whom that request was made. If it was made to Cohen, which is most likely since he offered to get one, did Cohen then ask Reymondin to ask Wildenstein? If so, did Cohen tell Reymondin to tell Wildenstein that he was soliciting his opinion for someone, who wished to buy the painting, even if the prospective buyer wished to remain anonymous?

On August 10, 2000, Christie's International agreed to present the painting at its November 8, 2000 auction, for a price estimated at between $12 and $16 million and a reserve price, i.e., the price below which the painting would not be sold, set at $12 million. Mandarin then purchased the painting, from a nonparty entity, for $11.3 million. However, Christie's was unable to sell the painting, because the high bid was only $9

million.

The Wildenstein appraisal letter, which did not indicate the purpose for which the appraisal was given, was addressed to a nonparty whose relationship with Mandarin is not identified in the complaint and who is alleged on appeal to be an intermediary. The complaint alleges that defendants provided an inflated appraisal figure because they had an ownership interest in the painting; that Mandarin was unaware of defendants' interest in the painting; that defendants received amounts in excess of the painting's true market value; and that Mandarin has been unable to sell the painting for an amount even approaching the Wildenstein appraisal figure.

The complaint fails to state a cause of action for fraudulent misrepresentation, because the appraisal consists of opinion, which is not actionable (*compare Jacobs v Lewis*, 261 AD2d 127 [1999]). The appraisal contains no facts that are alleged to have been misrepresented (*see Rodin Props.-Shore Mall v Ullman*, 264 AD2d 367 [1999]; *Kimmell v Schaefer*, 224 AD2d 217 [1996], *affd* 89 NY2d 257 [1996]). The parties had no relationship with each other, and there was no indication of the purpose of the appraisal, which was not alleged to have been inconsistent with other information provided by defendants (*compare Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 294-295 [1986]). Moreover, since the complaint does not

allege that defendants were even aware of Mandarin's existence, it fails to state that the appraisal was made to induce Mandarin's reliance, a necessary element of fraudulent misrepresentation (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421-422 [1996]) and fraudulent concealment (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1996]).

The complaint also fails to state a cause of action for negligent misrepresentation, because, without any knowledge on defendants' part of Mandarin's existence or the purpose for which the appraisal was to be used, there could be neither privity of contract between the parties nor a relationship so close as to approach privity (*see Parrott v Coopers & Lybrand*, 95 NY2d 479, 483 [2000]; *Ravenna v Christie's Inc.*, 289 AD2d 15 [2001]).

Ravenna is a case directly on point. There, at a single meeting with an old master paintings specialist at Christie's, the specialist gave the owner erroneous information regarding the provenance of a painting after being shown photographs of the painting. This Court dismissed the complaint, finding that there was no allegation that Christie's was retained or paid for the advice and no allegation of a prior or subsequent dealings with Christie's. As here, all that could be gleaned from the complaint was that Christie's gave gratuitous advice based on a walk-in inquiry. Such a one-time meeting, the Court found, which did not even create a business relationship, cannot be said to

have created a relationship of trust and confidence. Although it was undisputed that the specialist was aware that plaintiff would rely upon his advice, that fact alone was found to be insufficient to state a claim of negligent misrepresentation. Here, on the other hand, we have an even stronger case for dismissal. Here, there is no allegation or evidence that Wildenstein even knew of Mandarin's existence (by name or anonymously) or that Mandarin or any other person would rely upon his opinion to buy the painting. The dissent attempts to distinguish this case from *Ravenna* because here there is an allegation that the appraisal was made for a prospective buyer of a painting in which the appraiser had an undisclosed interest and that this Court noted in *Ravenna* that a business relationship had not been created. It suggests that discovery will explore the nature of Wildenstein's relationship, if any, with Mandarin; however, the plaintiff in *Ravenna* made the same argument, which was found without merit. As this Court stated: "[t]he mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action" (*id.* [citation omitted]).

Because the existence of a valid and binding contract is not alleged, the complaint fails to state a cause of action for either breach of contract (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]) or breach of the implied covenant

of good faith and fair dealing (*see American-European Art Assocs. v Trend Galleries*, 227 AD2d 170 [1996]).

Moreover, despite allegations that defendants failed to disclose their ownership in the painting and intentionally inflated their appraisal of its value, causing Mandarin to be misled as to the painting's value and to pay an inflated price for it, and that defendants or entities related to them received a large portion of the higher-than-market purchase price, the complaint fails to state a cause of action for unjust enrichment. "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). As found by the motion court, under the facts alleged Mandarin was not entitled to rely on Wildenstein's appraisal, and even if defendants received a benefit from Mandarin, it has not shown that any enrichment was unjust, especially because Mandarin could have, but did not, obtain its own appraisal from Wildenstein. As the court found, Mandarin's unjust enrichment claim cannot be a back door to recovery based upon reliance on the appraisal, when it was not entitled to rely upon the appraisal in the first place.

All concur except Tom, J.P. who dissents in part, and Nardelli, J. who dissents, in separate memoranda as follows:

TOM, J.P. (dissenting in part)

While I concur that the complaint does not state grounds for relief at law, I conclude that a claim in equity is sufficiently stated. At issue is whether the complaint adequately pleads that defendants have been unjustly enriched, not whether plaintiff will ultimately be able to prove it. At this preliminary stage of the proceedings, on an undeveloped record, it is premature to adopt Supreme Court's conclusion that "plaintiff has not demonstrated that equity and good conscience entitle plaintiff to the relief sought."

The complaint seeks damages alleged to have been sustained as a result of plaintiff's purchase of *Paysage aux Trois Arbres*, a painting by Paul Gauguin, in reliance on an appraisal obtained from defendant Guy Wildenstein, acting on behalf of defendant Wildenstein & Co., Inc. Included are sums expended to facilitate the purchase of the painting from entities in which defendants had an interest. As this Court has observed, under a theory of unjust enrichment, "recovery is available not only where there has been an actual benefit to the other party but, in the instance of a wrongdoing defendant, to restore the plaintiff's former status, including compensation for expenditures made in reliance upon defendant's representations" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1991], citing *Farash v Sykes Datatronics*, 59 NY2d 500, 505 [1983]). Thus, a

cause of action for unjust enrichment is the appropriate vehicle to pursue the recovery plaintiff seeks.

The complaint states, "Defendants knew that an appraisal coming from them would be reasonably relied upon by the purchaser of the Painting." To recover under a theory of unjust enrichment, it is not necessary to show, as Supreme Court suggested, "that defendants' conduct was tortious or fraudulent, as it relates to plaintiff." To the contrary, "[u]njust enrichment . . . does not require the performance of any wrongful act by the one enriched" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). Rather,

> "[a] quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another . . . It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it . . . Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner" (*Miller v Schloss*, 218 NY 400, 407-408 [1916]).

There is no requirement that the aggrieved party be in privity with the party enriched at his or her expense (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]; *Bradkin v Leverton*, 26

NY2d 192, 195 [1970]; *Joan Briton, Inc. v Streuber*, 36 AD2d 464 [1971], *affd* 30 NY2d 551 [1972]).

The facts alleged in the complaint to support plaintiff's cause of action for unjust enrichment are that defendants issued an inflated appraisal of the painting, knowing that due to their worldwide expertise in the works of Paul Gauguin, "an appraisal coming from them would be reasonably relied upon by the purchaser of the painting." While defendants had not been told the purpose of the appraisal, because of their ownership interest in the subject painting they certainly should have been aware that it was being sought in connection with a prospective purchase. By further failing to disclose their interest in the work, defendants gave plaintiff no basis to question the impartiality of their assessment of its value.

There is no question that privity is lacking so as to support a contract action based on the appraisal and that no misrepresentation was directly made to plaintiff so as to give rise to an action for fraud, fraudulent misrepresentation or negligent misrepresentation. Moving beyond the elements necessary for an action at law to considerations of equity, "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415,

421 [1972], *cert denied* 414 US 829 [1973]).

The involvement of defendants in the multifarious aspects of this transaction should give us pause. According to the complaint, the purchase was initiated when Patrick Blum, a director of plaintiff's parent, Phoenix Capital Reserve Fund, was approached by J. Amir Cohen about purchasing art works as an investment. Cohen informed Blum that the owner of the Gauguin was looking to sell it and that an appraisal of the painting should be obtained from Guy Wildenstein, a world renowned expert. In an appraisal dated July 28, 2000, he valued the work at between $15 and $17 million. A certificate of authenticity for the painting was issued by Daniel Wildenstein, on behalf of the Wildenstein Institute in Paris. The Gauguin was sold on August 25, 2000 by Peintures Hermes, a Swiss company owned by Guy, Daniel and Alec Wildenstein. The invoice provided by the seller indicated that although it was once owned by "Wildenstein, New York" (Wildenstein & Co., Inc.), it was presently in a "Private Collection." Following plaintiff's payment of $11.3 million to Calypso Fine Art Ltd., which acted as intermediary in the transaction, $9.5 million was transferred to the Wildensteins' company, Peintures Hermes, which then paid $8.8 million to the owner, Allez la France Ltd., in which defendants also had an interest. Plaintiffs incurred more than $2 million in expenses in connection with the purchase. At an auction held on November

8, 2000, the painting drew a high bid of only $9 million, which was lower than the reserved price. These facts make clear that although privity is lacking with respect to the appraisal, there is privity between plaintiff and defendants' companies with respect to the transaction sufficient to hold defendants liable on the ground that they were unjustly enriched by plaintiff's purchase (*cf. Sperry*, 8 NY3d at 216 [connection between various sellers of chemicals and purchaser using them to manufacture its products too attenuated to support claim for unjust enrichment]).

On a motion to dismiss a pleading under CPLR 3211(a)(7), the sole inquiry is whether, according the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out (*see e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [2005]). The facts asserted in the complaint sufficiently allege that defendants used their superior knowledge and contacts in the art world to interest plaintiff in purchasing the painting and to manipulate plaintiff into paying an inflated price in reliance on not only the appraisal provided by Guy Wildenstein, but also the certificate of authenticity provided by Daniel Wildenstein and the provenance provided by Peintures Hermes, the Wildensteins' company.

There is no disagreement that the complaint fails to state an action for which the law affords relief because the asserted

misrepresentation with respect to the value of the painting was not made to plaintiff but to an intermediary. As Supreme Court stated, the claims at law fail "because, under the facts alleged, plaintiff was not entitled to rely on the Appraisal." The court, however, then simply applied the same rationale to dismiss plaintiff's prayer in equity, a disposition endorsed by the majority.

The prevailing rule at law is that, under the doctrine of caveat emptor, a party to a transaction is required to assess its value and fitness to his or her circumstances, and the failure to exercise due care will preclude the grant of relief (*see e.g. Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 277 [1996] ["(a) party will not be relieved of the consequences of his own failure to proceed with diligence or to exercise caution with respect to a business transaction"]; *First Nationwide Bank v 965 Amsterdam*, 212 AD2d 469, 472 [1995] [debtor's failure to make independent analysis of property's suitability is governed by caveat emptor]). While mere nondisclosure, such as defendants' failure to disclose their interest in the subject painting, is generally not actionable, this Court has recognized an exception where the seller has created a situation that substantially impairs the value of the transaction to the buyer. In those circumstances, the seller, as a matter of equity, is obligated to disclose to the purchaser information material to the value of

the transaction (*Stambovsky v Ackley*, 169 AD2d 254, 259 [1991]).

Accepting, as we must, the allegations of the complaint as true, defendants fostered the impression that the Gauguin was worth much more than its actual value, causing plaintiff to overpay and thereby impairing the value it received (*see Cox v Microsoft Corp.*, 8 AD3d 39, 40 [2004] ["plaintiffs' allegations that Microsoft's deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment"]). Because defendant Guy Wildenstein is the acknowledged expert on Gauguin, the actual value of the painting was both peculiarly within his knowledge and readily accepted as authoritative. And because he derived a benefit as a result of the inflated appraisal, it cannot be characterized as merely "gratuitous advice" (*cf. Ravenna v Christie's Inc.*, 289 AD2d 15, 16 [2001]).

The complaint states a basis for equitable relief from the contract of sale. As stated in *Stambovsky*,

> "Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To

> the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy" (169 AD2d at 259).

We further noted, "It has been remarked that the occasional modern cases which permit a seller to take unfair advantage of a buyer's ignorance so long as he is not actively misled are 'singularly unappetizing'" (*id.* at 260, quoting Prosser, Torts § 106, at 696 [4th ed]). Having impaired the value of plaintiff's bargain by issuing an inflated appraisal, defendants were equitably obligated to reveal their interest in the transaction.

Plaintiff has stated grounds for equitable relief and is entitled to the opportunity to establish that defendants were unjustly enriched to the extent the appraised value of the Gauguin was inflated above its actual value. Thus, should plaintiff prevail, he should be permitted to recover the excess consideration paid as well as such reasonable expenses incurred in connection with the purchase as may be consequent upon the inflated appraisal.

Accordingly, the order should be modified to the extent of reinstating the cause of action for unjust enrichment.

NARDELLI, J. (dissenting)

I would reverse, deny the motion to dismiss the complaint, and reinstate the complaint.

At issue is whether the claims alleged in the complaint are sufficient to withstand a pre-answer motion to dismiss. The following factual recitation is derived from the complaint. It is alleged that Phoenix Capital Reserve Fund, the parent company of plaintiff Mandarin Trading, was approached in July 2000 about purchasing a Paul Gauguin painting, *Paysage aux Trois Arbres*. Amir Cohen, a nonparty, informed Patrick Blum of Phoenix that he could arrange for the sale of the painting in exchange for a percentage of the subsequent resale price. As a condition of the sale, Mandarin required an appraisal and reports of the painting's condition and prior ownership. Cohen agreed to obtain the information and recommended that defendant Guy Wildenstein, a renowned Gauguin expert, provide the appraisal. In a July 28, 2000 letter to a purported Mandarin intermediary, Michel Reymondin, Wildenstein stated:

> You have asked my opinion about the value of two paintings with which I am quite familiar, since at one time they were sold by our firm . . . with regard to [the Painting], this is no. 489 of the *catalogue raisonné* [a catalogue of Gauguin's paintings] published by my grandfather . . . It was part of Mrs. Arthur Lehman's collection . . . This picture was painted in 1892, during the artist's first voyage to Tahiti. Given the rarity of the paintings from this era and its size, I think in the current market it would be worth

> between 15 and 17 million dollars . . . I hope this has answered your questions.

In an August 10 letter, Thomas Seydoux, the Director of Christie's Impressionist Paintings Department, stated:

> After having carefully examined the painting . . . we would be very honored to be able to present this masterpiece . . . on November 8th, with an estimated price of US$ 12 million to US$ 16 million and a reserve [minimum sale] price set at US$ 12 million.

On or about August 12, Mandarin received the appraisal. The complaint alleges that a sales invoice was issued on August 16 which contained the provenance of the painting and led Mandarin to conclude that Wildenstein once owned the painting, that he had sold it to Mrs. Lehmann, and that it was part of a private collection as of the date of the invoice. On or about August 23, Daniel Wildenstein, of the Wildenstein Institute of Paris, certified the painting's authenticity, but made no mention of the defendants' alleged ownership interest in it. On or about August 25, 2000, Mandarin purchased the painting for $11.3 million, which it wired to Calypso Fine Art Ltd. Calypso then allegedly paid $9.5 million to Peintures Hermes S.A., which, in turn, transferred $8.8 million to an account of Allez la France Ltd., in which defendants purportedly had an interest. Mandarin also alleged that at least $2.3 million was paid to intermediaries in connection with the sale. Christie's tried to sell the painting at its November 8 auction, but received a high bid of only $9

million, less than the reserve, and Mandarin retained the painting.

Six years later, shortly before the running of the statute of limitations, Mandarin filed this complaint, which contains claims for fraudulent misrepresentation and omission for defendants' failure to disclose their ownership interest and inflation of the appraisal; fraudulent concealment based on defendants' expert status; negligent omission and misrepresentation as a "special relationship of trust or confidence existed between" the parties based on defendants' expertise; breach of the contract to provide an appraisal, as a third-party beneficiary; breach of the duty of good faith and fair dealing in connection with such contract; and unjust enrichment as defendants benefitted by receiving more than the painting's value. Central to each of the six causes of action is a specific allegation that the defendants failed to disclose their ownership interest in the painting, as well as an allegation that the defendants appraised the painting for a substantially higher value than it was worth.

Prior to serving an answer defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). They argued there was no fraud as the appraisal contained a non-actionable opinion, that the unjust enrichment claim was without merit as the Christie's bid of $9 million was more than the $8.8 million

defendants allegedly received, and that there was no privity between the parties.

Mandarin responded that the opinion was actionable as it was expressed with knowledge of its falsity, and that defendants were unjustly enriched as they received at least $9.5 million through Peintures, and, upon information and belief, may have received the full sale price.

The court granted the motion in its entirety. Making a factual finding on this pre-answer motion to dismiss, it found that since the record did not establish that defendants knew of Mandarin, and there was no indication that Mandarin would rely on the appraisal, no cause of action for fraudulent misrepresentation was stated. It further found that the fraudulent concealment claim could not be sustained as it required the additional element of a duty to disclose arising out of a fiduciary or similar relation of trust and confidence, which was not satisfied by allegations of defendants' superior knowledge or expertise.

The court also found that Mandarin failed to establish a claim for negligent misrepresentation or omission, as defendants were not in a special position of trust and confidence with Mandarin, their expertise did not per se create a fiduciary relation, there was no contract of privity between the parties, and Mandarin had not even alleged that defendants' conduct

evinced an understanding of Mandarin's reliance.

The court further found that Mandarin's failure to disclose its relationship with Reymondin and identify the provision alleged to have been breached, or to plead the provisions of the contract, mandated dismissal of the breach of contract claim. Finally, in dismissing the unjust enrichment claim, the court found that plaintiff was not entitled to rely on the appraisal despite the allegation that it had requested the appraisal in the first instance.

It is axiomatic that on a CPLR 3211 motion to dismiss, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where an issue cannot be resolved as a matter of law, and a factual question is presented, the motion to dismiss must be denied (*Condren, Walker & Co., Inc. v Wolf*, 19 AD3d 151, 152 [2005]). "[A] dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Martinez* at 88).

Preliminary to any assessment of the viability of the causes of action is the recognition that the complaint alleges that Wildenstein, at the time he gave his "opinion," and stated that his firm had "once" sold the painting, had an interest in

the ownership of the painting. Nothing in the record contradicts this allegation. There is certainly nothing in the record to establish as a matter of law that the defendants did not have an interest in the painting at the time of the issuance of the "opinion," or of the sale itself. Thus, in reviewing the challenges to the complaint it must be assumed that the defendants had a contemporaneous ownership interest in the painting. Additionally, since the complaint specifically alleges that Cohen recommended Wildenstein to provide the appraisal, after Mandarin requested an appraisal, it should also be assumed that Wildenstein's written statement as to the painting's value was made at Mandarin's request, and that Wildenstein was aware that Mandarin would rely on it.

The majority makes a factual finding that the parties did not know of each other, and that Wildenstein did not know the reason for the appraisal, despite the absence of any documentary evidence for this assertion. The majority also concludes that the appraisal contains no facts which were misstated, despite the allegations in the complaint that Wildenstein, with a present interest in the painting, knowingly overstated the value of the painting without disclosing his interest.

The elements of a fraudulent misrepresentation claim consist of "a misrepresentation or a material omission of fact which was . . . known to be false by defendant, made for the purpose of

inducing the other party to rely upon it, justifiable reliance of the other party . . . and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A claim for fraudulent concealment "requires additionally setting forth that the defendant had a duty to disclose material information" (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1996]). Such a duty arises where a fiduciary or confidential relationship exists between the parties (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [2006]).

It is clear that the first two causes of action for fraudulent misrepresentation are sufficiently pleaded. They allege that Mandarin sought an appraisal before purchasing the painting, that Wildenstein issued an appraisal upon which Mandarin relied, that Wildenstein failed to disclose his ownership interest in the painting, and that his appraisal grossly inflated the value of the painting. Furthermore, the appraisal itself contains the affirmative statement that his firm once sold the painting. Discovery will establish whether Wildenstein had an ownership interest in the painting at the time of the appraisal, but, if he or his firm did, the representation that he "once" sold the painting was clearly designed to conceal the possibility that he or his firm had a present interest in the painting.

The claim for negligent misrepresentation is likewise

sufficiently pleaded. By alleging that the appraisal was prepared at its request, Mandarin claims the existence of a "relationship so close as to approach that of privity" (*Parrott v Coopers & Lybrand*, 95 NY2d 479, 483-484 [2000]). The elements of the cause of action, "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (*id.* at 484, citations omitted), are gleaned from the allegations that Wildenstein prepared the appraisal for Mandarin's use in determining whether to purchase the painting.

Unlike the circumstances in *Ravenna v Christie's Inc.* (289 AD2d 15 [2001]), upon which the majority relies, it is alleged here that the appraisal was made for a prospective buyer of a painting in which the preparer had an undisclosed interest. In *Ravenna* the court specifically noted that a business relationship had not been created (*id.* at 16). Again, discovery would explore the nature of the relationship, if any, but, at this juncture, it cannot be said as a matter of law that a business relationship did not exist, even if through intermediaries.

Mandarin also pled sufficient facts to establish that it was an intended beneficiary of the appraisal contract and thus its claims for breaches of contract and the implied covenant of good

faith and fair dealing should not have been dismissed. A party "asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit and (3) that the benefit to them is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal quotation marks omitted]). While the consideration to be rendered for the appraisal is not specified, the complaint nevertheless alleges Wildenstein prepared the appraisal at the request of intermediaries, as a result of Mandarin's initial request, and that Mandarin would rely upon the appraisal in order to buy the painting. If true, Wildenstein's failure to advise of his interest in the painting, or to provide an honest appraisal, would expose him to liability. Thus, the fourth and fifth causes of action are also sufficiently pleaded.

The claim for unjust enrichment should also be sustained. "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). The majority makes a factual finding that plaintiff had no right to rely on the appraisal, in

the absence of any evidence. I submit, respectfully, that the allegations that Wildenstein actually had an interest in a painting which he overvalued, with the knowledge that an unwitting buyer would rely upon it, and that he profited unjustly, sufficiently make out a claim that Wildenstein benefitted inequitably from the transaction, and should return his gain. This is not the juncture at which findings of fact are to be made, particularly since there is no conclusive documentary evidence indicating otherwise (*see Martinez*, 84 NY2d at 88).

A plaintiff is not obligated to supply evidentiary support for his claims when faced with a pre-answer motion to dismiss (*see Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [2002]). I must part company with the majority's plaint that the record does not support plaintiff's allegations. The record neither proves nor disproves the allegations. The answer to all of the questions posed by the majority would hopefully have been obtained during discovery. In the interim, I believe the allegations of the complaint were sufficient to withstand dismissal.

Finally, I agree with the concurrence to the extent it suggests that if defendant inflated the appraisal knowing that plaintiff would rely on it, and received a monetary benefit from such reliance, a cause of action for unjust enrichment would lie. I disagree, however, with the suggestion that what is alleged is

mere nondisclosure. If Wildenstein had an interest in the painting at the time he issued the appraisal, rather than a former interest, as suggested in the appraisal report, his conduct amounted to more than nondisclosure.

Since the record does not establish what the relationships of any of the parties were, or what was known or unknown by any of them, the need for discovery is evident, and the motion to dismiss should be denied.

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

ENTERED: AUGUST 18, 2009

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5401 The People of the State of New York, Ind. 6415/03
Respondent,

-against-

Bernell Frank, etc.,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Appeal from judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 24, 2006, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, held in abeyance, and the matter remanded for a hearing on defendant's suppression motion.

In summarily denying defendant's motion to suppress physical evidence seized from his apartment on the day of his arrest, Supreme Court found that defendant failed "to allege any sworn allegations of fact in his motion to contest the factual allegations set forth by the People in the felony complaint, VDF, indictment, and read at the defendant's Supreme Court arraignment" and that, even though defendant had "direct knowledge of the facts concerning what property was recovered," he failed "to assert a possessory interest" in the property.

Contrary to Supreme Court's conclusions, the affirmation of defendant's counsel provided all the particulars required in a motion alleging violation of *Payton v New York* (445 US 573 [1980]), namely, that defendant "was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]; and that the items of property, "all items enumerated in the v.d.f.," were seized illegally at the time of his arrest because "the police lacked probable cause to go to his apartment and take him into custody." Counsel additionally asserts that "the police did not have an arrest warrant."

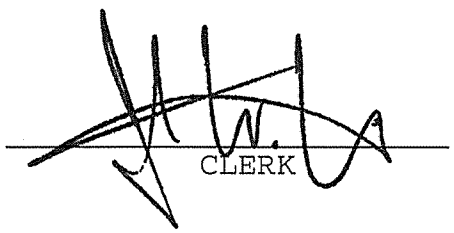
The People's only "factual" response to defendant's *Payton* motion was: "As the VDF indicates, the People intend to introduce certain tangible evidence. The evidence was lawfully obtained, and the People deny all allegations to the contrary." The People did not say that the police had a warrant or that defendant was outside in the hallway or at his apartment entrance or that defendant consented to have the police enter and search his apartment. They merely stated that defendant was arrested at "60 West 125 Street."

Based upon the foregoing, we find that the summary denial of

defendant's motion to suppress physical evidence seized from his apartment on the day of his arrest was improper and, accordingly, remand the matter for a hearing on the motion.

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

ENTERED: AUGUST 18, 2009



Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

241 Bruce Pomahac, Index 105689/04
Plaintiff-Respondent, 591169/04

-against-

TrizecHahn 1065 Avenue of the Americas, LLC, et al.,
Defendants-Appellants,

Sterling Services Company, et al.,
Defendants.

[And a Third-Party Action]

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for TrizecHahn 1065 Avenue of the Americas, LLC, appellant.

Jeffrey Samel & Partners, New York (Judah Z. Cohen of counsel), for American Building Maintenance Co. of New York, appellant.

Friedman, Friedman, Chiaravalloti & Giannini, New York (A. Joseph Giannini of counsel), for respondent.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered September 17, 2007, which, insofar as it denied defendants-appellants' motions for summary judgment, reversed, on the law, without costs, the motions granted and the complaint and all cross claims as against them dismissed. The Clerk is directed to enter judgment accordingly.

The accident giving rise to this action occurred at approximately 9:00 a.m. on October 29, 2003 in the lobby of a building managed by defendant TrizecHahn and maintained by defendant ABM. Plaintiff testified at his deposition that he

opened the exterior door to the building, walked through a small vestibule, then passed through the interior door leading to the lobby. A mat covered the vestibule floor and a three- to five-foot long mat was placed on the lobby floor immediately past the interior door. The terrazzo lobby floor appeared to plaintiff to be wet, which he attributed to tracked-in rain water from a storm that produced over an inch and a half of rain. The storm had begun several hours before the accident and ended either shortly before or after it. As he entered the lobby, plaintiff noticed a yellow "caution" warning sign approximately 15 feet away and a man mopping the floor near the sign. As he walked past the man mopping the floor, plaintiff slipped and fell; there was no mat where plaintiff fell. A security guard monitoring the lobby testified at his deposition that someone spilled a cup of coffee in the area where plaintiff fell only moments before the accident and that the man mopping the floor was cleaning that spill at the time of the accident.

Plaintiff commenced this action against, among others, TrizecHahn and ABM, claiming that they failed to maintain the lobby floor in a reasonably safe condition. The principal theory of plaintiff's case is that defendants failed to place additional mats in the lobby, including a mat covering the spot where he fell. Although plaintiff asserts that his fall was precipitated by tracked-in rain water, he claims that the source of the

moisture on the floor where he fell is irrelevant. He reasons that if additional mats had been placed in the lobby, the moisture, whatever its source, would have been absorbed. ABM moved for summary judgment dismissing the complaint and TrizecHahn's cross claims against it, as well as TrizecHahn's third-party action against it. TrizecHahn cross-moved for summary judgment dismissing the complaint and ABM's cross claims against it. After initially granting these motions, Supreme Court granted plaintiff's motion to reargue those motions and, on reargument, the court denied the motions of ABM and TrizecHahn.

ABM and TrizecHahn each made a prima facie showing of entitlement to judgment as a matter of law on the ground that, regardless of the source of the moisture, they took reasonable precautions to remedy the wet condition on the lobby floor. The undisputed evidence demonstrates that two mats were placed in the entranceway of the building, one in the vestibule and one on the lobby floor immediately past the threshold of the interior door; at least one yellow "caution" sign was placed in the lobby; and an ABM employee had mopped the floor several times before the accident occurred and was mopping it at the time of the accident. Thus, if the source of the moisture was tracked-in rain water,

defendants took reasonable measures to remedy it (*see Amsel v New York Convention Ctr. Operating. Corp.*, 60 AD3d 534 [2009]; *Ford v Citibank, NA*, 11 AD3d 508 [2004]; *Sook Ja Lee v Yi Mei Bakery Corp.*, 305 AD2d 579 [2003]; *see also Gale v BP/CG Ctr. I LLC*, 49 AD3d 454 [2008]).[1] Similarly, if the source of the moisture was spilled coffee, defendants acted reasonably. According to the security guard who was stationed in the lobby, the coffee was spilled moments before the accident in the area where plaintiff fell. Almost immediately after the coffee was spilled, an employee of ABM placed a yellow "caution" sign in the area of the spill and began mopping the area.

In opposition, plaintiff asserts that ABM and TrizecHahn failed to follow a practice they had established in dealing with tracked-in rain water, a practice that plaintiff claims could have prevented the accident. Specifically, plaintiff demonstrated that defendants had a practice of placing three mats on the lobby floor when it was raining; these mats would be in addition to the mat in the vestibule, which was always present. Two of the mats would be placed side-by-side on the floor immediately past the interior door and the third mat would be

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[1]Defendants submitted evidence indicating that additional mats were placed in the lobby at the time of the accident, as well as additional yellow "caution" signs. However, that evidence is not consistent with plaintiff's testimony. Because ABM and TrizecHahn sought summary judgment against plaintiff, we view the evidence in the light most favorable to plaintiff and accept as true plaintiff's testimony.

placed at the end of the first two mats. Testimony regarding the length of the mats varied but demonstrated that each mat was between 10 and 20 feet long. Thus, while we cannot know how far into the lobby the mats would run if configured in the manner outlined above, we do know that the mats would run at least 20 feet into the lobby if so configured. Because plaintiff testified that he fell approximately 15 feet from the interior door, the mats, if placed in accordance with defendants' usual practice, may have covered the area in which the accident occurred.

Contrary to plaintiff's contention, that defendants had a practice of placing a certain number of mats in a particular fashion in inclement weather and failed to adhere to that practice at the time of the accident is insufficient to raise a triable issue of fact with respect to defendants' negligence. A defendant's failure to adhere to its own internal guideline or policy may be some evidence of negligence (*see* 1A PJI3d 2:16, at 254 [2009]). But where the internal guideline or policy requires a standard that transcends the standard required by the duty of reasonable care, a defendant's breach of the guideline or policy *cannot* be considered evidence of negligence (*Gilson v Metro. Opera*, 5 NY3d 574, 577 [2005], quoting *Sherman v Robinson*, 80 NY2d 483, 489 n 3 [1992]; *Lesser v Manhattan & Bronx Surface Tr. Operating Auth.*, 157 AD2d 352, 356 [1990] ["While internal

operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant's negligence or absence thereof, such rules must be excluded, as a matter of law, if they require a standard of care which transcends the area of reasonable care"], *affd sub nom Fishman v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 NY2d 1031 [1992]). The reasonable care standard does not require a defendant to cover all of its floors with mats to prevent a person from falling on tracked-in moisture (*see Negron v St. Patrick's Nursing Home*, 248 AD2d 687 [1998]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1995]; *see also Kevin Choi v Olympia & York Water Str. Co.*, 278 AD2d 106 [2000]); nor does it require a defendant to place a particular number of mats in particular places (*see generally Amsel, supra*; *Ford, supra*; *Sook Ja Lee, supra*). Instead, all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition. Thus, defendants' internal policy of placing three mats in a particular configuration and their failure to follow that voluntarily-adopted policy cannot serve as a basis of liability (*see Newsome v Cservak*, 130 AD2d 637 [1987]). We note as well that plaintiff's position relies on the erroneous proposition that defendants could satisfy their duty of reasonable care only be adhering to their prior practice,

not by promptly mopping up the moisture.

Nor did the affidavit of plaintiff's engineer raise a triable issue of fact with respect to defendants' liability. The engineer stated that defendants should have placed a mat in the area where plaintiff fell because the terrazzo floor, when wet, is extremely slippery. The engineer based this opinion on, among other things, a reading of the coefficient of friction of the lobby floor taken several months after the accident. The engineer's affidavit fails to raise a triable issue of fact because his assertion that a mat was required to be placed in the area where plaintiff fell is unsupported by any generally accepted engineering standard or practice (*Jones v City of New York*, 32 AD3d 706 [2006]). Moreover, the engineer's opinion is entitled to no weight because he did not identify the basis for the coefficient of friction value he utilized as a standard and did not demonstrate that, at the time he measured the coefficient, the lobby floor was in the same condition as it was on the date of the accident or a substantially similar condition (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [2004]).

The dissent emphasizes the issue of whether defendants had notice of the condition of the floor, finding a triable issue of fact on this score. The issue of notice, however, is irrelevant because defendants do not assert that they are entitled to

summary judgment on the ground that as a matter of law they did not have notice of the condition of the floor. TrizecHahn argues that it is entitled to summary judgment because it took reasonable precautions to remedy the wet condition on the lobby floor. ABM makes that same argument and additionally contends that it is entitled to summary judgment because it owed no duty of care to plaintiff.

As noted above, it is well established both that a defendant's breach of its own internal policy cannot be considered evidence of negligence where that policy requires a standard that transcends the standard required by the duty of reasonable care, and that the reasonable care standard does not require a defendant to cover all of its floors with mats to prevent a person from falling on moisture. The dissent, however, disregards both principles. Thus, even though defendants (1) provided two mats in the entranceway, i.e., one in the vestibule and one in the lobby -- not one as suggested by the dissent -- (2) placed at least one yellow "caution" sign, situated in the immediate area of plaintiff's fall, in the lobby, and (3) assigned a worker to mop the lobby periodically, including at the time of plaintiff's fall, the dissent nonetheless concludes that a triable issue of fact exists with respect to whether defendants should have placed more mats on the floor. The dissent cites no authority supporting its position.

The dissent dismisses as dicta the portions of the holdings in *Amsel* (*supra*), Ford (*supra*), and *Gale* (*supra*) that support defendants' position that as a matter of law they took reasonable measures to remedy the moist condition of the floor. The dissent reasons that in each of these cases the Court also concluded that as a matter of law the defendant did not have notice of the condition. In each case, however, the Court addressed *first* the issue of whether the defendant was entitled to judgment as a matter of law because it had taken reasonable measures to remedy the condition. Accordingly, if any portion of the discussion in these cases should be dismissed as dicta, the more reasonable conclusion is to regard the discussion of the issue of notice as dicta (*Amsel*, 60 AD3d at 535 ["Defendant established prima facie its entitlement to summary judgment by demonstrating that it had rained earlier in the day and was raining at the time of plaintiff's accident and that defendant had taken reasonable precautions to prevent the tracked-in water from accumulating by placing mats on the lobby floor and mopping the floor throughout the day and had neither actual nor constructive notice of the particular wet condition that allegedly caused the accident"]; *Ford*, 11 AD3d at 508-509 ["In the instant case, the defendant Citibank . . . established its prima facie entitlement to summary judgment as a matter of law by submitting evidence that it took reasonable precautions to remedy wet conditions on its premises

caused by a lengthy rainstorm. In this regard, Citibank provided two mats and mopped its lobby floor within one hour prior to the time that the plaintiff allegedly slipped and fell. There was no evidence that Citibank created the wet condition, and it was not obligated to provide a constant remedy to the problem of water being tracked into a building in rainy weather. Moreover, Citibank demonstrated that it had no actual notice of the particular accumulation of water on the floor which caused the plaintiff to fall, and in the absence of proof as to how long this specific wet condition existed, there is no evidence to permit an inference that Citibank had constructive notice of the condition"] [internal quotation marks and citations omitted]; *Gale*, 49 AD3d at 454 ["Plaintiff offered no evidence that defendant owners failed to take reasonable precautions to remedy wet conditions in the building at the time of the accident. After he stepped off the mats that had been provided, plaintiff slipped in an area that had been mopped less than 15 minutes earlier. During that 15-minute period, several people had walked through the area without incident, in full view of building employees. Therefore, plaintiff cannot show that the allegedly dangerous wet condition was visible and apparent for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it"] [internal quotation marks and citations omitted]).

In light of our conclusion that TrizecHahn and ABM are entitled to summary judgment on the ground that they acted reasonably as a matter of law, we need not and do not pass on the merits of their remaining contentions.

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

MOSKOWITZ, J. (dissenting)

I dissent because the majority unjustifiably takes this case away from the jury. Plaintiff has raised an issue of fact as to whether appellants failed to use reasonable care to remedy the slippery wet floor, of which they had notice, by not placing a sufficient number of mats on the floor on the day of the accident.

Plaintiff slipped and fell on a wet terrazzo floor in the entry corridor of a building at about 9:00 a.m. Defendant TrizecHahn 1065 Avenue of the Americas, LLC (TrizecHahn) was the property manager which, it is undisputed, contracted for defendant American Building Maintenance Co. (ABM) to perform building maintenance.

It had been raining just before the accident. Plaintiff testified that it was no longer raining when he entered the building. As he entered the corridor, there was one mat extending no more than five feet, a yellow warning sign on the floor 12 to 15 feet away and a man mopping nearby. As plaintiff walked past the man about a third of the way into the 50-foot corridor, or approximately 15 to 20 feet from the entrance, he slipped and fell.

Frank DeSilvio, ABM's on-site foreman, testified that when it rained it was the building's practice to place two mats side by side extending 12 to 20 feet into the lobby and then a third

mat of the same size in the center extending 12 to 20 feet further.

Nonparty security supervisor Errol Marshall and another individual were the ones who would place mats on the floor. It was Marshall's understanding that, on the day of the accident, they had used all the available mats. Yet, he testified, he had seen other persons slipping on the floor that very morning and, immediately before plaintiff fell, he had called for more mats and for personnel to mop. This contradicted plaintiff's testimony as well as Marshall's own claimed understanding that the building had used all available mats. Moreover, defendants' surveillance tape showing only one mat in the corridor corroborates plaintiff's version.

Marshall testified that the corridor had been polished that week and that the substance used to polish the floor makes it slippery "when it gets wet." He had also personally investigated at least one other incident several months earlier when a Ms. Lauck fell on the wet floor in the corridor at approximately 8:30 a.m. and was aware of other unspecified incidents of people slipping on the floor after it had rained.

While I agree with the majority that defendants were not required to cover the entire floor with mats, or continuously mop, there are issues of fact concerning whether, under the weather conditions during the morning of October 29, 2003, ABM

placed enough mats on the terrazzo floor.

Property owners and those to whom they delegate their responsibility have a duty to maintain their property in a reasonably safe condition under the circumstances (*Peralta v Henriquez*, 100 NY2d 139, 144-145 [2003]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). Here, the evidence raises issues of fact as to whether defendants took reasonable precautions, even though they were not required to cover all of the floor with mats or to continuously mop up all moisture from tracked-in rain water (*see Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1995]).

First, it is not disputed that defendants were on constructive notice of the condition. While the inherently slippery nature of a floor is insufficient to impose liability (*see Eichelbaum v Douglas Elliman, LLC*, 52 AD3d 210 [2008]; *DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181 [2007]; *Sarmiento v C & E Assoc.*, 40 AD3d 524, 527 [2007]), including terrazzo floors as here (*see Duffy v Universal Maintenance Corp.*, 227 AD2d 238 [1996]), plaintiff's theory of liability is that the floor on which he fell is slippery when wet. Although Marshall notified the building employees essentially contemporaneously with plaintiff's accident that people were slipping on the wet floor (*see Kovelsky, supra*), he related prior incidents of people falling on the same floor when it was wet. Defendants were thus

aware of a recurring dangerous condition (*cf. White v New York City Hous. Auth.*, 55 AD3d 400 [2008]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106 [2000]).

Moreover, there is at least a question of fact as to whether defendants had sufficient time to remedy the problem, because the rain had already stopped (*cf. Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005]).

Amsel v New York Convention Ctr. Operating Corp. (60 AD3d 534 [2009]) and other cases relied on by the majority are distinguishable. *Amsel* does not indicate the number of mats that the defendant had put down because of the rain, it was still raining at the time of the accident, and the defendants had neither actual nor constructive notice of the particular wet condition that allegedly caused the accident.

Notice was similarly lacking in *Ford v Citibank, N.A.* (11 AD3d 508 [2004]). In *Ford*, where the Second Department held that the defendant had taken reasonable precautions by providing two mats and mopping its lobby floor one hour before the plaintiff fell, there was no evidence to permit an inference that the defendant had constructive notice of the condition and the decision does not indicate either the size of the lobby or the type of flooring. In view of the lack of notice, the ruling as to the reasonableness of the precautions was dicta. In *Gale v BP/CG Ctr. I LLC* (49 AD3d 454 [2008]), there was a lack of notice

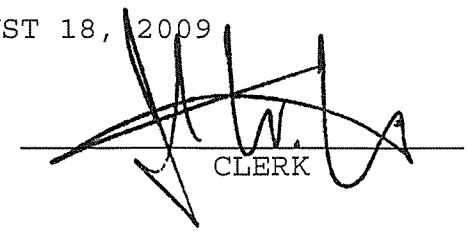
where the plaintiff slipped in an area that had been mopped less than 15 minutes earlier and, unlike here, during that 15 minute period several people had walked through the area without incident in full view of building employees. As noted, in *Keum Choi (supra)*, there was also a lack of notice of a dangerous condition.

Here, the corridor where plaintiff slipped and fell was 50 feet long, and there is evidence that the only mat in place extended perhaps five feet into it, covering only about one tenth of its length. There is therefore a question of fact as to whether this, the mopping and the caution sign constituted reasonable precautions under the circumstances.

Finally, ABM failed to support its contention that it did not owe plaintiff a duty of care under its contract with TrizecHahn (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). By failing to produce its maintenance contract, it was unable to show that its contractual obligation did not entirely displace property manager's owner TrizecHahn's duty to safely maintain the premises (*see Mastroddi v WDG Dutchess Assoc., Ltd. Partnership* 52 AD3d 341, 342 [2008]).

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

ENTERED: AUGUST 18, 2009



Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

251N Keith Mayo, Index 110482/07
Petitioner-Respondent,

-against-

Personnel Review Board of the Health and Hospitals Corporation, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Koehler & Isaacs, LLP, New York (Mercedes M. Maldonado of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered January 22, 2008, which granted the petition, denied respondents' cross motion to dismiss, and remanded for petitioner's reinstatement to his position with respondent New York City Health and Hospitals Corporation (HHC), modified, on the law, the directive that respondents reinstate petitioner to his position vacated, the matter remanded to respondents for further proceedings consistent herewith, and otherwise affirmed, without costs.

Petitioner was employed by HHC as a supervisor of stock workers. As a result of an altercation between petitioner and one of his subordinates, HHC preferred two charges against petitioner. The first charge stated "[t]hat on or about March 8, 2005 at approximately 8:30 a.m. you assaulted" the subordinate; the second charge stated "[t]hat on or about March 8, 2005, your

conduct was unbecoming and unprofessional of a corporate employee and supervisor when you assaulted" the subordinate. Following a hearing, an administrative law judge determined that, although the altercation occurred, HHC failed to establish that petitioner initiated or willingly participated in it, and she recommended that the charges be dismissed. HHC rejected the conclusion of the ALJ that petitioner did not initiate the fight, determined that petitioner did initiate it and assaulted the subordinate, and terminated petitioner's employment.

On petitioner's administrative appeal to respondent Personnel Review Board of the HHC (the PRB), HHC's decision to terminate petitioner's employment was sustained. The PRB, however, did not base its determination on a finding that petitioner initiated the altercation or assaulted the subordinate. Rather, the PRB concluded that petitioner had a duty to report immediately the incident to the HHC police (or his superiors). Finding that he failed to report immediately the incident, the PRB upheld HHC's decision to terminate petitioner's employment.

Petitioner commenced this CPLR article 78 proceeding seeking to annul the PRB's determination and to be reinstated to his position with HHC. Petitioner asserted that the PRB violated his due process rights by upholding HHC's decision to terminate his employment on a ground of misconduct that was never charged --

failing to report immediately the altercation. Respondents, the PRB and HHC, moved to dismiss the proceeding. Supreme Court found that the PRB's determination was founded on uncharged misconduct and therefore violated petitioner's due process rights. The court annulled the PRB's determination and remanded the matter to the PRB to dismiss the charges against petitioner and reinstate him to his position. The court stated that:

> "The determination of the [PRB] . . . [that] upheld the termination of [petitioner] as an employee of [HHC] is annulled, as it was based on an uncharged offense, namely a failure to report the incident of March 8th, 2005 and therefore, denied [petitioner] his constitutional right to be confronted with the charges and thus, was arbitrary and capricious.
>
> "Further, since the PRB otherwise accepted the [ALJ]'s findings of fact and credibility, which concluded that the sole charge against [petitioner], that of assault was not proved, and recommended dismissal of the charge, the penalty imposed of termination is shocking and disproportionate.
>
> "[S]ince HHC rule[] 7.5.6 precludes removal or disciplinary proceedings from being commenced more than 18 months after the occurrence of the alleged misconduct, except for actions which would constitute a crime, which this finding of no -- of not reporting would not be, and it should be noted here all criminal charges relating to the assault charge were dismissed, and here, the events occurred on March 8th, 2005, almost three years ago.
>
> "I am remanding this matter to the PRB and directing they [*sic*] act vis-a-vis dismissal of the charges and reinstatement of Petitioner, in all ways consistent with this

> Court's Decision and Order granting the petition."

We agree with Supreme Court that petitioner's due process rights were violated because the PRB affirmed HHC's decision to terminate petitioner's employment based on uncharged misconduct. As the Court of Appeals has observed:

> "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged . . . A public employee has a claim to due process and he may assume that the hearing will be limited to the charges as made. His lawyer is likewise entitled to prepare for the hearing in reliance that, after the hearing is concluded, the charges will not be switched. Any other course is a violation of the employee's right to be treated with elemental fairness" (*Matter of Murray v Murphy*, 24 NY2d 150, 157 [1969] [internal citations omitted]).

Notably, "[w]here we are involved with such a fundamental constitutional right as the right to be put on notice of the charges made, prejudice will be presumed" (*id.*).

Here, petitioner was charged with two counts of misconduct: (1) "[t]hat on or about March 8, 2005 at approximately 8:30 a.m. you assaulted" the subordinate; and (2) "[t]hat on or about March 8, 2005, your conduct was unbecoming and unprofessional of a corporate employee and supervisor *when you assaulted*" (emphasis added) the subordinate. Respondents maintain that the second charge provided petitioner with sufficient notice of a charge of

failing to report the altercation because it "addressed the unprofessional and unbecoming misconduct relating to the fight, which encompassed petitioner's failure to report the incident." However, as Supreme Court aptly observed, "Any reasonable person hearing that [charge], any reasonable . . . lawyer hearing that [charge], would construe that to mean that this was all about the assault." And, as Supreme Court noted, both the ALJ and HHC believed that the two charges preferred against petitioner related solely to the assault itself. Thus, the second charge did not afford petitioner with notice of a charge of failing to report the incident (*see id.*; *Matter of Tartaglione v Bd. of Commrs. of Police Dept. of Vil. of Briarcliff Manor*, 301 AD2d 655 [2003], *lv denied* 100 NY2d 513 [2003]; *Matter of Brown v Saranac Lake Cent. School Dist.*, 273 AD2d 785 [2000]; *Whitbread-Nolan v Shaffer*, 183 AD2d 610 [1992]).

Contrary to respondents' assertion, the admission of testimony regarding petitioner's failure to report the incident does not mean that the failure to provide petitioner with notice of a charge of failure to report can be overlooked. Petitioner and his attorney were entitled to assume that the hearing would be limited to the charges as made. By switching the basis of the charges after the hearing (and the first layer of administrative review) the PRB violated petitioner's "right to be treated with elemental fairness" (*Murray*, 24 NY2d at 157); because the right

to notice of the charges is a fundamental constitutional right, prejudice will be presumed where, as here, that right is violated (*id.*).

In addition to annulling the determination of the PRB, Supreme Court remanded the matter to respondents and directed them to dismiss the charges against petitioner and reinstate him to his position. Specifically, Supreme Court remanded the "matter to the PRB and direct[ed] they [*sic*] act vis-a-vis dismissal of the charges and reinstatement of Petitioner, in all ways consistent with th[e] Court's Decision and Order granting the petition." The court's position in the decision and order seems quite clear -- the PRB's determination is annulled and petitioner is to be reinstated to his position. Moreover, the court also made clear that the PRB is precluded from taking any further action against petitioner based on the events surrounding the assault. Thus, the court wrote that "HHC rule[] 7.5.6 precludes removal or disciplinary proceedings from being commenced more than 18 months after the occurrence of the alleged misconduct, except for actions which would constitute a crime, which this finding of no -- of not reporting would not be, and it should be noted here all criminal charges relating to the assault charge were dismissed, and here, the events occurred on March

8th, 2005, almost three years ago."[1] Accordingly, only ministerial action -- dismissal of the charges and reinstatement of petitioner -- is "consistent with [Supreme] Court's Decision and Order granting the petition." For the reasons stated below, the court should not have addressed the issue of whether the PRB is precluded under HHC rule 7.5.6 from taking any further disciplinary action against petitioner, and consequently the court's directive limiting the action that the PRB can take with respect to the matter was erroneous. Because the court stated that PRB is precluded from taking any further action against petitioner based on the events surrounding the assault, the dissent is wrong in asserting that "there is nothing in Supreme Court's decision that precludes respondents from pursuing any appropriate and timely charges against petitioner."

The PRB did not pass on the issue of whether HHC personnel rule 7.5.6 bars respondents from taking further administrative action against petitioner. Thus, there was no determination by the PRB with respect to that issue for Supreme Court to review. Given the limited function of a court in reviewing an administrative determination, the court should not have provided

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[1]HHC personnel rule 7.5.6 states that "[n]o removal or disciplinary proceeding shall be commenced more than eighteen (18) months after the occurrence of the alleged incompetency or misconduct complained or described in the charges except where the incompetency and/or misconduct complained of and so described would constitute a crime if proved in a court of appropriate jurisdiction."

what amounted to an advisory opinion that respondents are barred from taking further administrative action against petitioner; that question is for the PRB in the first instance.

That the PRB should determine what action to take with respect to the matter based Supreme Court's finding (which we affirm) that petitioner did not have sufficient notice of the failure to report charge is supported by additional considerations. First, only rule 7.5.6 has been provided to us and we do not know what other rules, if any, are relevant in determining whether respondents may take further administrative action against petitioner. Second, the PRB may interpret rule 7.5.6 in a manner that does not bar it from pursuing further administrative action against petitioner (*see Matter of Herzog v Joy*, 74 AD2d 372, 375 [1980], *affd* 53 NY2d 821 [1981] [administrative agency's interpretation of its own regulations entitled to "the greatest weight"]). For instance, the PRB could take the position that the proceeding was commenced timely with respect to the original charges and an amended charge, such as one for failure to report, relates back to those timely-commenced charges. Third, in *Murray*, the Court of Appeals determined that where a person was denied due process because of insufficient notice of the nature of the administrative charges against the

person, the appropriate remedy is a new hearing (*Murray*, 24 NY2d at 158 ["Having been denied due process, [petitioners] are entitled to a new hearing"]; *see Matter of Rivera v Rozzi*, 149 AD2d 514 [1989]; *Montrois v City of Watertown*, 115 AD2d 298 [1985]; *Cruz v Lavine*, 45 AD2d 720 [1974]). The dissent cites no authority to the contrary. Thus, a new hearing is generally the remedy afforded to a person in petitioner's position.

At bottom, no determination by the PRB is before us with respect to whether HHC personnel rule 7.5.6 bars respondents from taking further administrative action against petitioner, and the PRB should determine in the first instance what action to take with respect to the matter based on Supreme Court's finding (which we affirm) that petitioner did not have sufficient notice of the failure to report charge.

We find respondents' remaining arguments, including those related to the standard of review and statute of limitations, without merit.

All concur except Andrias, J.P. who dissents in part in a memorandum as follows:

ANDRIAS, J.P. (dissenting in part)

We all agree that the second disciplinary charge against petitioner did not specify a "failure to report," and that the court therefore properly found that petitioner was denied the due process of adequate notice of that alleged misconduct (*see Matter of Murray v Murphy*, 24 NY2d 150, 157 [1969]; *Matter of Benson v Board of Educ. of Washingtonville Cent. School Dist.*, 183 AD2d 996, 997 [1992], *lv denied* 80 NY2d 756 [1992]).

However, to the extent the majority would remand the matter for a new hearing on the failure to report charge, it asserts that Supreme Court directed that respondents reinstate petitioner to his position. However, in its decision dictated on the record of January 16, 2008, after having permitted respondents to file an answer and submit responsive papers as to the proper remedy, "[i]n other words, for me to reinstate Petitioner, or rather to remand," the court specifically stated: "I will remand, but with specific language." The court then stated that it was annulling the Personnel Review Board's April 17, 2007 determination, which upheld petitioner's termination, because it was based on the uncharged offense of failure to report the incident of March 8th, 2005 and that, since the Board otherwise accepted the Administrative Law Judge's findings of fact and credibility, which concluded that the sole charge of assault against petitioner was not proven, "the penalty imposed of termination is

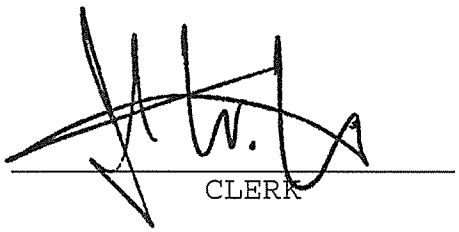
shocking and disproportionate." The court further stated that respondent HHC's rule 7.5.6 precludes removal or disciplinary proceedings from being commenced more than 18 months after the alleged misconduct, except for actions that would constitute a crime, and noted that all criminal charges relating to the assault charge had been dismissed and that the events occurred on March 8th, 2005, almost three years before.

The majority does not dispute the accuracy of any of the court's observations, but seemingly adopts respondents' sole argument on the issue, namely, that "the PRB in the first instance should have the opportunity to interpret and apply the rules." However, the court was simply stating the obvious, which is in accord with the well-settled principle that where an administrative rule is clear and unambiguous, there is no need for administrative interpretation. In any event, on the remand, there is nothing in Supreme Court's decision that precludes respondents from pursuing any appropriate and timely charges against petitioner. If there are no other charges brought or sustained, respondents will have to determine whether there is any basis for denying petitioner reinstatement to his position with back pay, which determination would be subject to further review by the courts.

Accordingly, I would simply affirm the judgment appealed from.

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

ENTERED: AUGUST 18, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

350 Tammy D. Johnson, etc., et al., Plaintiffs-Respondents, Index 110686/05 101056/06

-against-

City of New York, et al., Defendants-Appellants.

[And Another Action]

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellants.

Gutterman & Speiser, New York (Barry A. Gutterman of counsel), for respondents.

Order, Supreme Court, New York County (Karen Smith, J.), entered July 31, 2008, which denied defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to entered judgment accordingly.

This negligence action arises from an exchange of gun fire involving police officers and an armed robbery suspect on a residential street in Manhattan. The officers had followed two men who were armed robbery suspects, from 125th Street, along Lenox Avenue, and then onto 126th Street in the direction of Fifth Avenue. All of the officers involved testified that as they entered 126th Street they did not see any bystanders. On 126th Street they exited their police car, and ordered one of the suspects to drop a gun which they observed him to be carrying.

Instead of complying he began to fire his weapon at them, and they returned his fire.

Plaintiff testified that she was outside her residence on 126th Street when she heard shots being fired. She grabbed her daughter, and took cover behind a truck. She did not notice the police officers as the shooting began, and only saw two men running down the street.

As a general rule, a municipal defendant is immune from liability for conduct involving the exercise of discretion and reasoned judgment (*see Mon v City of New York*, 78 NY2d 309 [1991]). However, the judgment error rule does not immunize municipal defendants when an innocent bystander is injured by the action of a police officer "in an altercation involving a violation of established police guidelines governing the use of deadly physical force by police officers" (*Lubecki v City of New York*, 304 AD2d 224, 234 [2003], *lv denied* 2 NY3d 701 [2004]; *see Rodriguez v City of New York*, 189 AD2d 166, 178 [1993]).

In this case, there has been no showing that any police guidelines were violated. There is no evidence that innocent persons were unnecessarily endangered, because nothing indicates that at the time the robbery suspect opened fire there were any bystanders, including the plaintiffs, in view. To the contrary, the uncontradicted testimony of the police officers was that they saw no bystanders as they sought to protect themselves and their

fellow officers by returning fire. The police took appropriate measures to protect themselves, as well as the public, which was clearly endangered by the actions of this fleeing felon. Furthermore, in view of the absence of proof that there were any bystanders in view, the report of the plaintiffs' expert suggesting that there were questions of fact as to whether police guidelines were violated must be rejected.

Under such circumstances, the officers' exercise of their professional judgment in deciding whether to use appropriate force as they pursued an individual who was firing at them is not actionable.

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

DeGRASSE, J. (dissenting)

I respectfully dissent. Plaintiffs are bystanders who were shot during a daylight exchange of gunfire between police officers and a robbery suspect. Five police officers, including Officers Beddows and Garcia, discharged their weapons during the incident. All of the police officers involved used nine millimeter weapons as opposed to the .380 caliber pistol fired by the suspect. Plaintiffs' ballistics expert opined that a bullet fragment taken from plaintiff Tammy Johnson's arm is "consistent with having been fired from one of the Police officers weapons [*sic*]." The City's ballistics expert added that the fragment recovered from Johnson's body could have come from the weapon fired by either Beddows, Garcia or Williams, another officer. West 126th Street is a one-way street running east to west. During the relevant part of the gunfire, the suspect was crouched behind a van parked in front of 60 West 126th Street, on the south side of the street. Beddows fired from a position behind a vehicle which was parked across the street, in front of 69 West 126th Street. Garcia fired his weapon from the north side of the street, directly across the street from 40 West 126th Street. Johnson testified that she, her then 19-month daughter and plaintiff Garnold King were wounded while crouched at the tail end of an SUV which was parked facing west in front of 58 West 126th Street. The next parked vehicle behind the SUV was two and

one-half car lengths away.

The complaint includes allegations of negligence. Citing *Mon v City of New York* (78 NY2d 309 [1991]) and other cases, the City moved for summary judgment on the ground that municipalities are immune from liability for conduct involving the exercise of discretion and reasoned judgment. Supreme Court denied the motion, finding an issue of fact as to whether the police officers failed to follow their department's procedures by discharging their weapons in a way that unnecessarily endangered innocent persons. Citing *Lubecki v City of New York* (304 AD2d 224 [2003], *lv denied* 2 NY3d 701 [2004]) and *Rodriguez v City of New York* (189 AD2d 166 [1993]), the majority has reversed the order below finding no showing that police guidelines were violated. I disagree and would affirm Supreme Court's decision for the reasons that follow.

A municipality is immune from liability for the injurious consequences of conduct involving the exercise of discretion and reasoned judgment (*see Mon* 78 NY2d at 313-316). Such immunity applies to the actions of police officers engaged in law enforcement activities, but does not apply where police officers act in violation of acceptable police practice (*see e.g. Lubecki*, 304 AD2d at 233-234). This case presents the question of whether plaintiffs' injuries were brought about by a departure from acceptable police practice.

The Police Department's Procedure No. 203.12 sets forth the following relevant guidelines with respect to the use of firearms:

> "a. Police officers shall not use deadly physical force against another person unless they have probable cause to believe they must protect themselves or another person present from imminent death or serious physical injury.
>
> "b. Police officers shall not discharge their weapons when doing so will unnecessarily endanger innocent persons."

As to the first guideline, based on the conduct of the armed robbery suspect there was probable cause for the use of firearms by those police officers who could do so without endangering innocent bystanders. As to the second guideline, the majority concludes that "[t]here is no evidence that innocent persons were unnecessarily endangered, because nothing indicates that at the time the robbery suspect opened fire there were any bystanders, including plaintiffs, in view." A sketch prepared by the Police Department's Crime Scene Unit depicts an obtuse triangle formed by the positions of Officer Garcia, the robbery suspect and plaintiffs with the longest side extending between Garcia and the suspect and the shortest between the suspect and plaintiffs, two brownstones away. Garcia testified that he saw the suspect but did not see plaintiffs. Nevertheless, evidence indicates that when Garcia fired his weapon plaintiffs were closer than the suspect, with two and one-half empty parking spaces behind them

on the side Garcia was facing. Garcia testified at his deposition as follows:

> "Q. While you were shooting, did you look to see whether there were any pedestrians or bystanders on the street.
>
> "A. No."

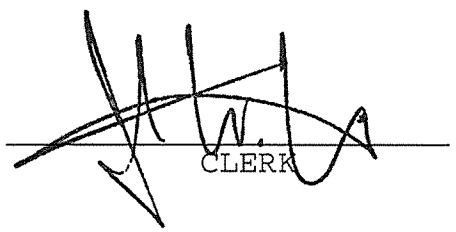
Similarly, Beddows gave the following testimony:

> "Q. Did you see any pedestrians or civilians on the street at the time other than the perp?
>
> "A. No.
>
> "Q. Did you look to see if there were any around?
>
> "A. I looked after pretty much everything was done."

I submit that the foregoing creates a triable factual issue as to whether Garcia and Beddows violated the Police Department's guideline by failing to even ascertain whether innocent persons were unnecessarily endangered at the time they discharged their weapons.

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

ENTERED: AUGUST 18, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
James M. McGuire
Rolando Acosta
Dianne T. Renwick, JJ.

4312
Index 101464/06

x

Patrick Cherry,
Plaintiff-Respondent-Appellant,

-against-

Time Warner, Inc., etc., et al.,
Defendants-Appellants-Respondents,

"John Doe," etc., et al.,
Defendants.

x

Cross appeals from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered November 28, 2007, which denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) cause of action, denied defendants' cross motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted plaintiff's cross motion for leave to amend the complaint to allege a cause of action under Labor Law § 241(6).

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for appellants-respondents.

Hacker & Murphy, LLP, Latham (John F. Harwick of counsel), for respondent-appellant.

CATTERSON, J.

This action arises out of a claimed violation of Labor Law § 240(1). The plaintiff alleges that he was not provided with an adequate safety device, a guardrail, while working on a scaffold at the Time Warner Center on Columbus Circle. The plaintiff further alleges that, as a result, he fell off the scaffold and was seriously injured.

The undisputed facts are that on July 28, 2003, the plaintiff was an employee of subcontractor New England Construction Company (hereinafter referred to as "NEC") which was contracted to work at the CNN studios, between the third and eleventh floors of the 80-story building. The defendant Time Warner, Inc. is the owner of the building; the defendant Turner Construction Company was the general contractor of the construction project. On the day of the accident, the plaintiff was securing sheet rock to the ceiling on the third floor when he fell off a baker's scaffold onto the concrete floor eight feet below. The scaffold measuring approximately two feet wide by six to eight feet long had guardrails on only two of its four sides.

The plaintiff commenced this action in February 2006, and subsequently moved for summary judgment alleging that the scaffold from which he fell was the only scaffold chained to the workers' gang box on the third floor that day; that the scaffold

lacked appropriate guardrails, and that he was not provided with any other safety devices to protect him from falling. He further alleged that he did not see any scaffolds with guardrails on the date of his accident, and that he was not instructed, at any time, that he should use only scaffolds with railings.

The defendants opposed plaintiff's motion, and cross-moved for summary judgment seeking dismissal of plaintiff's section 240(1) cause of action. They alleged that the plaintiff was instructed not to use scaffolds without guardrails at elevations above four feet; that the NEC provided weekly safety meetings reiterating this rule; that scaffolds with railings were available to workers at all times; that it was NEC's practice to set up each scaffold and that they would always remain assembled through the project, and that the plaintiff was shown how to install guardrails and where to find them. The defendants also pointed to the plaintiff's deposition testimony in which he claimed that he had seen scaffolds with guardrails on the third floor and on other floors prior to the date of his accident. The defendants asserted that, therefore, the plaintiff was the sole proximate cause of his injuries. The plaintiff then cross moved to amend his complaint to include a Labor Law § 241(6) cause of action pursuant to CPLR 3025(b) and (c).

Supreme Court denied both parties' motions for summary

judgment holding that a triable issue of fact exists as to whether safety guardrails were in place on the scaffold from which the plaintiff fell, and if they were not in place, whether they were made readily available on site for the plaintiff's use.

For the reasons set forth below, we affirm the motion court's decision. It is well established that there is a statutory duty for contractors and owners to provide adequate safety devices for their workers. Labor Law § 240(1) provides in pertinent part:

> "All contractors and owners and their agents[...]in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure *shall furnish or erect, or cause to be furnished or erected* for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices *which shall be so constructed, placed and operated as to give proper protection* to a person so employed" (emphasis supplied).

The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers "'are scarcely in a position to protect themselves from accident.'" Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 520, 493 N.Y.S.2d 102, 105, 482 N.E.2d 898, 901 (1985), quoting Koenig v. Patrick Constr. Co., 298 N.Y. 313, 318, 83 N.E.2d 133, 135 (1948). Therefore, the statute should "'be construed as liberally as may

be for the accomplishment of the purpose for which it was thus framed.'" Zimmer, 65 N.Y.2d at 521, 493 N.Y.S.2d at 105 quoting Quigley v. Thatcher, 207 N.Y. 66, 68, 100 N.E. 956, 956 (1912).

In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 289, 771 N.Y.S.2d 484, 489-490, 803 N.E.2d 757, 762-763 (2003).

However, if adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under section 240(1) does not attach. Robinson v. East Med. Ctr., LP, 6 N.Y.3d 550, 554, 814 N.Y.S.2d 589, 591, 847 N.E.2d 1162, 1165 (2006); Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40, 790 N.Y.S.2d 74, 76, 823 N.E.2d 439, 441 (2004). Hence, in determining whether there is a violation of Labor Law § 240(1), or whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, "furnished" or "placed" for the worker's use on the work site.

In Zimmer, the Court of Appeals was unequivocal as to what constituted the duty of an owner or contractor to "furnish or erect or cause to be furnished or erected" safety devices which

"shall be so constructed, placed and operated as to give proper protection" in the performance of labor described in the statute. In that case, the Court held, "[t]he mere presence of ladders or safety belts *somewhere* at the worksite does not establish 'proper protection.'" Zimmer, 65 N.Y.2d at 524, 493 N.Y.S.2d at 107 (emphasis added).

In more recent decisions, however, the Court has seemingly diluted this unequivocal stance to a point where it is possible to believe, as the dissent apparently does, that the statutory obligation of a contractor or owner to provide safety devices must be matched by an obligation on the part of the worker to exhibit a "normal and logical response" to search for the safety devices at the work site. Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 806, 795 N.Y.S.2d 490, 491, 828 N.E.2d 592, 593 (2005); Robinson v. East Med. Ctr., LP, 6 N.Y.3d at 554, 814 N.Y.S.2d at 591; Miro v. Plaza Constr. Corp., 38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dept. 2007), modified, 9 N.Y.3d 948, 846 N.Y.S.2d 76, 877 N.E.2d 294 (2007). Indeed, in the instant case, the dissent suggests the obligation on the part of the worker to search for a scaffold with a guardrail existed even though the work site occupied eight entire floors of the building.

A closer analysis of the cases on which the dissent relies, however, demonstrates that the Court of Appeals did not intend

and could not have intended to provide support for such a lax statutory interpretation. First, the phrase "normal and logical" as it pertains to a worker's response to the lack of a safety device appears to have landed within the lexicon of Labor Law § 240(1) by sheer happenstance. It first appeared in Montgomery v. Federal Express Corp. (307 A.D.2d 865, 866, 763 N.Y.S.2d 600, 601, aff'd, 4 N.Y.3d 805, 795 N.Y.S.2d 490, 828 N.E.2d 592 (2005)), where this Court found a worker to be the sole proximate cause of his injuries for using an inverted bucket rather than a ladder to gain access to a motor room after a stairway leading to it had been removed. This Court held that approaching the motor room and seeing no stairway "[a]t that point, the normal and logical response would have been to go and get a ladder or other appropriate safety device to gain access to the motor room." Montgomery, 307 A.D.2d at 866, 763 N.Y.S.2d at 601. The six-paragraph decision was devoid of any reference whatsoever as to the proximity or availability of ladders or any other safety devices at the site.

The Court of Appeals, nevertheless, affirmed as follows: "We agree with the Appellate Division that, *since ladders were readily available*, plaintiff's 'normal and logical response' should have been to go get one." Montgomery, 4 N.Y.3d at 806, 795 N.Y.S.2d at 491 (emphasis supplied).

The Court repeated the language and the rationale a year later again to find a worker the sole proximate cause of his injuries. This time, the Court found sole proximate cause in the worker's failure to replace his six-foot ladder with an eight-foot ladder more suited for the job. Robinson, 6 N.Y.3d at 554-555, 814 N.Y.S.2d at 591-592. The Court cited to its determination in Montgomery and summarized the facts of that case as follows: "Ladders were available at the job site, albeit not in the immediate vicinity [...] Citing Blake, we noted that 'since ladders were readily available, plaintiff's normal and logical response should have been to go get one.'" Id., at 554, 814 N.Y.S.2d at 591.

While in Montgomery the Court gave no indication as to what might be considered "readily" available, in Robinson, on the other hand, the Court's narrative included the facts that the worker knew there were eight-foot ladders on the job site and "knew what part of the garage [they] were in." Id. at 553, 814 N.Y.S.2d at 590. Further, its decision included the worker's testimony that, "I knew where the tools are located. It's a practice of help yourself [...] you just grab a ladder and do the job." Id. at 553, 814 N.Y.S.2d at 590. Hence, the Court concluded that the eight-foot ladder was *readily* available because "there were eight-foot ladders on the job site, [the

worker] knew where they were stored, and [...] he routinely helped himself to whatever tools he needed rather than requesting them." Id. at 554-555, 814 N.Y.S.2d at 591-592.

Most recently in Miro v. Plaza Constr. Corp. (38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dept. 2007), modified, 9 N.Y.3d 948, 846 N.Y.S.2d 76, 877 N.E.2d 294 (2007), supra) this Court reiterated the requirement of *ready* availability of safety devices. In that case, the plaintiff testified that when a ladder was defective, he could request another ladder from the defendant, which the defendant was "pretty good" at providing from its stockroom. Miro, 38 A.D.3d at 455, 834 N.Y.S.2d at 37. The Court of Appeals, however, modified the determination of this Court where we found that the plaintiff's "normal and logical response" should have been to request another ladder since the defendant had "a lot of ladders" available at its projects. Miro, 9 N.Y.3d at 949, 846 N.Y.S.2d at 76. The Court held that characterization was insufficient to establish that the ladders were *readily* available, and thus that a triable issue of fact existed because "[a]ssuming that the ladder was unsafe, it is not clear from the record how *easily* a replacement ladder could have been procured." Id. at 949; 846 N.Y.S.2d at 76 (emphasis added).

In essence, while the Court has not effectively defined readiness or ease of availability, the Robinson decision

indicates that the requirement of a worker's "normal and logical response" to get a safety device rather than having one furnished or erected for him is limited to those situations when workers know the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for them to do so. The dissent's observation does not reflect any such factors in this case. Indeed, the critical observation that "there is no evidence that plaintiff looked 'beyond his immediate work location,' i.e. the third floor" is predicated on the assumption that the plaintiff had an obligation to search all eight floors because he had seen scaffolds with guardrails *somewhere* on the job site prior to the day of the accident.

This is precisely the standard that the Zimmer Court rejected. Moreover, it is not the standard enunciated either in Montgomery or Robinson. It is highly unlikely that the availability of a scaffold with guardrails on a different floor would qualify as "ready" or "easy" availability. However, that question is not before us, since the record in this case does not establish exactly where such scaffolds were to be found on the day of the accident. To the extent that the statements and testimony of the plaintiff and the defendants conflict as to where the scaffolds with guardrails were located that day, they

raise a triable issue of fact, and so preclude summary judgment.

Lastly, we find the motion court properly granted the plaintiff leave to amend his complaint since the defendants are not prejudiced by the proposed amendments which do not add any new factual allegations. See McQuaig v. Olympia & York 125 Broad St. Co., 247 A.D.2d 273, 668 N.Y.S.2d 614 (1st Dept. 1998).

Accordingly, the order of the Supreme Court, New York County (Edward H. Lehner, J.), entered November 28, 2007, which denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) cause of action, denied defendants' cross motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted plaintiff's cross motion for leave to amend the complaint to allege a cause of action under Labor Law § 241(6), should be affirmed, without costs.

All concur except McGuire, J. who dissents in an Opinion.

McGUIRE, J. (dissenting)

I disagree with the majority that a triable issue of fact exists with respect to whether plaintiff's actions were the sole proximate cause of his injuries. In my view, *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]) and *Robinson v East Medical Center* (6 NY3d 550 [2006]) control this appeal and require that plaintiff's Labor Law § 240(1) cause of action be dismissed. Accordingly, I respectfully dissent.

Plaintiff was hired by defendant New England Construction Company to perform carpentry work on a project on which New England was a subcontractor. On the morning of the incident giving rise to this litigation, plaintiff was working on the third floor of the project installing sheet rock in the ceiling. To perform this task, plaintiff was standing on a six-foot baker's scaffold that had guardrails on the front and back portions of the platform but lacked rails on its sides. Plaintiff obtained the scaffold from an area on the third floor near the workers' gang box; it was the only scaffold on the third floor. As plaintiff was screwing a piece of sheet rock into the ceiling, he stepped off one of the unguarded ends of the scaffold and fell to the floor below.

Plaintiff commenced this Labor Law § 240(1) action against,

among others,[1] the owner of the property and the general contractor, and sought summary judgment on the issue of liability. Plaintiff argued that defendants failed to provide him with a scaffold with guardrails on all four sides of the platform, that their failure to do so was a violation of their duty under section 240(1) to provide him with an adequate safety device, and that the absence of an adequate safety device caused his injuries. Defendants cross-moved for summary judgment dismissing the complaint as against them on the ground that plaintiff's conduct was the sole proximate cause of his injuries. Specifically, defendants asserted that scaffolds with proper guardrails, i.e., guardrails on all four sides of the platform, were available on the job site; plaintiff knew scaffolds with proper guardrails were available on the job site; plaintiff, for no good reason, failed to use a scaffold with proper guardrails; and plaintiff's accident would not have happened had he used a scaffold with proper guardrails. Plaintiff then cross-moved for leave to amend his complaint to assert a cause of action under Labor Law § 241(6); the regulatory predicate of that cause of

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[1]Plaintiff also sued two other defendants to recover damages for injuries he suffered in a motor vehicle accident that occurred several months after his fall from the scaffold. Plaintiff alleged that the injuries he sustained as a result of his fall from the scaffold were aggravated by the motor vehicle accident.

action is 12 NYCRR 23-5.18(b), which prescribes the type of safety railings required on manually-propelled mobile scaffolding. Supreme Court denied the competing motions for summary judgment and granted plaintiff's cross motion for leave to amend his complaint. Plaintiff appeals from that aspect of the order denying his motion for summary judgment, and defendants cross appeal from those aspects of the order denying their motion for summary judgment and granting plaintiff's cross motion for leave to amend.

A defendant cannot be held liable under Labor Law § 240(1) where the worker's actions were the "sole proximate cause" of the worker's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). As noted above, two recent "sole proximate cause" cases decided by the Court of Appeals control this appeal -- *Montgomery* and *Robinson*.

In *Montgomery*, the plaintiff and his supervisor were assigned to do work in an elevator motor room, which was located four feet above the roof level of the building in which they were working. The plaintiff and his supervisor went to the roof and found that the stairs that had previously led from the roof to the motor room had been removed. There was no ladder in the immediate vicinity, but ladders were available at the job site. Rather than leaving the roof and retrieving a ladder from

elsewhere on the job site, the plaintiff and his supervisor climbed to the motor room by standing on an inverted bucket that the plaintiff had found. After finishing the task, the plaintiff's supervisor jumped down to the roof without incident; the plaintiff also jumped but injured his knee in the process. Affirming an order of the Appellate Division dismissing the plaintiff's Labor Law § 240(1) claim, the Court of Appeals stated that, "[w]e agree with the Appellate Division that, since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. [The] [p]laintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law § 240(1)" (4 NY3d at 806, citing *Blake, supra*).

In *Robinson*, the plaintiff, working in a building that was under construction, was using a six-foot ladder to install components of pipe hanging systems onto overhead structural beams. The ladder was sufficient to allow the plaintiff to perform safely his task in a hallway; however, when the plaintiff moved from the hallway into an office he observed that the structural beams were at a height of 12-to-13 feet from the floor, a height greater than in the hallway. Nevertheless, the plaintiff stood on the top cap of the six-foot ladder and continued with his work. As he was using a wrench to tighten a

clamp to the top of a beam, the plaintiff lost his balance and sustained back injuries in the process of steadying the tipping ladder. According to the plaintiff, a couple of hours before the incident he had asked his foreman for an eight-foot ladder and the foreman replied "I'll see if I can get you one." The foreman did not supply the plaintiff with an eight-foot ladder prior to the incident. The plaintiff, however, knew that there were eight-foot ladders on the job site and knew where they were stored. Supreme Court granted the plaintiff partial summary judgment on the issue of liability on his section 240(1) claim, but the Appellate Division reversed and dismissed that claim on the ground that the plaintiff did not fall from a height, but rather sustained injuries in the process of steadying the ladder (17 AD3d 1027 [2005]).

The Court of Appeals affirmed the dismissal of the section 240(1) claim but on a different basis. The Court determined that the plaintiff's conduct was, as a matter of law, the sole proximate cause of his injuries. The Court noted that

> "plaintiff knew that he needed an eight-foot ladder in order to screw the rods into the clamps once he left the hallway and entered the office suite. He acknowledges that there were eight-foot ladders on the job site, that he knew where they were stored, and that he routinely helped himself to whatever tools he needed rather than requesting them from the foreman. While intimating that all the eight-foot ladders may have been in use at the time of his accident, plaintiff also

> conceded that his foreman had not directed him to finish the piping in the office suite before undertaking other tasks, and testified that there was sufficient other work to occupy him for the rest of the workday. He also testified that on prior occasions he had waited for a ladder to be freed up by other workers. He claims to have asked his foreman for an eight-foot ladder only an hour or two before he started to install the rods in the office suite. Yet he proceeded to stand on the top cap of a six-foot ladder, which he knew was not tall enough for this task, without talking to the foreman again, or looking for an eight-foot ladder beyond his immediate work location" (6 NY3d at 554-555).

Holding that a defendant cannot be held liable where "adequate safety devices are available at the job site but the worker either does not use or misuses them" (*id.* at 554), the Court concluded that "there were adequate safety devices - eight-foot ladders - available for plaintiff's use at the job site" (*id.* at 555). Accordingly, the Court determined that the "[p]laintiff's own negligent actions - choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work - were, as a matter of law, the sole proximate cause of his injuries" (*id.*).

Under *Montgomery* and *Robinson* liability under Labor Law § 240(1) cannot be imposed where the injured worker knows that adequate safety devices are available at the job site but for no good reason fails to use them. We have applied this rule to

preclude recovery under section 240(1) in a number of cases (*see e.g. Egan v Monadnock Constr., Inc.*, 43 AD3d 692 [2007], *lv denied* 10 NY3d 706 [2008]; *see also Thomas v Fall Cr. Contrs., Inc.*, 21 AD3d 756 [2005]).

Here, plaintiff needed a scaffold to perform his task and obtained the one he used from an area near the workers' gang box on the third floor. Although it was the only scaffold on the third floor -- the floor on which he was working -- plaintiff acknowledged that there were scaffolds on the job site that had proper guardrails. Plaintiff testified that, prior to the date of the incident, he observed scaffolds with proper guardrails on both the third floor and other floors, and that, prior to the date of the incident, he observed other workers employed by his employer using scaffolds with proper guardrails. Plaintiff also testified that although his employer could have provided him with a scaffold with proper guardrails, plaintiff did not request one. Additionally, there is no evidence that plaintiff looked "beyond his immediate work location," i.e., the third floor, for a scaffold (*see Robinson*, 6 NY3d at 555 [worker used ladder that was not tall enough to perform his task without "looking for an [adequate] ladder beyond his immediate work location"]), and no evidence that plaintiff was directed by a superior to perform his task with the inadequate scaffold that he selected.

In light of these facts, the baker's scaffold without siderails is indistinguishable from the bucket in *Montgomery* and the six-foot ladder in *Robinson*. Plaintiff's "normal and logical response" should have been to go look for a scaffold with proper guardrails or ask a superior to provide him with one. Thus, defendants established as a matter of law that (1) adequate safety devices were available at the job site, (2) plaintiff knew that the devices were available and (3) plaintiff, for no good reason, failed to use an available adequate safety device. Because plaintiff offered no evidence raising a triable issue of fact with regard to the issue of whether his conduct was the sole proximate cause of his injuries, defendants are entitled to summary judgment dismissing the complaint as against them (*see Robinson*, 6 NY3d at 554-555; *Montgomery*, 4 NY3d at 806; *Egan*, 43 AD3d at 693-694).

Miro v Plaza Constr. Corp. (9 NY3d 948 [2007]), cited by the majority, is consistent with *Robinson* and *Montgomery*. In *Miro*, the plaintiff slipped and fell as he climbed down a ladder he was using to install fire alarms. The ladder was covered partially with sprayed-on fireproofing material, and the plaintiff alleged that the fireproofing material caused him to slip. The plaintiff knew that the material was on the ladder but chose to use it anyway; he testified at his deposition that he could have

requested a different ladder but he did not do so.

We reversed an order of Supreme Court granting plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim and granted the defendants summary judgment dismissing that claim (38 AD3d 454 [2007]). We reasoned that the plaintiff knowingly chose to use the unsafe ladder despite the fact that he could have requested another ladder, and that the plaintiff's conduct was therefore the sole proximate cause of his injuries. We came to this conclusion even though "the record d[id] not elucidate whether the stockroom where [the defendant owner] kept its supply of ladders was or was not on the work site" (*id.* at 457). We viewed this factual ambiguity as legally irrelevant; a new ladder could have been provided to the plaintiff at the job site had he requested it (*id.*).

Although the Court of Appeals affirmed so much of our order as reversed Supreme Court's order granting the plaintiff's motion for summary judgment on liability on the section 240(1) claim, it modified our order by denying summary judgment to the defendants on that claim. The Court held that the defendants were not entitled to summary judgment because "it is not clear from the record how easily a replacement ladder could have been procured" (9 NY3d at 949). Here, however, there is no such material issue of fact precluding summary judgment. To the contrary, as in

Robinson (6 NY3d at 555 ["there were adequate safety devices - eight-foot ladders - available for plaintiff's use at the job site"]) and *Montgomery* (4 NY3d at 806 ["ladders were available at the job site"]), it is undisputed that adequate safety devices were available on the job site. Thus, *Miro* undermines rather than supports the majority's position.

The majority correctly observes that in *Zimmer v Chemung County Performing Arts* (65 NY2d 513 [1985]), the Court of Appeals stated that "the mere presence of ladders or safety belts somewhere at the worksite does not establish 'proper protection'" under Labor Law § 240(1) (*id.* at 524). But *Zimmer* was decided at a time when the *only* defense to a section 240(1) action based on the conduct of the worker was the recalcitrant worker defense. Under that defense, a defendant in a section 240(1) action was absolved of liability if the worker was given but ignored specific instructions to use readily available safety devices (*see e.g. Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]). As the commentary to the PJI charge on section 240(1) explains

> "A line of cases preceding *Blake* denied recovery to so-called 'recalcitrant workers' who ignored specific instructions to use readily available safety equipment. In *Cahill v Triborough Bridge and Tunnel Authority* (4 NY3d 35 [2004]), however, the Court of Appeals stated that 'the controlling question is not whether plaintiff was "recalcitrant," but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of the

> accident'" (1B PJI3d 2:217, at 1185 [2009] [internal citations omitted]).

Accordingly, the language from *Zimmer* that the majority relies upon cannot be regarded as authoritative. Moreover, that language cannot be reconciled with the legal principle for which *Montgomery* and *Robinson* stand -- liability under Labor Law § 240(1) cannot be imposed where the injured worker knows that adequate safety devices are available at the job site but for no good reason fails to use them (*Robinson*, 6 NY3d 554 [the prerequisites to Labor Law § 240(1) liability "do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them"]; *Montgomery*, 4 NY3d at 806 ["since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one"]).

The majority writes "that the requirement of a worker's 'normal and logical' response to get a safety device rather than having one furnished or erected for him is limited to those situations when workers know the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for them to do so." I respectfully disagree, as nothing in *Montgomery* or *Robinson* supports reading such a limitation into their holdings. To the contrary, the relevant inquiry under both cases is whether the

injured worker knew that adequate safety devices were available at the job site but for no good reason failed to use them. Moreover, by obligating workers to avail themselves of safety devices they know to be available on the job site, the holdings of *Montgomery* and *Robinson* provide workers with a strong incentive to engage in behavior that promotes the statutory goal of worker safety. In limiting that obligation to situations in which workers know the "exact location" of safety devices and an antecedent "practice of obtaining such devices" has been established, the majority dilutes that incentive. To that extent, the "lax statutory interpretation" is the one the majority embraces. Finally, the majority's reliance on the fact that the work site consisted of eight floors of the building is misplaced. Regardless of whether safety devices that are not on the job site itself can be "readily available" (*see Miro*, 9 NY3d at 948), *Montgomery* and *Robinson* foreclose any contention that safety devices that a worker knows to be on the job site itself are not "readily available."

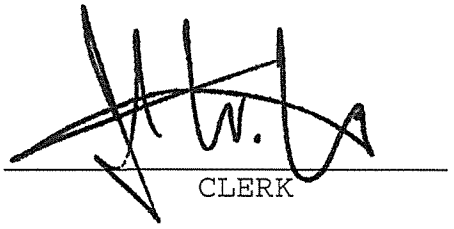
With respect to that aspect of the order granting plaintiff's motion to amend his complaint to assert a cause of action under Labor Law § 241(6), the only regulatory predicate plaintiff asserts for that cause of action is 12 NYCRR 23-5.18(b), which prescribes the type of safety railings required on

manually-propelled mobile scaffolding. Plaintiff's conduct in using a scaffold with inadequate railings despite the availability of adequate safety devices on the job site was the sole proximate cause of his injuries. Thus, any violation of 12 NYCRR section 23-5.18(b) was not a proximate cause of plaintiff's injuries and the section 241(6) cause of action therefore is devoid of merit (*see Davis & Davis v Morson*, 286 AD2d 584 [2001] [leave to amend complaint will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law]).

In sum, I would modify the order to grant defendants' cross motion for summary judgment dismissing the complaint and to deny plaintiff's cross motion for leave to amend the complaint.

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

ENTERED: AUGUST 18, 1009



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