SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 25, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Catterson, McGuire, Acosta, JJ.

4882N.1
4882N.1A Suzana Caba, Index 25866/99
Plaintiff-Appellant,

-against-

Lidawattee Rai,
Defendant-Respondent.

Manuel D. Gomez & Associates, PC, New York (Manuel D. Gomez of counsel), for appellant.

Orders, Supreme Court, Bronx County (Nelson S. Roman, J.), entered January 14 and April 25, 2008, which, in an action for personal injuries, denied plaintiff's motion to attach defendant's real property in order to satisfy a default judgment, and, after a traverse hearing, granted defendant's cross motion to vacate the default judgment and for leave to serve an answer, reversed, on the law, without costs, the cross motion denied and the matter remanded to Supreme Court to reconsider and determine plaintiff's motion to compel the sheriff to seize and sell defendant's property.

On November 23, 1999, plaintiff commenced this action against defendant seeking damages for personal injuries she

sustained on property owned by defendant. Plaintiff's process server served defendant by delivering a copy of the summons and complaint to defendant's daughter at defendant's residence, i.e., 1221 Shakespeare Avenue in the Bronx, on December 11, 1999 (*see* CPLR 308[2]). The process server also mailed a copy of the summons and complaint to that address as required by CPLR 308(2). The affidavit of service was filed in the Bronx County Clerk's Office on January 11, 2000, thereby completing service (*see id.*). Thus, defendant's deadline for answering was February 22, 2000 (*see id.*; CPLR 320[a]; General Construction Law § 24, § 25-a). In March 2002, plaintiff moved for a default judgment based on defendant's failure to appear or answer the action. Supreme Court granted that motion by an order entered on May 1, 2002, and, by an order dated July 17, 2003, Supreme Court awarded plaintiff $250,000 in damages for pain and suffering. A judgment was entered on November 20, 2003 awarding plaintiff those damages plus interest.

In June 2007, plaintiff moved to compel the sheriff to seize and sell 1221 Shakespeare Avenue, real property owned by defendant, to satisfy the November 2003 judgment. Defendant cross-moved, among other things, to vacate the default judgment under CPLR 317 or 5015. While the court rejected defendant's contention that the judgment should be vacated under CPLR 317 because she moved for vacatur more than one year after she

learned of the judgment, the court found that defendant satisfied the requirements for vacatur under CPLR 5015(a)(1) -- a reasonable excuse for the default and a potentially meritorious defense. The court also granted that portion of the motion that sought an extension of time to answer the action "to the extent of setting the matter down for a traverse hearing," concluding that if "defendant was served with process, leave to interpose an answer will be denied, and the Court will enter a default judgment in favor of plaintiff. Should the Court find that service was not properly effectuated, leave to interpose an answer shall be granted." By a subsequent order, Supreme Court granted defendant leave to serve a belated answer because "plaintiff failed to proffer [her] process server for the purpose of conducting the [traverse] hearing." Plaintiff appeals from both orders.

CPLR 317 and 5015(a)(1) allow a defendant against whom a default judgment has been rendered to move to vacate that default. CPLR 317 provides that

> "[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 . . . who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."

Thus, this statute is available only to a defendant who (1) was

served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action. By contrast, CPLR 5015(a)(1) is available to any defendant against whom a default judgment was entered, provided that the defendant can demonstrate both a reasonable excuse for the default and a potentially meritorious defense. A defendant seeking relief under 5015(a)(1) must move to vacate the default judgment within one year of service on defendant of the default judgment with notice of entry. Both provisions assume personal jurisdiction exists over the defaulting defendant and provide that party with an opportunity to open the default and contest the merits of the plaintiff's claim (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C317:1, at 249-250 [main vol]; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:6, at 210). If the defaulting defendant asserts that the court lacked personal jurisdiction over him or her, the defendant should seek dismissal of the action under CPLR 5015(a)(4) (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C317:1, at 250 [main vol]), a motion that has no stated time limit and can be made at any time (Siegel, Practice Commentaries, McKinney's Cons Laws, Book 7B, CPLR C5015:3, at 205-206 [main

vol]).

In moving to vacate the default judgment, defendant argued that she was entitled to relief under CPLR 317 or 5015(a)(1) and sought to vacate the judgment and for an extension of time to interpose an answer; she did not seek relief under 5015(a)(4) or request that the complaint be dismissed for want of personal jurisdiction. To be sure, in her notice of cross motion, defendant requested an order "vacating and setting aside the defendant's [default] pursuant to CPLR 5015 and/or CPLR 317, extending the defendant's time to answer and compelling plaintiff to accept defendant's answer pursuant to CPLR 2004." Nowhere in her motion papers, however, did defendant suggest that the action should be dismissed because the court lacked personal jurisdiction over her. Although defendant did argue that she had not received the summons and complaint (or the default judgment), that argument was asserted by defendant in an effort to establish that she had a reasonable excuse for her default. What the concurring Justice considers to be part of the "crux" of defendant's motion, "the absence of any personal jurisdiction," was never stated in the motion. Accordingly, since defendant sought to vacate the judgment and defend the action on the merits, Supreme Court erred in ordering a traverse hearing; defendant charted a specific procedural course that Supreme Court improperly altered (*see Mitchell v New York Hosp.*, 61 NY2d 208,

214 [1984]).[1]

With respect to her contention that she was entitled to relief under CPLR 317, defendant obtained knowledge of the judgment in January 2004 when she received a credit report listing the judgment, and did not move to vacate the default until August 2007. Thus, that portion of defendant's cross motion seeking relief under CPLR 317 was untimely.

Regarding that portion of the cross motion that sought relief under CPLR 5015(a)(1), there is no indication when the default judgment with notice of entry was served on defendant. Thus, assuming without deciding that defendant properly could

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[1]If defendant had raised an issue regarding whether the court had personal jurisdiction over her, Supreme Court would have been obliged to determine that issue first, as defendant would have been entitled to an unconditional dismissal of the complaint if the court lacked personal jurisdiction over her. "When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1)" (*Roberts v Anka*, 45 AD3d 752, 753 [2007], *lv dismissed* 10 NY3d 851 [2008]; *see Delgado v Velecela*, 56 AD3d 515 [2008]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C317:1, at 250 [main vol]). We take no position on whether defendant was entitled to a traverse hearing; we conclude only that if defendant sought dismissal of the action on the ground that the court lacked personal jurisdiction over her the court would have been obligated to address that issue before deciding whether to vacate the judgment under CPLR 5015(a)(1). Thus, the concurring Justice errs in stating that we "presume[] that defendant would have been entitled to the traverse had she expressly invoked CPLR 5015(a)(4)."

seek relief under 5015(a)(1),[2] the motion appears timely and plaintiff does not argue to the contrary. Nonetheless, defendant is not entitled to relief under 5015(a)(1). Although defendant denied receiving the summons and complaint or any other papers in this matter until she was served with plaintiff's motion to compel the sheriff to seize and sell her property, defendant learned of the judgment in January 2004. She did not move to vacate the default, however, until August 2007 and only did so in response to plaintiff's motion to seize and sell her property. Moreover, plaintiff's counsel averred that both defendant and her attorney contacted plaintiff's counsel on May 11, 2005 about vacating the judgment, an averment that is corroborated by phone message slips generated by plaintiff's counsel's secretary and which defendant does not dispute. Thus, defendant failed to proffer a reasonable excuse for her substantial delay in moving to vacate the judgment (*see Bekker v Fleischman*, 35 AD3d 334 [2006]; *Robinson v 1068 Flatbush Realty, Inc.*, 10 AD3d 716 [2004]; *Duran v Edderson*, 259 AD2d 728 [1999]). In light of our conclusion that defendant failed to proffer a reasonable excuse,

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[2]It is far from obvious that a party served in a manner other than personal delivery may seek relief under CPLR 5015(a)(1) when a motion by that party under CPLR 317 would be time-barred. Under the canon of statutory interpretation that a specific provision is controlling over a general provision (*see P.T. Bank Cent. Asia v Chinese Am. Bank*, 229 AD2d 224, 234-235 [1997]), the time prescribed in CPLR 317 may trump the time limit specified in the more encompassing statute, CPLR 5015(a)(1). However, we need not and do not decide that issue.

we need not determine whether she offered a potentially meritorious defense to the action.

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

MAZZARELLI, J. (concurring)

I agree that the court's order granting the cross motion should be reversed. However, I disagree with the majority's holding that the motion court erred in directing a traverse because defendant "charted a specific procedural course" by failing to mention CPLR 5015(a)(4) in her notice of cross motion and other submissions. The crux of defendant's motion was that the affidavit of service filed by plaintiff, if not the entire action, was a sham and that the judgment was entered in the absence of any personal jurisdiction. Both defendant and her daughter submitted affidavits in which they denied ever having received a copy of the summons and complaint. Under these circumstances, the court properly treated the motion as contesting service, notwithstanding that it conflated that issue with the issue of whether defendant had a reasonable excuse for not having appeared in the action.

I also depart from the majority to the extent that it presumes that defendant would have been entitled to the traverse had she expressly invoked CPLR 5015 (a)(4). I do not believe that the traverse was properly directed upon the papers submitted here by defendant.

The affidavit of service filed by plaintiff was prima facie evidence that defendant was properly served with the summons and

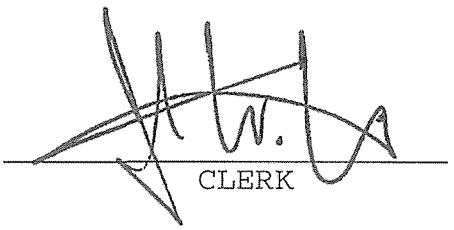
complaint pursuant to CPLR 308(2) (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [2004]). It asserted that on December 11, 1999 process was delivered to defendant's daughter, as a person of suitable age and discretion, and that an additional copy was mailed that day to defendant at the same address. To create an issue of fact as to whether plaintiff obtained jurisdiction over defendant, defendant was required to deny service in a non-conclusory fashion (*id*). However, defendant's daughter merely swore that "[o]n December 11, 1999 I was not served with a summons and verified complaint in the above cited matter." That statement was insufficient to force a traverse hearing (*compare Haberman v Simon*, 303 AD2d 181 [2003] [traverse hearing ordered where defendant asserted that his physical description did not match the description of him given in the affidavit of service] *and Ananda Capital Partners v Stav Elec. Sys.*, 301 AD2d 430 [2003] [defendant claimed he was at a meeting in Brooklyn at the same time as the process server swore to have served him in Manhattan]).

Defendant's own denial was similarly bald. She swore only that "[o]n no occasion did I ever receive any summons and complaint." She did attempt to create an issue of fact by claiming that, on December 11, 1999, she no longer lived at 4415 Furman Avenue, Bronx, New York, the address contained on the last page of the complaint. However, it is not the address on the

complaint that controls, but the address on the affidavit of service. The affidavit of service clearly states that the process server mailed an extra copy of the process to the first floor of 1221 Shakespeare Avenue, Bronx, New York. Defendant concedes that she lived at that address on the date of mailing. Accordingly, her conclusory statement that she never received the mailing was also insufficient to create an issue of fact and require a traverse hearing (*see Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875 [2007]; *96 Pierrepont v Mauro*, 304 AD2d 631 [2003]).

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

ENTERED: JUNE 25, 2009



Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

664-
664A IDT Corporation, Index 603710/04
Plaintiff-Appellant,

-against-

Morgan Stanley Dean Witter & Co., et al.,
Defendants-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), for appellant.

Davis Polk & Wardwell, New York (Guy Miller Struve of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered April 8, 2008, which granted defendants' motion to dismiss the sixth and seventh causes of action in the amended complaint, unanimously reversed, on the law, with costs, the motion denied and the causes of action reinstated. Appeal from order, same court and Justice, entered October 29, 2008, which, to the extent appealable, denied plaintiff's motion for leave to renew, unanimously dismissed, without costs, as academic in view of the foregoing.

The issue on this appeal is whether cognizable claims for fraudulent misrepresentation and fraudulent concealment may be based on intentional spoliation of evidence, notwithstanding that New York does not recognize an independent tort of third-party negligent spoliation. We conclude that intentional spoliation of evidence may be the basis for such claims.

Plaintiff IDT, a telecommunications company, alleged in its original complaint that Morgan Stanley, its former investment banker, had engaged in a variety of improper conduct including breach of fiduciary duty and tortious interference with contract. The essence of the complaint[1] was that IDT had a contract with third-party Telefonica International, S.A. for a submarine fiber-optic cable encircling Latin America; that Telefonica was also a client of Morgan Stanley; that IDT and Telefonica had negotiated the contract without any involvement by Morgan Stanley; and that Morgan Stanley induced Telefonica to breach the contract with IDT and to instead enter into a similar deal with a different partner introduced to Telefonica by Morgan Stanley so that Morgan Stanley could earn millions of dollars in investment banking and other fees. IDT alleged that Morgan Stanley provided confidential and proprietary business and financial information about IDT to Telefonica to induce Telefonica to delay performance of the contract and eventually to breach the contract.

In May 2001, IDT commenced an arbitration proceeding against Telefonica alleging that Telefonica had breached its contract with IDT. Morgan Stanley was not a party to the arbitration.

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[1]The original complaint was dismissed in its entirety upon a finding by the Court of Appeals that the claims for breach of fiduciary duty, tortious interference with contract and misappropriation of confidential and proprietary business information were time-barred and that the unjust enrichment claim failed to state a cause of action (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]).

The arbitration panel concluded that Telefonica had breached the contract, and IDT was awarded more than $16,000,000 in damages. IDT's claims for fraudulent misrepresentation and fraudulent concealment in this action are based on Morgan Stanley's response to a subpoena served by IDT in connection with the arbitration proceeding that sought all documents referring or relating to any advice provided to Telefonica by Morgan Stanley concerning the fiber-optic cable deal.

IDT alleges that Morgan Stanley produced more than 2,000 pages of documents in response to IDT's subpoena and represented in writing that it had fully complied with the subpoena, but that during the course of discovery in this action IDT learned that Morgan Stanley produced only a small percentage of the documents that were relevant and responsive to IDT's subpoena and that the excluded documents, consisting of an additional 500,000 pages, included critical "smoking gun" documents. One of those documents is a letter from two Morgan Stanley executives to Telefonica's chairman just two months after the contract with IDT was signed, advising Telefonica to sell its equity in the project at cost and encouraging Telefonica to reevaluate its agreements with IDT. IDT alleges that this concealment by Morgan Stanley caused it great damage in the arbitration because the withheld documents would have enabled IDT to prove that Telefonica had breached the contract as early as October 1999 rather than

somewhere between October 2000 and March 2001, as the arbitrators determined, thus increasing the award of damages.

Since IDT had not initially included causes of action for fraudulent misrepresentation and fraudulent concealment in its complaint, it sought leave to amend the complaint.[2] Supreme Court granted the motion, rejecting Morgan Stanley's arguments that the claims were legally deficient because IDT could not demonstrate that it suffered any harm as a result of not having the documents during the arbitration and that the documents were cumulative. The court found that IDT had pleaded the elements of fraud and fraudulent concealment, noting that the elements of fraudulent concealment are the same as fraud, with the addition that the party charged with the fraud must have had a duty to disclose.

Subsequently, Morgan Stanley moved to dismiss those causes of action for failure to state a cause of action on the ground that New York does not recognize spoliation of evidence as a cognizable tort. On constraint of the Court of Appeals' decision in *Ortega v City of New York* (9 NY3d 69 [2007]), Supreme Court granted the motion, concluding that IDT's framing of the claims as fraud claims "[did] not take it out of the rules regarding spoliation of evidence claims." This was error.

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[2] The motion to amend was submitted and decided prior to the Court of Appeals' decision dismissing the original complaint.

Supreme Court correctly found in its initial assessment that IDT had sufficiently alleged claims for fraud and fraudulent concealment. IDT alleges that Morgan Stanley made a material misrepresentation of fact when it represented that it had fully complied with the subpoena; that the misrepresentation was made intentionally to defraud or mislead IDT; that IDT reasonably relied on the misrepresentation, and that it suffered damage as a result of its reliance (*see e.g. P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [2003]). In addition to these elements, IDT alleges that Morgan Stanley had a duty to disclose and that it failed to do so, thus stating a claim for fraudulent concealment (*id.*).

The Court of Appeals' decision in *Ortega v City of New York* (9 NY3d 69 [2007], *supra*) does not require dismissal of IDT's claims for fraud and fraudulent concealment simply because the vehicle for the alleged fraudulent conduct was concealment of evidence. First, the *Ortega* holding involved a claim of negligent spoliation of evidence, not a claim of intentional concealment or spoliation of evidence. Second, unlike the City in *Ortega*, which the court noted was a third party with a duty to preserve evidence but with no connection to the underlying litigation, Morgan Stanley was not an uninvolved third party to the arbitration proceeding between IDT and Telefonica. It had fiduciary relationships with both parties, and the concealment of

documents from IDT arguably both benefitted its client Telefonica in the arbitration and protected Morgan Stanley from being sued by IDT.

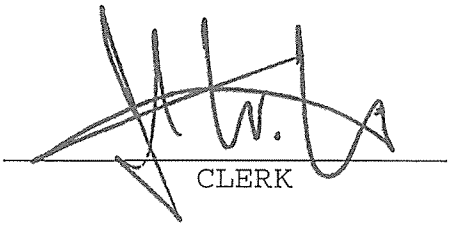
Two additional circumstances distinguish this case from *Ortega*. The *Ortega* court refused to recognize a third-party spoliation claim because the content of the lost evidence is unknown, thus leading to speculation as to causation and damages. Here, there is no such concern because the concealed documents have been produced. The court also found that it would not be sound public policy to permit an independent tort of spoliation to be asserted against a municipality. There are no public policy reasons to disallow IDT's claims for fraud and fraudulent concealment against its fiduciary based on the latter's spoliation of subpoenaed documents.

Importantly, the *Ortega* court wrote that "[a]t bottom, plaintiffs seek recognition of a new cause of action because they cannot meet the traditional proximate cause and actual damages standards at the foundation of our common-law tort jurisprudence" (9 NY3d at 80). IDT suffers from no such impediment. It has met the pleading standard for fraud and fraudulent concealment and thus has a remedy under existing tort principles. There is no indication in *Ortega* that the court would reject an already recognized common-law tort claim simply because the claim was based on the spoliation of evidence.

We note that the New Jersey courts, which do not recognize a separate tort action for intentional spoliation, recognize a claim of fraudulent concealment based on the intentional spoliation of evidence (*see e.g. Rosenblit v Zimmerman*, 166 NJ 391, 766 A2d 749 [2001]; *R.L. v Voytac*, 402 NJ Super 392, 407-408, 954 A2d 527, 536 [App Div 2008] *certif granted in part* 197 NJ 259, 962 A2d 530 [2008]; *Viviano v CBS, Inc.*, 251 NJ Super 113, 597 A2d 543 [App Div 1991] *certif denied* 127 NJ 565, 606 A2d 375 [1992]). There is no sound reason for New York courts to conclude otherwise.

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

ENTERED: JUNE 25, 2009



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Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5017 Mark Torkel, Index 106731/05
Plaintiff-Respondent,

-against-

NYU Hospitals Center, et al.,
Defendants-Appellants.

[And a Third Party Action]

Harrington, Ocko & Monk, LLP, White Plains (Adam G. Greenberg of counsel), for appellants.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered September 11, 2008, which denied defendants' motion for summary judgment dismissing the complaint (except as to plaintiff's claim under Labor Law § 241[6] based on Industrial Code [12 NYCRR] § 23-2.1[b]) and, upon a search of the record, granted summary judgment in favor of plaintiff on the issue of liability under Labor Law § 240(1), modified, on the law, to the extent of dismissing plaintiff's claims under Labor Law §§ 240(1) and 241(6), and otherwise affirmed, without costs.

Plaintiff was employed by third-party defendant Rite-Way Internal Removal, Inc. (Rite-Way), which had been engaged as a subcontractor by defendant HRH Construction (HRH) to haul debris away from a work site on the ground floor of a medical school building where a new magnetic resonance imaging research facility

was being installed. HRH was employed as the general contractor and construction manager on the project, defendant New York University (NYU) owns the premises, and the other defendants are NYU affiliates. The construction agreement between NYU and HRH required the latter to hire subcontractors to perform the work, which included keeping the work site "free at all times from unreasonable accumulation of waste material or rubbish" caused by the project. A June 2002 transmittal letter from HRH to defendant NYU Hospitals Center indicates that HRH had contracted with Rite-Way to perform "[d]emolition" work on the project, and other correspondence from HRH to Rite-Way reflects HRH's intent to award Rite-Way a contract for the work. A form of contract for the work by Rite-Way is also included in the record.

The construction debris from the project was removed from the site and taken to the street in Rite-Way's wheeled containers, which typically held about 250 pounds of material. HRH employees, with plaintiff's regular help, loaded the containers. Rite-Way employees would haul the debris away by truck about once a day, sometimes after an HRH employee had called and requested a pick-up. The Rite-Way employees would drive a truck to the work site and, using a winch affixed to the truck, raise the containers and dump the debris into it.

On March 19, 2004, plaintiff, who had been sent to the work site by Rite-Way dispatchers, was injured while rolling a filled

container from the work site to his truck parked on the street. When plaintiff arrived, he observed that a three-quarter-inch-thick sheet of plywood had been laid down as a makeshift ramp to bridge the gap in height between the edge of the work site, at curb level, and the street, which was lower than usual because the surface layer of asphalt had been removed during ongoing re-paving. The plywood was not braced or supported from beneath. Plaintiff stated that the height differential between the bridged levels was "[a]nywhere between 12 and 18 inches, give or take a few." While plaintiff was maneuvering the container down the plywood ramp, the ramp collapsed, causing the container to spill concrete debris onto plaintiff's leg and fall over onto the sidewalk. Plaintiff was injured while trying to regain control of the container and keep it from tipping over.

Upon defendants' motion for summary judgment, the motion court searched the record and granted summary judgment to plaintiff as to liability under Labor Law § 240(1), and denied summary judgment to defendants with respect to the claims under Labor Law §§ 200 and 241(6), to the extent the latter were based on Industrial Code (12 NYCRR) §§ 23-1.7(f) and 23-1.22(b)(2). The court granted summary judgment to defendants with respect to plaintiff's claim based on Industrial Code § 23-2.1(b) and denied it with respect to the Labor Law § 200 and common-law negligence claims.

Labor Law § 240(1) provides in relevant part:

> "All contractors and owners and their agents . . . in the . . . demolition [or] altering . . . 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."

Section 240(1) imposes absolute liability on owners, contractors and their agents for injury proximately caused by a breach of the statutory duty (*Gordon v Eastern Ry. Supply,* 82 NY2d 555, 559 [1993]). The hazards that warrant the protection contemplated by the statute are "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level . . ." (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

As a threshold matter, the only argument defendants made to the motion court for dismissing the section 240(1) claim is that plaintiff was not exposed to the type of elevation-related hazard contemplated by the statute. However, in its order, the court stated that

> "[w]ith respect to plaintiff's Labor Law 240 claim defendants argue that the plaintiff was not engaged in an activity requiring protection. Defendants' argument is meritless. Defendants' foreman stated that plaintiff regularly assisted in moving the carts from the building to the truck. This work was carried out as part of a construction contract between defendants including the third-party defendant, plaintiff's

> employer. Defendants also do not deny that a ramp was necessary to move the carts between the height differential of the loading dock, the curb and the street although that differential was only over one foot high due to construction occurring on the roadway and sidewalk. Therefore, defendants were required to provide appropriate safety devices."

Here the court not only addressed and rejected defendants' argument that plaintiff was not exposed to an elevation-related hazard, but also raised new matter sua sponte. The court's findings that plaintiff moved containers from the building to the truck and that he performed his work pursuant to a contract between defendants, including his employer, have no bearing on whether his work presented an elevation-related hazard, which was the only argument before the court with respect to whether plaintiff was "engaged in an activity requiring protection" under section 240(1).

On appeal, defendants contend for the first time that the statute is inapplicable because plaintiff was not engaged in any of the enumerated activities set forth in the statute or in work that was "incidental and necessary" to the performance of those activities. Whatever its merit, this new argument is not properly before this Court because defendants' failure to raise it before the motion court deprived plaintiff of the opportunity to submit evidence with which to refute it (*see e.g. Douglas Elliman-Gibbons & Ives v Kellerman*, 172 AD2d 307, 308 [1991]), *lv denied* 78 NY2d 856 [1991]).

However, given that the bottom of the ramp was resting on the street and the top was resting on the adjacent sidewalk curb, and the height differential from the bottom to the top was at most 12 to 18 inches, we agree with defendants that plaintiff was not exposed to an elevation-related hazard as contemplated by section 240(1) (*see DeStefano v Amtad N.Y.*, 269 AD2d 229 [2000] [ramp rising 12 inches from ground to building entrance did not present an elevation-related hazard]; *DeMayo v 1000 N. of N.Y. Co.*, 246 AD2d 506 [1988] [13-inch-high step from ground to shanty entrance not an elevation-related hazard]; *cf. Arrasti v HRH Constr. LLC*, 60 AD3d 582 [2009] [section 240(1) claim stated where plaintiff fell from ramp connecting concrete floor with hoist platform constructed about 18 inches above floor]).

Plaintiff's Labor Law § 241(6) claims predicated on Industrial Code (12 NYCRR) §§ 23-1.7(f) and 23-1.22(b) should have been dismissed. Section 23-1.7(f) applies to stairways, ramps, and runways used "as the means of access to working levels above and below ground." The ramp in this case, which bridged the height differential between a sidewalk curb and the adjacent road surface, did not provide access to an above- or below-ground working area within the meaning of the regulation.

We note that defendants' only argument to the motion court with respect to the section 23-1.7(f) claim was that they did not supply the ramp. However, since there is no dispute about how

the ramp was used, the question whether section 23-1.7(f) applies presents an issue of law that is properly before this Court (*Buywise Holding, LLC v Harris*, 31 AD3d 681, 682 [2006]; *see also Anderson v Carduner*, 279 AD2d 369, 370 [2001]).

Section 23-1.22(b) applies to ramps used by "motor trucks or heavier vehicles," "wheelbarrows, power buggies, hand carts or hand trucks" or by "persons only." The use of the ramp in question as a means for workers to move wheeled dumpsters does not fall within the regulation's enumerated categories.

To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site (*see Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229 [2008]), a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition (*see Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 290-291 [2008]; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2008]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [2004]).

Defendants argue that they cannot be liable under section 200 because plaintiff failed to show that they supervised or

controlled his work. As evidence of control, however, plaintiff submitted testimony from an HRH foreman that HRH was responsible for moving the containers to the Rite-Way trucks parked on the street and that sometimes plaintiff and other Rite-Way employees moved the containers because "basically we're trying to help each other." This testimony, when coupled with HRH's contractual obligation to have rubbish removed from the project site, creates an issue of fact as to control.

In addition, plaintiff made a prima facie showing that HRH was responsible for or was aware of the dangerous condition. The NYU defendants failed to meet their initial burden on the summary judgment motion by showing lack of responsibility or awareness.

Contrary to the dissent's assertion that plaintiff offers "no evidence as to how the piece of plywood came to be placed where it was," the HRH foreman testified that (1) the ramps used to move the containers to the street were made of "whatever you can find to use," (2) the ramp that caused the accident was made of plywood that "was probably taken out of one of the dumpsters" at the site, (3) during the four- or five-day period between the time the top surface of the roadway was stripped (making a ramp necessary to move the containers from the curb to the street) and plaintiff's accident, the foreman alone moved the containers to the trucks, and (4) to move the containers, "[y]ou find a piece of plywood, piece of steel, piece of tin and you put it on the

curb." These statements, coupled with plaintiff's testimony that the ramp was in place when he arrived, could lead a finder of fact reasonably to conclude that it was more likely than not that someone under defendants' control laid down the plywood and thereby created the dangerous condition.

All concur except Andrias, J.P. and Nardelli, J. who concur in part and dissent in part in a separate memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (concurring in part, dissenting in part)

In this action to recover for personal injuries suffered by plaintiff on March 19, 2004 as he was using a roughly three-foot by two-to-four foot piece of three-quarter-inch plywood as a makeshift ramp to push a mini-container of construction debris from the freight entrance of a building at 660 First Avenue in Manhattan to his refuse removal truck, we all agree that defendants are entitled to summary judgment dismissing plaintiff's causes of action alleging violations of Labor Law §§ 240(1) and 241(6). However, I would dismiss those causes of action for additional reasons, and I therefore concur separately. Because plaintiff also failed to present evidence sufficient to raise a question of fact regarding his Labor Law § 200 and common-law negligence causes of action, I dissent from the majority's sustaining of those causes of action and would reverse and grant defendants' motion in its entirety and dismiss the complaint.

While there are some differences in the testimony of the only two fact witnesses, plaintiff and defendant HRH Construction's laborer foreman Arthur Covelli, all parties agree that the operative facts, which derive from their testimony, are not in dispute. At the time of the accident, plaintiff was a driver for third-party defendant Rite-Way Internal Removal, Inc., and his job on the day in question was to pick up mini-containers

filled with construction debris at various locations. Covelli, whom plaintiff knew only as "Artie," was in charge of collecting the debris, putting it in the mini-containers provided by Rite-Way, and placing the mini-containers out on the sidewalk to be picked up.

According to plaintiff, no one other than the Rite-Way dispatcher directed, supervised or controlled his activities on a daily basis. On the morning in question, he was given a route sheet by his dispatcher listing the locations at which he was to make pickups that day. One of these was 660 First Avenue, where HRH was the general contractor and construction manager of a project for the complete renovation of 2700 square feet of the ground floor, including the Emergency Department of Radiology at the NYU Medical Center. Rite-Way was not performing any work at 660 First Avenue. Plaintiff was there simply to pick up dumpsters.

Plaintiff testified at one point that when he first arrived at the site there were full containers of construction debris already outside the freight entrance at 660 First Avenue. However, at another point he testified that when he arrived at the site he did not find dumpsters already outside the building.

Plaintiff gave the following account of his accident:

> "I went to where the containers were by the freight area. I went to push a container, a mini, half yard mini container overloaded of [*sic*] concrete to the truck, and I went down a makeshift plywood ramp and the plywood ramp gave way.
> "I tried to hold the container up and I couldn't since it was too heavy and that's how my injury occurred."

The exact location of the piece of plywood and the height differential between the top and the bottom are not entirely clear. Again, however, any differences in the witnesses' testimony have no legal significance.

Plaintiff testified that when he arrived at the site he double parked his truck in front of a "cut sidewalk . . . [f]or a driveway" about 25 to 50 feet from the freight entrance and got out. He then walked to the freight entrance, grabbed a container and pushed it outside. He had no problem pushing the container to the piece of plywood, but as he pushed the overloaded container down it the plywood "buckled. You heard it cracked [*sic*]." As the container tipped over on the sidewalk, either it or some of its contents grazed plaintiff's right leg, causing him to twist his leg. Thus far, no one from HRH had been present or had spoken to him. Plaintiff testified that, after Covelli arrived at the scene, they and two other men who were working across the street for either Consolidated Edison or the Department of Environmental Protection righted the dumpster.

Covelli then wheeled it over to the truck, and plaintiff hooked up two chains and a winch cable and dumped the contents into the truck.

According to Covelli, his duties at HRH's jobsite were "general housekeeping" ("I have to maintain the site so there's no tripping hazard, rubbish on the floor for fire, rodents. And removal of all the rubbish that's on the floor."). He also testified that his duties were limited to the inside of the building ("Inside the building I am responsible for, outside the building I am not responsible. If there is a sign from the telephone people or bus stop I'm not responsible for that. But inside the building, yes . . ."). Covelli testified that, at about 9:00 or 10:00 A.M. on the day in question, he filled up six or seven mini-containers with construction debris, moved them from the work site and lined them up on the sidewalk up against the building, where they waited to be picked up. Sometime later that morning, Rite-Way's dispatcher radioed him while he was in the building's basement and told him that the truck was outside to pick up the containers ("Usually they blow the horn on the truck and you can come down to the street. I happened to be in the basement. They usually reached me by radio."). Covelli told the dispatcher he would be right up and went up to the street, where he saw plaintiff in the middle of the driveway, sitting on an overturned container. Plaintiff told him that he thought he

had hurt his knee. Covelli then helped plaintiff right the container and pick up the spilled debris. They dumped the rest of the containers into the Rite-Way truck, and plaintiff drove off.

The mini-containers, which contained approximately 250 pounds of debris, were usually lined up near the freight entrance and were pushed 15 feet along the "very smooth" sidewalk to a driveway where plaintiff had parked his truck. Normally the containers were simply pushed down the driveway into the street without assistance because there was about a two-to-four inch differential between the street and the steel curb of the driveway apron. However, because Con Edison had stripped the asphalt from the street down to the concrete four or five days earlier, prior to repaving it, there was a six-to-eight inch differential between the steel curb and the surface of the street. As a result, for the four or five days preceding plaintiff's accident, Covelli used a piece of plywood, steel or tin as a makeshift ramp to facilitate pushing the mini-containers down the driveway to street level, where they were hooked up to a winch by a Rite-Way employee, who emptied the contents into the truck. After all the containers were emptied, the makeshift ramp would be picked up and thrown into the back of the truck to be discarded.

The containers were picked up on a daily basis by various

Rite-Way drivers. Sometimes the driver would help Covelli push the containers to the truck; sometimes he would not help.

> "It's basically we're trying to help each other. I want the containers emptied and they want to get to their next stop. So we try and help each other. We push the container to the truck, we help him that way and then he dumps it and tries to get it done as quick as he can.
>
> "Q. So it wouldn't be out of the ordinary for them to pull the full dumpster toward the truck to assist in the dumping?
>
> "A. That's correct. It's done every day."

According to Covelli, plaintiff's duties were to operate the truck and dump the contents of the container into the back of the truck. "When he arrives on the job site, we're supposed to bring the containers to the truck, we help him hook them up to the truck because there are some cables. He operates the truck which dumps the container with the rubbish in it . . . [W]hen he is done he will remove the cables and he is finished." When asked if before the accident he ever told plaintiff not to help with the dumpsters, he replied, "No, sir." He also testified that Rite-Way had no employees who actually worked in the building and that Rite-Way employees were there solely to pick up rubbish. Usually HRH employees took the containers to the truck but "[s]ometimes" plaintiff also took containers to the truck.

HRH, and the NYU defendants, the owner of the premises, moved for summary judgment dismissing the complaint on the ground

that there is no evidence that plaintiff's accident resulted from the effects of gravity as required by Labor Law § 240(1); that no liability can attach under Labor Law § 200 because there is no evidence that HRH or the NYU defendants supervised or controlled plaintiff's activities at the time of the accident; that the Industrial Code sections underlying plaintiff's Labor Law § 241(6) claim are inapplicable to the facts of this case; and, that if plaintiff's Labor Law claims are dismissed, his common-law negligence claims should also be dismissed, because there is no evidence that defendants caused his accident.

As in all summary judgment motions, once the movants establish prima facie entitlement to judgment as a matter of law, the burden shifts to the opposing party to present sufficient evidence either to raise a substantial question of fact warranting a trial or to establish its entitlement to judgment as a matter of law. Therefore, since in his opposition plaintiff agreed that there is no dispute as to the relevant facts, the issue for the motion court to decide was whether the agreed-upon facts were sufficient to impose liability upon defendants as a matter of law.

As to his Labor Law § 240(1) claim, plaintiff argued, in pertinent part, that the piece of plywood failed to give him proper protection in the task of wheeling the container over a significant height gap of 12 to 18 inches, as shown by the fact

that it collapsed while in use and caused his injuries. In support of his Labor Law § 200 claim, plaintiff's sole argument was that defendants presented no evidence that they did not control his work since they failed to proffer any contract or witness in support of their claim that plaintiff acted without their control when he used the makeshift ramp. As to his Labor Law § 241(6) claim, plaintiff offered an affidavit by his safety expert opining that defendants violated Industrial Code (12 NYCRR) §§ 23-2.1, 23-1.22 and 23-1.7(f).

The motion court denied defendants' motion and, upon searching the record, granted plaintiff summary judgment on his Labor Law § 240(1) claim, based upon his uncontradicted testimony that the plywood ramp gave way. Citing *McCann v Central Synagogue* (280 AD2d 298, 299-300 [2001]), the motion court reasoned that defendants were liable under any interpretation of the facts, that is, if they provided the plywood, then the statute is violated because of a defective safety device, and, if they failed to provide the plywood, then that failure is also a violation of the statute. As to plaintiff's Labor Law § 200 claim, the court found that Covelli's testimony "that when plaintiff assisted in moving the carts the foreman did not stop him from doing so . . . creates an issue of fact as to the defendants' control over the plaintiff's work as plaintiff's actions were performed in full view of the testifying foreman who

also assisted plaintiff in moving the carts." The court also found that Industrial Code (12 NYCRR) §§ 23-1.7(f) and 23-1.22(b) are sufficiently specific to support liability under Labor Law § 241(6).

Defendants appeal, and argue that plaintiff was not performing a protected activity since he was merely at the site to pick up debris; that the piece of plywood cannot be called an "elevated work surface" since none of the safety devices enumerated in section 240(1) could have been used on the plywood to allow plaintiff to perform the work more safely; and that plaintiff was not injured when he fell from a height or when a load being hoisted above him fell upon him but was struck by an object at the same height as the one he was working on. They further argue that the alleged Industrial Code violations are not applicable to the facts of this case since plaintiff was not using the plywood as a means of accessing any working levels above or below ground at the site and that plaintiff has failed to present any evidence that defendants exercised any degree of actual supervision or control over the work being performed at the time of the accident.

As to his section 240(1) claim, plaintiff responds that the motion court properly concluded that the collapse of a makeshift ramp bridging a gap of 12 to 18 inches constitutes a violation of the statute, based on Covelli's testimony that a ramp was needed

at the drop where the driveway curb met the roadway. He also argues that defendants fail to even mention *McCann v Central Synagogue* (280 AD2d 298, 299-300 [2001]) or *Conklin v Triborough Bridge & Tunnel Auth.* (49 AD3d 320, 321 [2008]), relied upon by the motion court, and that their claim that removing construction debris from a work site is not a protected activity under Labor Law § 240(1) is being raised for the first time on appeal and is contrary to this Court's decision in *Rivera v Squibb Corp.* (184 AD2d 239 [1992]). Plaintiff further argues that there is ample evidence supporting his Labor Law § 241(6) claim and that Covelli's testimony establishes that HRH controlled the work of moving the dumpsters and created the dangerous condition by allowing the use of the unsecured plywood as a ramp, in violation of Labor Law § 200.

Plaintiff relies heavily on this Court's decision in *Rivera* for the proposition that removing debris is an integral part of a construction project. However, all the relevant facts are not set forth in our memorandum decision in *Rivera*. An examination of the appellate record demonstrates, as discussed below, that the relevant facts in that case are readily distinguishable.

In avoiding any discussion of *Rivera*, which is extensively briefed by the parties, the majority adopts plaintiff's argument that defendants' claim that removing construction debris from a work site is not a protected activity under Labor Law § 240(1) is

raised for the first time on appeal. However, this conclusion is belied not only by the motion court's decision, which specifically notes that "[w]ith respect to plaintiff's Labor Law 240 claim defendants argue that the plaintiff was not engaged in an activity requiring protection," but also by the parties' appellate briefs, which frame the primary issue presented as whether plaintiff was engaged in a protected activity under Labor Law § 240(1) at the time of his accident. There is nothing in the motion court's decision or in the record to support the majority's conclusion that the motion court "raised new matter sua sponte" or in any way did not decide the issues as presented by the parties. Clearly, the question of whether plaintiff was engaged in work covered by section 240 was raised and decided below. Nevertheless, although it declines to reach that argument, the majority rejects plaintiff's Labor Law § 240(1) claim on other grounds.

In *Rivera* (184 AD2d at 239), an employee of a subcontractor performing demolition work on the 25th through 27th floors of an office building was assigned to help a fellow employee empty the contents of 14 dumpsters into their employer's garbage truck. To do so, the truck was equipped with a mechanism to which the loaded dumpsters were attached by a metal rod and then hoisted and their contents dumped into the garbage truck. The containers were located on the loading dock on the ground floor of the

building. The accident occurred when debris became stuck in one of the containers that was being hoisted. Plaintiff attempted to loosen the debris and had his arms inside the container when his coworker pulled the lever to activate the hoist. Plaintiff was lifted off the ground with the container until his coworker realized the problem and stopped the hoist and brought it back down. In the process, plaintiff fell to the ground and was injured.

First, unlike the plaintiff here, Rivera was an employee of the demolition subcontractor that was actually performing the demolition work in the building at the time of the accident and thus was a member of a team within the meaning of *Prats v Port Auth. of N.Y. & N.J.* (100 NY2d 878, 882 [2003]). As the court stated in *Prats*, explaining *Martinez v City of New York* (93 NY2d 322 [1999]), where there are separate, sequential phases in a particular project, involving different employees working for different contractors, work being performed during "a separate phase easily distinguishable from other parts of the larger construction project" may therefore fall outside the protection of Labor Law § 240 (100 NY2d at 881). In *Prats*, the plaintiff, an assistant mechanic employed by the air conditioning contractor, was hit by a falling ladder on which his coworker was inspecting an air conditioning return fan. The Court held that such inspections fell within the purview of Labor Law § 240(1)

because they "were ongoing and contemporaneous with the other work that formed part of a single contract" (*id*).

Here, on the other hand, the record is clear that, at the time of plaintiff's accident, plaintiff's employer, Rite-Way, was not hired to perform any demolition work on the premises, and the work being performed by plaintiff fell into "a separate phase easily distinguishable from other parts of the larger construction project." Plaintiff was not a person "employed" to carry out any demolition work and was there merely to pick up garbage. Thus, unlike the plaintiffs in *Rivera* and *Prats*, he was not within the class of workers that Labor Law §§ 200, 240 and 241 were enacted to protect and cannot invoke these provisions as a basis for recovery (*see Martinez*, 93 NY2d at 326; *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109-1110 [1991]).

Among the issues presented in *Rivera* was whether Labor Law § 200 applied, given the fact that the injuries occurred away from the actual demolition work site. In affirming the denial of summary judgment to defendants, this Court found that the debris removal process was part of the construction job site and was accorded the protections of the Labor Law (184 AD2d at 240). Although not specifically spelled out, this conclusion necessarily implicated Labor Law § 200(1), which requires owners and general contractors to provide construction site workers with

a safe place to work and mandates that "[a]ll machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons," i.e., "persons employed therein or lawfully frequenting such places." The plaintiff in *Rivera* alleged that the hoisting mechanism was not properly operated. This Court also found that there was a question of fact whether there was a violation of Labor Law § 240(1), which was clearly applicable since plaintiff, an employee of the subcontractor that was actually doing the demolition work at the time of the accident, was injured in the process of hoisting the dumpster into the truck. Here, there was no hoisting involved, and plaintiff was merely pushing the mini-container when it overturned.

Thus, although the intent of section 240(1) is to protect workers employed in the acts enumerated in the statute (here, construction), "even while performing duties ancillary to these acts," there is absolutely no evidence that plaintiff was a "member of a team that undertook an enumerated activity under a construction contract" (*Prats*, 100 NY2d at 882). Nor was he employed by defendant HRH, the general contractor, or any subcontractor actively working on the project. Rather, he was simply picking up debris that HRH employees put in Rite-Way's mini-containers to be emptied by plaintiff into Rite-Way's truck.

Moreover, although removal of debris may be a necessary part of any construction or demolition process, "the question whether a particular [activity (e.g., an inspection or, as in this case, removal of debris)] falls within section 240(1) must be determined on a case-by-case basis, depending on the context of the work" (*Prats*, 100 NY2d at 883). In *Prats*, the Court found that a confluence of factors brought the plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred (*id.*). None of these factors is present in this case. As this Court noted in *Adair v Bestek Light. and Staging Corp.* (298 AD2d 153, 153 [2002]), "[t]he Court of Appeals, in holding that 'the task in which an injured employee was engaged must have been performed during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure"' in order to fall within the statute (*Martinez v City of New York*, 93 NY2d 322, 326), has expressly rejected an 'integral and necessary' test as 'improperly enlarg[ing] the reach of the statute beyond its clear terms'(*id.*)." Clearly, at the time of the accident, plaintiff was not participating in an activity enumerated in Labor Law § 240(1).

Even assuming arguendo that plaintiff was engaged in an enumerated activity, it is well settled that the "special hazards" against which the Legislature intended to protect workers under Labor Law § 240 are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]). While there is no "bright-line" test regarding height differentials (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]), height differentials are significant in determining whether the work being done required the use of "scaffolds, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [or] ropes" (Labor Law § 240[1]). Here, the work required no such protective devices.

Viewing the evidence in the light most favorable to plaintiff, the record establishes that (1) he was not part of a "team" involved in an activity requiring protection; (2) he was never supervised or directed by HRH or NYU in his work; and (3) rather than wait for an HRH employee, he undertook to push the mini-container to his truck using a piece of plywood that was already in place as a makeshift ramp to make it easier to push the mini-container to street level. There is absolutely no

evidence as to how the piece of plywood came to be placed where it was.

Nevertheless, citing *Conklin v Triborough Bridge & Tunnel Auth.* (49 AD3d 320, 321 [2008], *supra*), the motion court found that since defendants did not deny that the makeshift ramp was necessary to move the mini-containers through the height differentials of the loading dock, the curb and the street, they were required to provide appropriate safety devices. However, *Conklin* is readily distinguishable in that the so-called ramp or "chicken ladder" in that case consisted of two 10 or 12-foot-long planks with 2-by-4s nailed across the planks at approximately 20-inch intervals, to act as rungs or crosspieces, and was laid on a 45-degree slope to provide the sole means of access to the plaintiff's employer's shanty. To access the shanty, the worker first had to climb down an aluminum ladder backwards, turn or zigzag at its base, and then go forward eight feet down the chicken ladder to the shanty. Clearly, not only the height differential involved, but also its use as the functional equivalent of a ladder, a device enumerated in the statute, brought the chicken ladder within the ambit of Labor Law § 240 ("The rule of noscitur a sociis limits the construction of the 'other devices' of the statute to the company of the specific words preceding it . . . [i.e.,] a scaffold, hoist, stay, ladder,

sling, hanger, block, pulley, brace, iron or rope" (*Ryan v Morse Diesel*, 98 AD2d 615, 615-616 [1983]), and this Court found that defendants' failure to equip the chicken ladder with a handrail or other safety device was the proximate cause of the plaintiff's injuries.

Here, on the other hand, whether accepting plaintiff's or Covelli's description, the height differential between the top end and bottom end of the piece of plywood was, at most, 18 inches. Such height differentials have been found insufficient to implicate Labor Law § 240 (*see e.g. DeStefano v Amtad N.Y.*, 269 AD2d 229 [2000] [no cause of action under Labor Law § 240(1) since the ramp that was positioned at building entrance and rose to a maximum of 12 inches did not present elevation hazard]). Indeed, where, as here, a plank, was used as a temporary passageway or stairway, as opposed to the functional equivalent of a device enumerated in the statute, section 240(1) has been held not to apply (*see Paul v Ryan Homes*, 5 AD3d 58, 60-61 [2004]).

As noted above, the motion court, citing *McCann v Central Synagogue* (280 AD2d 298, 299-300 [2001]), nevertheless reasoned that defendants were liable under any interpretation of the facts. However, in *McCann*, the plaintiff was pushing a bin filled with debris up an unbarricaded wooden ramp four to eight feet high when he fell. This Court found that the issue was not

whether the ramp itself was a safety device but whether it was constructed and maintained with adequate safety devices, such as railings or safety curbs.

As to plaintiff's Labor Law § 241(6) claim, the sections of the Industrial Code he relies upon are not applicable to the facts of his case. While plaintiff argues that the piece of plywood in issue did not meet the two-inch thickness requirement in Industrial Code (12 NYCRR) § 23-1.22(b), the piece of plywood is not the type of ramp, runway or platform contemplated by that section. Moreover, Industrial Code § 23-1.7(f), entitled "*Vertical passage*," merely provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case *ladders or other safe means of access shall be provided*" (emphasis added). Clearly, the ramps, stairways or runways contemplated by the statute are of such a nature that, in their absence, a ladder would be necessary to access different working levels (*compare Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 584-585 [2008] [failure to provide safe access from highway overpass to wooden deck three feet below]; *Conklin*, 49 AD3d at 321 [10 to 12 foot "chicken ladder" laid on 45-degree slope as sole means of access to employer's shanty]; *Miano v Skyline New Homes* Corp., 37 AD3d 563, 565 [2007] [failure to provide safe means of access to

basement apartment of newly constructed house]). Here, there is no claim, and there is no basis in the record for any claim, that plaintiff's activities required a means of access to another working level within the meaning of Industrial Code § 23-1.7(f) (*see Lavore v Kir Munsey Park 020 LLC*, 40 AD3d 711, 713 [2007], *lv denied* 10 NY3d 701 [2008][utility bin on side of truck not a working level above ground requiring a stairway, ramp, or runway under that section]).

That leaves only plaintiff's Labor Law § 200 and common-law negligence claims.

With regard to these claims, the majority rightly asserts that, to support a finding of liability, plaintiff must show that defendants supervised or controlled plaintiff's work or had actual or constructive knowledge of the alleged unsafe condition in an area over which they had supervision or control, or created the unsafe condition (*Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [2005]). Curiously, however, although the majority finds that the fact that plaintiff was performing his work pursuant to a contract between HRH and Rite-Way has no bearing on his Labor Law § 240(1) claim, it nevertheless finds, with regard to his Labor Law § 200 claim, that Covelli's testimony that he was responsible for moving the containers to the Rite-Way trucks parked on the street and that "sometimes" plaintiff and other Rite-Way employees moved the containers (because "basically we're

trying to help each other"), "when coupled with HRH's contractual obligation to have rubbish removed from the project site, creates an issue of fact as to control." I disagree.

While there is a February 11, 2002 subcontract in the record calling for Rite-Way to perform $13,500 in demolition work for NYU's Emergency Department Radiology Renovation project, neither the parties nor the motion court allude to it and there is no evidence that such demolition work was being performed more than two years later on March 19, 2004, the date of plaintiff's accident. In fact, both plaintiff and Covelli testified at their depositions that on the day of the accident Rite-Way was not performing any work at that location and that plaintiff was there simply to pick up dumpsters.

Any argument that the parties' conduct, i.e., cooperating in the removal of the construction debris, evidences a contractual relationship that supports a finding that plaintiff's activity was protected is not only unpersuasive, but also is not raised by plaintiff on appeal. Plaintiff's only arguments on appeal with regard to his Labor Law § 200 claim are that the motion court correctly found that issues of fact were presented since defendants "proffered neither a contract nor a witness to describe the NYU Defendants' contractual roles," and that Covelli testified that he had a practice of using debris as makeshift ramps prior to plaintiff's accident, that he knew that Rite-Way

drivers, in the spirit of getting the work done quickly and efficiently, would move the debris-filled containers to the truck, and that he never told plaintiff to stop.

Plaintiff knew nothing about any contract. Covelli, when asked whether there was a written contract or whether it was done by phone, responded: "I think it is done verbally." None of the contracts in the record address the agreement or course of conduct, whether written or oral, whereby Rite-Way would pick up any construction debris when necessary and haul it away. Both witnesses testified that plaintiff was there simply to pick up garbage ("Q. They [Rite-Way] had no employees who actually worked inside the building do [*sic*] any demolition or other work? A. [Covelli]. No, sir"). As noted above, 660 First Avenue was only one of a number of locations at which plaintiff was scheduled to make pickups that day.

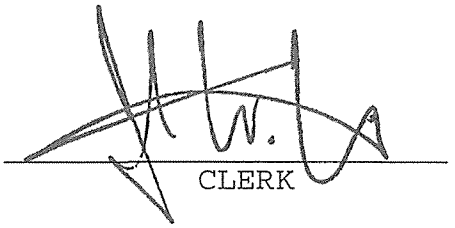
As to HRH's control and supervision of plaintiff's work, the majority is aware that the sole basis for the motion court's finding that there was a question of fact as to defendants' control over plaintiff's work was that "the foreman [Covelli] testified that when plaintiff assisted in moving the carts the foreman did not stop him from doing so." The majority does not adopt this questionable rationale, which relies upon a double negative, since it is also aware that both plaintiff and Covelli consistently testified that Covelli never supervised plaintiff's

work in any way. Nevertheless, the majority would still find that Covelli's testimony that in the past plaintiff sometimes helped HRH employees move the containers to the truck (with HRH's implicit acquiescence), because "basically we're trying to help each other," when coupled with his statement that it was HRH's responsibility to move the containers to the street, creates an issue of fact as to control and notice. This conclusion totally misses the point regarding control and supervision. To impose liability on an owner or general contractor under Labor Law § 200, "*there must be a showing that the owner or general contractor directly oversaw or controlled the actual work in which plaintiff was engaged at the time of his injury*" (emphasis added)(*see DeSimone v Structure Tone*, 306 AD2d 90, 91 [2003]); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [2007]. Clearly, even if there were a question of past supervision, which there is not, there is no such showing with regard to plaintiff's activities on the day of the accident. Finally, inasmuch as neither plaintiff nor the majority mentions his claim of common-law negligence, I assume that they agree that there is no evidence supporting that claim. Thus, defendants should have been granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims.

Accordingly, for all the foregoing reasons, summary judgment should be granted and the complaint dismissed in its entirety against all defendants.

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

ENTERED: JUNE 25, 2009



CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

638 The People of the State of New York, Ind. 4567/07
Respondent,

-against-

Travis Harry,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Elizabeth Howell of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 11, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

We find no basis for disturbing the court's credibility determinations, including its finding that the police did not conduct a manual body cavity search. Further, we conclude that the visual cavity inspection was conducted with "a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity" (*People v Hall*, 10 NY3d 303, 311 [2008], *cert denied* 555 US __, 129 S Ct 159 [2008]).

Prior to arresting defendant, the police had observed him

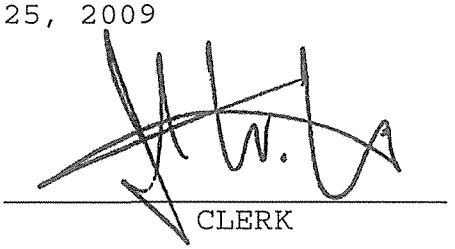
for a period of 30 to 35 minutes, during which time they observed three apparent drug transactions with other individuals. During each of the transactions, defendant was observed "reaching into his pants," after which he would make "hand-to-hand" contact with the individuals.

After defendant was arrested, he was handcuffed behind his back and placed in the police car. Once he was seated in the car, he was observed "moving around a lot, like sliding up and down in his seat and making movements with his hands . . . as if he was attempting to either secrete something in his pants or remove something from his pants." One of the arresting officers testified that from his professional experience he was well aware that those involved in the drug trade often secreted contraband in their buttocks or groin area.

Thus, since defendant's actions gave the police reasonable suspicion that he may have been secreting drugs in a body cavity, the visual cavity search was justified (*see e.g. People v Clayton*, 57 AD3d 557, 558-559 [2008]).

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

ENTERED: JUNE 25, 2009



CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, JJ.

684 Helen Sanchez, Index 25465/02
Plaintiff-Appellant,

-against-

Morrisania II Associates, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Silverman Sclar Shin & Byrne PLLC, New York (Alan M. Sclar of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered May 31, 2007, upon a jury verdict awarding plaintiff $100,000 for past pain and suffering and $150,000 for past lost earnings, unanimously modified, on the facts, the past pain and suffering award vacated and a new trial directed on damages for past pain and suffering, and otherwise affirmed, without costs, unless defendants, within 30 days after service of a copy of this order, stipulate to an increased award of $250,000 for past pain and suffering and entry of an amended judgment in accordance therewith.

The award of $100,000 for past pain and suffering deviated materially from reasonable compensation under the circumstances (CPLR 5501[c]; *see e.g. Bernstein v Red Apple Supermarkets*, 227 AD2d 264, 266 [1996], *lv dismissed* 89 NY2d 961 [1997]). It is undisputed that as a result of the accident, the 32-year-old

plaintiff sustained a fracture of her ankle, which required her to wear a cast for six to eight weeks, to walk with crutches for one week, and use a cane. It is further undisputed that plaintiff sustained a tear of her right rotator cuff, for which she underwent surgery and then one to two months of physical therapy. The award for past pain and suffering is accordingly increased to the extent indicated. However, given the lack of permanency of these injuries, there is no basis to disturb the jury's determination that plaintiff was not entitled to an award for future pain and suffering.

As to plaintiff's lower back, defendants' experts testified, contrary to plaintiff's witnesses, that plaintiff did not sustain a traumatically induced injury, that any lumbar condition was due to a congenital abnormality and chronic degenerative changes, as seen on the diagnostic films entered into evidence, and that plaintiff's subjective complaints of pain were not correlated with objective findings on clinical examination. A reasonable view of the evidence supports the determination that the jury may be presumed to have made, based on its evaluation of the conflicting expert testimony, that plaintiff's back injury was not caused by the accident (*see Goldstein v Snyder*, 3 AD3d 332, 333-334 [2004]).

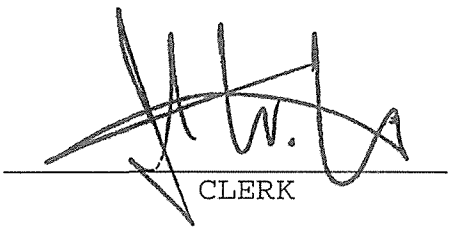
The jury's determination not to award damages for past or future medical expenses is not against the weight of the

evidence. As to the former, it is not clear from the hospital printout on which plaintiff relied whether the $80 shown to be owed by her either is attributable to the injuries she sustained as a result of the accident or will be paid from a collateral source. As to the latter, plaintiff's ankle and shoulder injuries resolved before trial and, as indicated, the jury could reasonably have found that her back injury was not caused by the accident, but resulted from a degenerative condition predating the accident (*see e.g. Mejia v JMM Audubon*, 1 AD3d 261 [2003]).

Nor is the jury's determination not to award damages for future lost earnings against the weight of the evidence. The vocational rehabilitation expert's opinion that plaintiff could return to work was based on his interview with her, her medical and employment records, government publications, and his experience as a vocational rehabilitation counselor. Plaintiff's contention that the expert was also required to discuss plaintiff's employability with employment agencies is unsupported and unpersuasive.

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

ENTERED: JUNE 25, 2009



CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Abdus-Salaam, JJ.

707 Ulric Todman, Index 101592/04
Plaintiff-Appellant,

-against-

Akiko Yoshida,
Defendant,

Wesley Brown, et al.,
Defendants-Respondents.

Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellant.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 24, 2008, which granted the motion of defendants Brown and Cook-Brown to preclude plaintiff's expert from testifying at trial and for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court correctly precluded the testimony of plaintiff's expert toxicologist. The foundation for the expert's opinion that plaintiff's alleged health condition was caused by toxic chemicals contained in the wood-stripping agents used by defendant Yoshida in an apartment in the building owned by Brown and Cook-Brown lacked the "specific causation" component, i.e., that plaintiff was exposed to levels of the toxins sufficient to cause the condition (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). While "not required to pinpoint exposure with

complete precision," the expert failed even to offer a "scientific expression" of plaintiff's exposure (*id.* at 449).

He neither provided a measurement of plaintiff's exposure nor employed any of the available methods for reasonably estimating it, such as mathematical modeling or comparing plaintiff's exposure level to those of study subjects whose exposure levels were precisely determined. Absent was any statement that the chemicals in question are capable of causing injury at even the lowest exposure level.

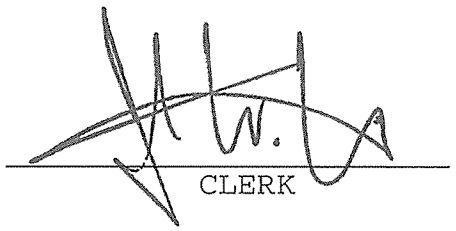
In his affidavit submitted in opposition to defendants' motion, the expert also failed to provide any measurement or estimate of plaintiff's exposure to the subject toxins. While he opined, based on the manner in which Yoshida used the wood-stripping agents, that Yoshida's exposure to the toxins contained in those agents exceeded the limits set by OSHA, "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation" (*id.* at 450). Furthermore, he failed to state any relationship between Yoshida's exposure and that of plaintiff, who occupied a different apartment.

Thus, based upon defendant's showing that the testimony of

plaintiff's expert toxicologist should be precluded, the complaint was correctly dismissed on the ground that plaintiff lacked the requisite causation evidence.

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

ENTERED: JUNE 25, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

833 Beagle Developers, LLC, Index 601113/07
Plaintiff Appellant,

-against-

Long Island Beagle Club #II, Inc., et al.,
Defendants-Respondents.

Bryan Cave LLP, New York (William J. Hibsher of counsel), for appellant.

Meyer, Suozzi, English & Klein, P.C., Garden City (Abraham B. Krieger of counsel), for Long Island Beagle Club #II, Inc. and Long Island Beagle Club, Inc., respondents.

Catalano, Gallardo & Petropoulos, LLP, Jericho (Matthew K. Flanagan of counsel), for Twomey, Latham, Shea, Kelley, Dubin & Quartararo LLP, respondent.

Appeal from order, Supreme Court, New York County (Herman Cahn, J.), entered September 4, 2008, which, in an action to recover a down payment on a real estate transaction, denied plaintiff buyer's motion for summary judgment and granted the motions by defendants Long Island Beagle Club, Inc. and Long Island Beagle Club #II, Inc. (seller) and Twomey, Latham, Shea, Kelley, Dubin & Quartararo LLP (escrow agent) for summary judgment dismissing the complaint, deemed an appeal from the judgment, same court and Justice, entered November 25, 2008 (CPLR 5501[c]), dismissing the complaint, and, so considered, the judgment unanimously affirmed, with costs.

Under section 1.02(c) of the contract, plaintiff had 60 days (extended to 75) to perform due diligence, i.e., undertake

environmental, engineering, zoning and abstract studies, and cancel the contract, and have its down payment returned, if it determined that the property was not suitable for its intended use. Under section 1.02(d), if plaintiff did not cancel within this 75-day period and deposited $250,000 in addition to the $750,000 down payment it had already made on contract signing, its right to cancel under section 1.02(c) would be deemed waived, and the entire down payment would become nonrefundable except for defendant's willful default in closing.

Assuming, as plaintiff argues, that its failure to cancel within the 75 days and its deposit of the additional $250,000 did not result in its waiver of defendant's obligation to provide marketable title, section 2.01(c) unambiguously states that defendant was not obligated to make any effort or expend any amount to dispose of "Title Objections." Such objections included plaintiff's objection to title arising out of the prior merger between Beagle Club, Inc. and Beagle Club #II, Inc. If defendant failed to cure any such Title Objections, plaintiff could terminate the contract or accept such title as defendant could deliver. Once defendant declared a time-of-the-essence closing and plaintiff made its own declaration for a time-of-the-essence closing for the same date, plaintiff unequivocally declared its intention to go forward, thereby waiving any Title Objections and agreeing to accept such title as defendant could

convey.

Additionally, assuming plaintiff elected at the closing to terminate the contract based on defendant's failure to cure plaintiff's Title Objection based on the merger, that failure was not a default by defendant, much less a willful default, since defendant was under no obligation to make any effort to cure plaintiff's Title Objection. Consequently, the down payment remained nonrefundable and constituted liquidated damages pursuant to section 5.03 of the contract.

Nor were the contract's unambiguous terms modified by defendant's attempt to accommodate plaintiff's requests for documents relating to the merger. The contract clearly states that a waiver of any right at one time does not waive any right at any other time, and further states that the contract may only be modified in writing. Plaintiff cannot negate these unambiguous terms by parol evidence (*see Namad v Salomon*, 74 NY2d 751, 753 [1989]; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). Defendant did not, by its actions, modify the agreement so as to become obligated to cure the purported title objections.

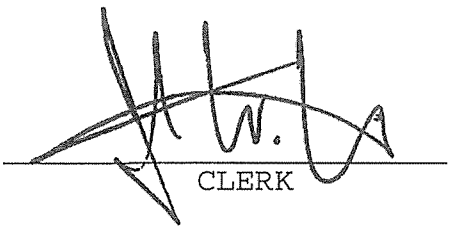
Plaintiff's interpretation of section 2.01(c), which views "Title Objections" as referring to the title issues contained in section 2.01(a), and "title objections," lower case, as referring to plaintiff's objections contained in its title report, changes the plain meaning of defendant's obligations and is not a

reasonable interpretation of the contract (*see AIU Ins. Co. v Robert Plan Corp.*, 44 AD3d 355, 356 [2007]). Section 2.01(a) expressly defines the title issues contained therein as "Permitted Encumbrances," not "Title Objections," and the plain meaning of Title Objections does not change, without further explanation, merely because the lower case is used.

Finally, the escrow agent's release of the down payment prior to closing without obtaining other security from defendant was not a material breach as plaintiff retained an equitable lien on the property (*see Sloan v Pinafore Homes*, 38 AD2d 718 [1972]; *Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 405 [1983]), which was unencumbered and worth far in excess of the down payment. In any event, since plaintiff is not entitled to return of the down payment, it suffered no damages as a result of the escrow agent's release of the down payment.

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

905 The People of the State of New York, Ind. 5051/07
Respondent,

-against-

Stanley Guy,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 10, 2008, convicting defendant, upon his plea of guilty, of attempted grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

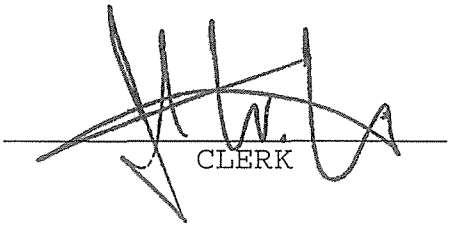
The court properly exercised its discretion in denying defendant's application to withdraw his guilty plea based upon his alleged misunderstanding as to the terms of his agreed-upon sentence. "Compliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580 [1976]). The record reveals that the court clearly explained that the sentence would run concurrently with the time remaining on a previously imposed sentence, nunc pro tunc as of November 28, 2007. Moreover, the court specifically

stated that the sentence could not be imposed nunc pro tunc as of any earlier date. Defendant discussed the matter at length with counsel and had ample opportunity to consider it (*see e.g. People v Torres*, 203 AD2d 208 [1994]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: JUNE 25, 2009



Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

907 Laverne Blair, Index 6143/05
Plaintiff-Respondent,

-against-

Carolyn Richards, et al.,
Defendants-Appellants,

Delores Wilson, et al.,
Defendants.

Law Office of Thomas K. Moore, White Plains (Roula Theofanis of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

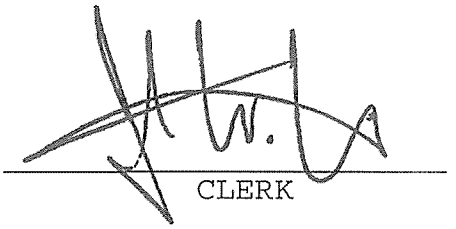
Order, Supreme Court, Bronx County (Lucy Billings, J.), entered September 17, 2008, which denied defendants-appellants Carolyn and Frank Richards' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The Richardses failed to make their initial prima facie showing that the runoff from melting piles of snow formed by shoveling on their property did not create or exacerbate the conditions that caused plaintiff's accident — an icy sidewalk running across a sloping grade. Frank Richards admitted his awareness of a runoff condition in the past, as well as the fact that he returned home on the date of the accident to find

substantial ice on the sidewalk where plaintiff fell (*see e.g. Knee v Trump Vil. Constr. Corp.*, 15 AD3d 545 [2005]; *see also Santiago v New York City Hous. Auth.*, 274 AD2d 335 [2000]).

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

908 In re Fernando S. and Another,

Children Under the Age
of Eighteen Years, etc.,

Fernando S.,
Respondent-Appellant,

New York City Administration for
Children's Services,
Petitioner-Respondent.

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Wendy Abels, New York, Law Guardian.

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about January 27, 2005, which, to the extent appealed from, as limited by the briefs, transferred custody of respondent father's children Fernando S. and Jesus S. to petitioner New York City Administration for Children's Services upon a finding of neglect, unanimously affirmed, without costs.

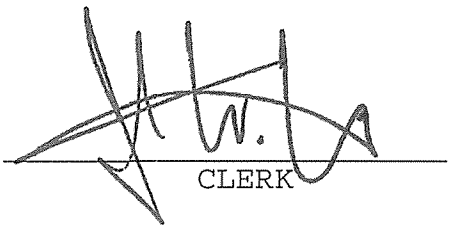
The finding of neglect under Family Ct Act section 1012(f) based upon inadequate guardianship and supervision of the subject children was supported by a preponderance of the evidence, including appellant's admissions in connection with a plea in a federal court criminal proceeding that he sold illegal narcotics and possessed loaded firearms at the home of the subject children

(*see* Family Ct Act § 1046 [b][i]). In reviewing the court's determinations, we must accord great weight and deference to them, including the court's assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Elijah C.*, 49 AD3d 340 [2008]).

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

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

909 Ficus Investments, Inc., et al., Index 600926/07
Plaintiffs-Respondents,

-against-

Private Capital Management, LLC, et al.,
Defendants,

Thomas B. Donovan,
Defendant-Appellant.

- - - - -

Schlam Stone & Dolan LLP,
Nonparty-Appellant.

[And Other Actions]

- - - - - - - - - - - -

910-
911-
911A Ficus Investments, Inc.,
Plaintiff,

Private Capital Group, LLC,
Plaintiff-Appellant,

-against-

Thomas B. Donovan,
Defendant-Respondent,

Private Capital Management, LLC, et al.,
Defendants.

[And Other Actions]

Michael C. Marcus, Long Beach, for Thomas B. Donovan, appellant/respondent.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for Schlam Stone & Dolan LLP, appellant.

Alston & Bird, LLP, New York (John F. Cambria of counsel), for Ficus Investments, Inc. and Private Capital Group, LLC, respondents, and Private Capital Group, LLC, appellant.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 3, 2009, which, to the extent appealed from as limited by the briefs, confirmed that part of a referee's report that found reasonable the amount of $1,541.999.08 in legal fees to be advanced by plaintiff Private Capital Group, LLC, on behalf of defendant Thomas B. Donovan, modified the report to require plaintiff to submit payment to Schlam Stone and Dolan LLP, counsel to Donovan, and directed Schlam Stone and Dolan, upon receipt of such payment, to pay Curtis, Mallet-Prevost, Colt & Mosle LLP its unpaid fees for legal services rendered to Donovan, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 26, 2009, unanimously dismissed, without costs, as superseded by the appeal from the February 3, 2009 order. Orders, same court and Justice, entered February 5, 2009 and February 24, 2009, insofar as they directed Schlam Stone to pay Curtis its unpaid fees, unanimously affirmed, without costs.

The referee's recommendation that no allocation of legal fees and expenses billed by three law firms that represented Donovan was required because the firms also represented other defendants who either were not entitled to advancement of legal fees and expenses or did not seek such advancement prior to settling was an equitable resolution of the issue, fully supported by the evidentiary record, and consistent with the

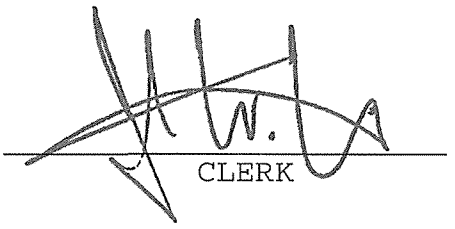
purpose of advancing legal fees (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 9 [2009]; *Fasciana v Electronic Data Sys. Corp.*, 829 A2d 160, 177 [Del Ch 2003]; *cf. Schoon v Troy Corp.*, 948 A2d 1157, 1171 [Del Ch 2008] [requiring pro rata allocation of advancement made to jointly represented officer]). The invoices had been reduced, pursuant to stipulation, to eliminate expenses either attributable to other defendants or not incurred because of Donovan's having been an officer of the company. The evidence was uncontroverted that the remaining expenses reflected legal work that was performed by the three law firms for Donovan's benefit and would have been performed regardless whether the firms also represented the other defendants.

Schlam Stone's assertion of a charging lien with respect to the advanced legal fees was correctly rejected, since the advancement to Donovan is not made pursuant to a final determination that he is entitled to indemnification from plaintiff (Judiciary Law § 475; *see Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 187-188 [2002]; *Natole v Natole*, 295 AD2d 706 [2002]), but only

represents a "credit," which he may be required to repay in the event he is ultimately unsuccessful in the defense of the lawsuit (*see Ficus*, 61 AD3d at 10; *Fasciana*, 829 A2d at 175).

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

ENTERED: JUNE 25, 2009



Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

912 The People of the State of New York, Ind. 3558/07
Respondent,

-against-

Anthony Pompey,
Defendant-Appellant.

Center for Appellate Litigation, New York, (Robert S. Dean of counsel), and Milbank, Tweed, Hadley & McCloy, New York (Ateesh Chanda of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 2, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 7 years and 3 years, respectively, unanimously affirmed.

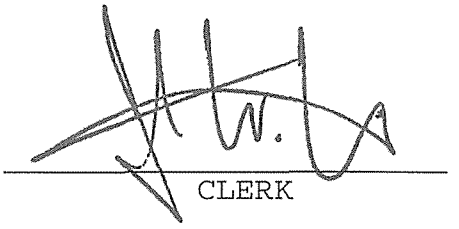
The court properly denied defendant's suppression motion. The officers' detailed testimony, taken together with the particular Patrol Guide section received in evidence, was sufficient to satisfy the People's initial burden of establishing that there was a standard policy regarding inventory searches, that the standard procedure was designed to meet the objectives justifying such searches, and that the search of defendant's bag was in compliance with the established procedure (*see People v Johnson*, 1 NY3d 252, 256 [2003]). In particular, the hearing

evidence made it clear that the relevant aspects of the procedure at issue were standardized rather than discretionary. The People also established that the police made a proper inventory search and not a search for incriminating evidence; we note that an officer continued and completed the search after another officer discovered a pistol. Furthermore, the officers compiled a proper inventory list of the full contents of defendant's bag, notwithstanding that they listed contraband and noncontraband items on different pages (*compare People v Gomez*, 50 AD3d 407, 409-410 [2008] [list limited to evidentiary items held insufficient]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

916 The People of the State of New York, Ind. 2909/07
Respondent,

-against-

Miguel Ortiz,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about April 9, 2008,

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

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

ENTERED: JUNE 25, 2009

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Abdus-Salaam, JJ.

917 Dennis Parente, et al., Index 101656/06
Plaintiffs-Appellants,

-against-

277 Park Avenue LLC, et al.,
Defendants-Respondents.

- - - - - - - -

JP Morgan Chase,
Third-Party Plaintiff-Respondent,

-against-

Cushman & Wakefield, Inc.,
Third-Party Defendant-Respondent.

Mauro Goldberg & Lilling LLP, Great Neck (Anthony F. DeStefano of counsel), for appellants.

Russo, Keane & Toner, LLP, New York (Kevin G. Horbatiuk of counsel), for 277 Park Avenue LLC, 277 Park Avenue Condominium and JP Morgan Chase, respondents.

Fidelman & McGaw, Jericho (Ross P. Masler of counsel) for Cushman & Wakefield, Inc., respondent.

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered May 30, 2008, which denied plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim, granted defendants' cross motion for summary judgment dismissing the complaint, and granted third-party defendant's motion for summary judgment dismissing the third-party action, unanimously modified, on the law, defendants' cross motions for summary judgment dismissing the § 240(1) cause of action denied, plaintiffs' motion granted, and the motion to dismiss the third-

party complaint denied, and otherwise affirmed, without costs.

Plaintiff Dennis Parente, an operating engineer employed by third-party defendant, was allegedly injured on a Saturday when he fell off a ladder he had placed on a desktop in an office leased by defendant Chase, while inspecting a malfunctioning booster fan over the desk. His supervisor, also employed by third-party defendant, testified that the building management had reported the malfunction, and this was considered an emergency because high temperatures in the office could damage the tenant's computers.

Labor Law § 240(1) imposes absolute liability on owners, contractors and their agents for injuries to workers engaged in the repairing of a building or structure that results from falls from ladders or other similar devices that do not provide the intended protection against such falls (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290 [2002]). It does not, however, apply to routine maintenance that is not performed in the context of construction or renovation. Replacement of parts that routinely wear out is considered maintenance, outside the purview of this section (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Where something has gone awry, however, requiring repair, § 240(1) is applicable (*see Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202 [2002]; *Franco v Jemal*, 280 AD2d 409 [2001]).

No evidence was presented that the cause of the booster fan's malfunction was wear and tear on the power box motor and that only routine maintenance was required to fix the booster fan. Although the injured plaintiff stated this was sometimes a problem, neither he nor his supervisor actually knew the reason for the fan's breakdown, so he went to work on this particular weekend to investigate. An employee of the tenant testified that booster fans did not break down on a regular basis. Thus, plaintiff was not engaged in routine maintenance when he fell. Instead, he was attempting to repair a broken fan by first ascertaining the cause of the breakdown.

Defendants and third-party defendant failed to raise a triable issue of fact as to the allegation that plaintiff was the sole proximate cause of the accident. In these circumstances, plaintiff should have been granted summary judgment as to liability on the Labor Law § 240(1) cause of action.

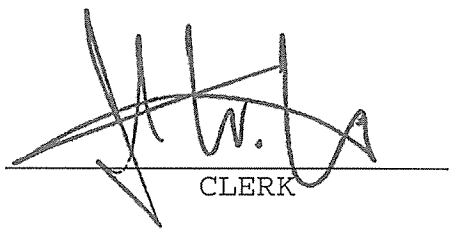
However, the court properly dismissed plaintiffs' claim under Labor Law § 241(6) (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), as well as under § 200 and common-law negligence (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), since no construction was being performed on the floor where the accident occurred.

As to the third-party action for indemnification, we find

triable issues of fact concerning third-party defendant's coverage under the tenant's insurance policy and the applicability of certain exclusions.

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

918 The People of the State of New York, Ind. 61004C/04
Respondent,

-against-

Wilson Toro,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Denis J. Boyle, J. at sentence), rendered May 16, 2008, convicting defendant of attempted criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 3 to 6 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 25, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

919 Gladys Reyes, Index 20261/97
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Lawrence P. Biondi, White Plains, for respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered May 16, 2008, which, insofar as appealed from as limited by the briefs, in this action for personal injuries, denied defendant's motion to set aside the jury's verdict finding it 100% liable, but granted its motion to the extent of directing a new trial on the issue of damages unless plaintiff stipulated to a reduction of the awards of $2,000,000 for past pain and suffering and $2,000,000 for future pain and suffering (10 years) to $1,500,000 and $750,000, respectively, unanimously affirmed, without costs.

Although "[t]he awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484, 484 [2007]), where there are factual issues as to the precise location of the defect that caused a plaintiff's fall and whether the defect is designated on the map, the question should

be resolved by the jury (*see Almadotter v City of New York*, 15 AD3d 426, 427 [2005]; *Johnson v City of New York*, 280 AD2d 271, 272 [2001]).

Here, plaintiff testified that the broken curb caused her foot to slip into the hole abutting the curb, where she fell and broke her ankle and wrist. The Big Apple Map showed an extended portion of broken or misaligned curb, as indicated by two "x's" connected by a straight line. The testimony at trial established that the defect, as depicted in the photographs in evidence, corresponded to the broken curb as marked on the map, that such defects would be noted on the Big Apple Map as a "curb defect" because the curb was broken and misaligned, and that a curb defect "also encompassed whatever happens at that particular location." Such evidence provided a sufficient basis for the jury to conclude that defendant had prior written notice of the defect.

The trial court providently exercised its discretion in granting plaintiff leave to amend her pleadings on the eve of trial to allege prior written notice, where such amendment did not prejudice or surprise defendant (CPLR 3025[b]; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Mezzacappa Bros., Inc v City of New York*, 29 AD3d 494 [2006], *lv denied* 7 NY3d 712 [2006]). Plaintiff alleged actual notice in her initial pleadings, and based on the service of a notice to

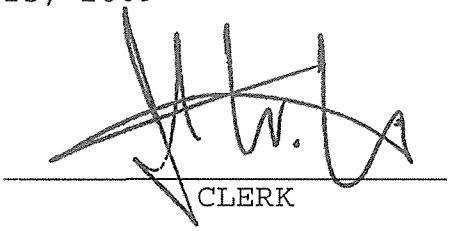
admit attaching the Big Apple Map and receipt of the map by the Department of Transportation, defendant was aware at least five years prior to trial that plaintiff intended to rely upon prior written notice.

The jury's finding that plaintiff was not comparatively negligent was based upon a fair interpretation of the evidence (*see e.g. McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]).

The awards of damages for past and future pain and suffering, as reduced by the trial court, do not deviate from what would be reasonable compensation for the significant injuries plaintiff sustained to her ankle and wrist (*see e.g. Bingham v New York City Tr. Auth.*, 25 AD3d 433 [2006], *affd* 8 NY3d 176 [2007]).

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

920 The People of the State of New York, Ind. 6845/05
Respondent,

-against-

Deandre Pickett,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 1, 2006,

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

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

ENTERED: JUNE 25, 2009

CLERK

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

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

921-
921A The People of the State of New York, Ind. 2283/07
Respondent, 2390/07

-against-

Hasan Muhammed, etc.,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Chadbourne & Parke LLP, New York (Morghan L. Richardson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

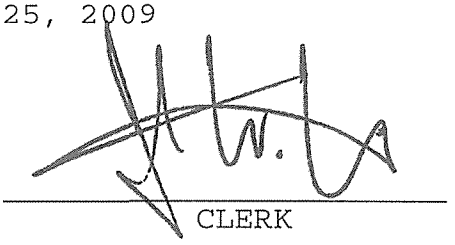
Judgments, Supreme Court, New York County (Michael A. Corriero, J.), rendered January 8, 2008, convicting defendant, after a jury trial, of robbery in the third degree, and also convicting him, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second violent felony offender, to concurrent terms of 3 to 6 years and 4½ years, respectively, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Any inconsistencies in the victim's testimony were minor and did not detract from the credibility of the account he provided.

The court properly declined to deliver an adverse inference charge for the People's inability to locate a police medical treatment of prisoner form. This form did not constitute *Rosario* material (*People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]), because the subject matter of the form did not relate to the subject matter of the police witness's testimony. While defendant asserts a possible connection between the form and the witness's testimony, we find such a connection to be extremely tenuous. In any event, even assuming this form existed and that it was *Rosario* material, there is no reasonable possibility that its nondisclosure materially contributed to the result of the trial (*see* CPL 240.75).

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

922 Coastal Sheet Metal Corp., Index 7749/04
Plaintiff-Appellant,

-against-

Martin Associates, Inc.,
Defendant-Respondent,

The Trustees of Columbia University, et al.,
Defendants.

Sullivan Gardner P.C., New York (Brian Gardner of counsel), for appellant.

Vincent J. Torna, New York, for respondent.

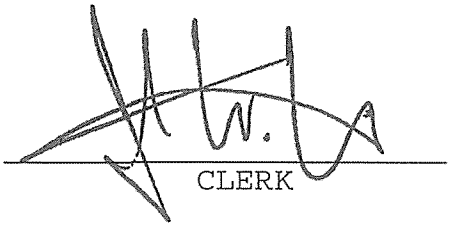
Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 27, 2007, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's last remaining cause of action for breach of contract, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The court erred in finding that, contrary to its claim of underpayment on a total of 13 jobs, plaintiff had in fact been overpaid, based on its review of change orders in only 10 of those jobs. The grant of summary judgment to defendant was error inasmuch as the documentation it provided failed to demonstrate that it had made full payment to plaintiff and that no issues of fact remained. Defendant "cannot obtain summary judgment by

pointing to gaps in plaintiff['s] proof" (*Torres v Industrial Container*, 305 AD2d 136, 136 [2003]). Accordingly, defendant's failure to make a prima facie showing required the denial of its motion, regardless of the claimed insufficiency of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: JUNE 25, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

923 The People of the State of New York, Ind. 3380/06
Respondent,

-against-

Enrique Cabrera,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

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

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

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

ENTERED: JUNE 25, 2009

CLERK

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

Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

924N Scott Kaufman, Index 300653/08
Plaintiff-Respondent,

-against-

Jennifer Kaufman,
Defendant.
- - - - - -
Cohen Lans LLP,
Nonparty Appellant.

Cohen Lans LLP, New York (Robert Stephan Cohen of counsel), for appellant.

Scott Kaufman, respondent pro se.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered March 18, 2009, which, to the extent appealed from, denied the nonparty's motion for leave to withdraw as plaintiff's counsel for nonpayment of attorney's fees and for judgment against plaintiff in the amount of $167,273.61, unanimously affirmed, without costs.

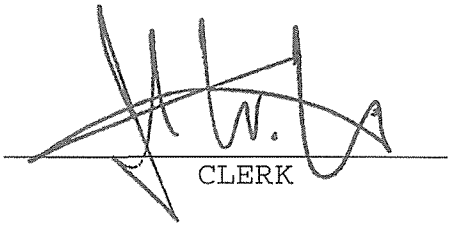
In this matrimonial action, the contractual provision in the retainer agreement that purports to authorize counsel to withdraw upon nonpayment of fees does not vitiate the procedural requirements of CPLR 321(b), nor does it deprive the court of its traditional discretion in regulating the legal profession by overseeing the charging of fees for legal services (*see e.g. Solow Mgt. Corp. v Tanger*, 19 AD3d 225 [2005]). The motion court properly considered counsel's motion to withdraw against the

requirement that to be "entitled to terminate the relationship with a client, an attorney must make a showing of good or sufficient cause and reasonable notice" (*George v George*, 217 AD2d 913 [1995]).

There is no basis on this record to conclude that the court engaged in an improvident exercise of its discretion in denying counsel's motion (*see e.g. Torres v Torres*, 169 AD2d 829 [1991]). The mere fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw (*Cashdan v Cashdan*, 243 AD2d 598 [1997]; *George v George*, 217 AD2d 913, *supra*).

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

ENTERED: JUNE 25, 2009



Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

925N-
926N-
927N-
928N R.P. Brennan General Contractors & Builders, Inc., Plaintiff-Respondent, Index 603088/08

-against-

CPS 1 Realty, LP, Defendant-Appellant.

Westermann Sheehy Keenan, Samaan & Aydelott LLP, Garden City (Stephen J. Gillespie of counsel), for appellant.

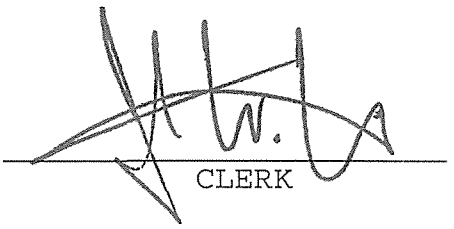
Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about December 18, 2008, which, inter alia, directed a hearing to determine whether plaintiff contractor had substantially completed its work, and order, same court and Justice, entered November 24, 2008, which, to the extent appealable, clarified that issues to be determined at the hearing would include the amount of retainage, if any, that should be released, unanimously reversed, on the law, without costs, and the direction for a hearing vacated.

The gravamen of the relief sought was the payment of damages, rendering specific performance an inappropriate remedy

(*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]).

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

ENTERED: JUNE 25, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

4318-
4318A
Ind. 301630/05

Ronald Fields,
Plaintiff-Appellant,

-against-

Lucille Fields,
Defendant-Respondent.

Plaintiff appeals from a judgment of the Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered June 22, 2007, awarding defendant a divorce with legal fees and distributing the marital assets, and judgment, same court (Laura Visitacion-Lewis, J.), entered October 10, 2007, awarding defendant a money judgment.

Arnold Davis, New York, for appellant.

Hoffman, Polland & Furman, PLLC, New York (Jessica Lee Leonard and Elliot R. Polland of counsel), for respondent.

ACOSTA, J.

In this action for divorce, plaintiff husband seeks to divest 69-year-old defendant wife of her equitable share of their marital residence, where they have lived continuously for over 31 years and raised their only child, on the basis that the townhouse is separate property that he owns and manages with his mother, and that defendant had no impact on its increase in value. We disagree with plaintiff's as well as the dissent's basic premise that the townhouse is separate property, and therefore affirm.

The parties were married on August 1, 1970, and approximately two and a half years later, on March 19, 1973, the couple's son was born. The wife continued to work outside the home until February 1973, and returned to work outside the home six months after the birth. In 1978, the couple decided to purchase a house and found a five-story townhouse with 10 apartments on the Upper West Side of Manhattan. The wife testified that maintaining a 10-apartment townhouse would be far too much work for her in conjunction with childcare for a five-year old after working outside the home all day. She therefore was prepared to invest in the property with her husband provided certain preconditions were met, including provisions for a maid's room and a live-in maid. The husband, unwilling to assent to

the wife's preconditions, purchased the building with the help of his mother. The purchase price was $130,000, with $30,000 down and the balance made up through two mortgages. The husband's mother arranged for her son to get the down payment from his grandparents; $15,000 represented a bequest that he would have gotten, and $15,000 that his mother agreed to repay to the grandparents. At the time of trial, the townhouse was appraised at $2,625,000.

The husband closed on the townhouse on August 31, 1978 and conveyed a one-half interest to his mother, as a joint owner, on September 6, 1978. Thereafter, from 1982 to 2001, the husband and his mother managed the townhouse as a formal partnership. The mortgages, as well as the maintenance and most renovations, were satisfied through rents and refinancing. Certain renovations were made and paid for by the husband's mother.

The couple and their five-year-old child moved into apartment 2 until apartment 1 was turned into a duplex with the basement apartment in 1979. The husband and his parents each paid rent to the partnership, of $1,100 per month, for their respective apartments, until 2002.

The couple lived in apartment 1 for five months, until the wife became ill. Believing that the physical conditions of the basement apartment were causing her illness, she moved into

vacant apartment 3, for which she paid rent. In 1983, following a burglary in that apartment, she moved into apartment 2, but returned to apartment 1 to practice piano and take baths.

The wife purchased some furniture for apartment 1 and "occasionally" swept and vacuumed the hall in front of the apartment entrance. She testified that she would clean up the lobby during renovations. She also purchased a $600 vacuum cleaner to clean the lobby three times a week, cleaned the mailbox vestibule, swept the interior and exterior steps, used bleach to clean dog excrement from the sidewalk, and raked leaves from a maple tree in the backyard. In the summers, when the husband would go to France to spend time with his mother, the wife took responsibility for disposing of the building's refuse. She washed lobby curtains, cleaned lobby windows and polished the lobby mirror. She also decorated apartment 1, planted and maintained the backyard, and bought patio furniture.

In addition to these services, the wife purchased a carpet, and a $500 Formica countertop for the marital apartment, as well as paying $700 for flooring in the foyer. She paid $400 for a foyer mirror, and paid for couches, a basement door installation, linen closet, bathroom cabinets and a chandelier.

In 1982, the husband and his mother opened a partnership account at Citibank into which rents and mortgage funds were

deposited. He testified that he occasionally deposited his paychecks into this account as well as a $35,000 inheritance, which he used for personal expenses. Occasionally, the account would be used as a "pass through" for his wife's paychecks. She would deposit the check in the account and a transfer for that amount would be "wired" to her separate account. Other times, the husband would deposit the wife's check into the account and he would give her cash. In addition to using the account to "accommodate" other transactions, the husband deposited into this account monies he earned from tax preparing and a video business, as well as income from managing a building across the street, which he described as "very small."

The husband commenced this action for divorce in February 2005, and on March 8, 2006, the court referred the issues of equitable distribution and counsel fees to a special referee. The Special Referee found that the marital property titled in the husband's name totaled $1,234,183.81. This included one half of the $2,625,000 value of the townhouse, less the $309,396 mortgage, and less the $30,000 separate property contribution the husband made to the acquisition of the property, as well 50% of the value of the Citibank account. There were also three other

bank accounts totaling a little over $20,000, titled in the husband's name. The marital property titled in the wife's name totaled $71,892.60.

Citing to *Maczek v Maczek* (248 AD2d 835, 837 [1998] ["A party is entitled to a return of the total contribution he [or she] made toward the purchase of the marital residence from his [or her] separate property" [internal quotation marks omitted]), the Special Referee found that the $30,000 down payment to be the husband's separate property, and a baby grand piano and an oak table owned by the wife to be her separate property.

The Special Referee then found that the wife was entitled to 35% of the marital property.[1] With respect to the townhouse, he found that the wife "participated in and made countless contributions to the building, both directly and indirectly"[2]

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[1]The parties had also previously stipulated to equalizing their respective pensions. The wife's pension was valued at $520,520.25 and the husband's was valued at $1,173,723.07. Thus, in order to equalize them, the wife received $326,601.50 from the husband's pension fund.

[2]This included: cleaning the lobby three times a week; cleaning the mailbox vestibule; purchasing and using a $600 vacuum cleaner for the building; sweeping the interior and exterior steps of the building; cleaning dog excrement from the front of the property; sweeping the building's sidewalk; sweeping and bagging leaves each year from the maple tree in the backyard; bagging and taking out the building garbage when the husband went to France each summer; washing the lobby curtains; cleaning the lobby windows; polishing the lobby mirror; decorating the master bedroom with curtains and rugs; planting the gardens on the

even though she "was not interested in the investment," and that the "building expenses were paid from rent proceeds." The special referee also found that the wife contributed to the building indirectly as spouse and mother.

The court confirmed the Special Referee's report in the judgment of divorce, entered June 22, 2007. A money judgment in the amount of $393,118.22 was entered on October 10, 2007 in favor of the wife. The husband appeals, in this consolidated appeal, from both the judgment of divorce and the money judgment. We now affirm.

The subject property, a valuable townhouse, was purchased by the husband in 1978 during his marriage to his wife and served as their marital residence. The parties raised their son in this residence and have lived in various configurations continuously ever since. That the husband used separate property for the down

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property; installing mirrors in the marital apartment; and washing walls in the building.

In addition to these services performed by the wife, she: purchased the rug for the son's room; purchased a bathroom cabinet; purchased bathroom wallpaper; purchased a Formica countertop for the marital apartment; purchased flooring for the building at a cost of $700; purchased the foyer mirror at a cost of $400; and paid for couches, a basement door installation, a linen closet, a bathroom cabinet and a chandelier.

The special referee noted that the husband acknowledged that his wife was involved in the day-to-day maintenance of the townhouse and that she swept and vacuumed the hall and front entrance.

payment and that the property was titled in his and his mother's name does not change the fact that his half interest in the property is a marital asset. These circumstances merely entitle the husband to a credit for his contribution of separate property toward the purchase of the marital residence, which was accounted for by the Referee (*see Juhasz v Juhasz*, 59 AD3d 1023 [2009]; *Heine v Heine*, 176 AD2d 77, 84 [1992], *lv denied* 80 NY2d 753 [1992]).

Now, after living in the townhouse for over 31 years with his wife, where they raised their son, the husband is asking this Court to deem 100% of his half interest in the increase in the property's value (as well as the Citibank account[3]) as his separate property because his 69-year-old wife did not contribute to the down payment or to the management of the property. This position, however, is inconsistent with Domestic Relations Law § 236(B)(1)(c), which defines marital property as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement of the commencement or a matrimonial action, *regardless of the form in which title is*

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[3]The Citibank account was marital property because the husband commingled numerous marital funds in this account and failed to trace them sufficiently to delineate what might have been separate property (*see McManus v McManus*, 298 AD2d 189 [2002]; *Sarafian v Sarafian*, 140 AD2d 801, 804 [1983]).

held" [emphasis added]. The term "marital property" is construed broadly in order to give effect to the "economic partnership" concept of the marriage relationship recognized in the statute (*see Majauskas v Majauskas*, 61 NY2d 481, 489-490 [1984]); "separate property," on the other hand, which is described in the statute as an exception to marital property, is construed narrowly (*see id.* at 489).

The facts of this case are similar to those in *Heine* (176 AD2d 77, *supra)*, where the parties purchased a townhouse with several apartments shortly after they were married. The husband used separate property for the down payment and thee parties secured two mortgages. The parties lived in a duplex and then a triplex apartment, but always rented a least one of the apartments. In distributing the marital assets, this Court credited the husband with the amount of the down payment, noting that "[w]here a spouse contributes separate property towards the creation of a marital asset, he or she is entitled to a credit for the amount of property contributed" (*id.* at 84). Significantly, however, this Court held that the appreciation in value of the townhouse was marital property inasmuch as it was not attributable to the down payment, but rather to renovations paid for with marital funds, mortgage payments made with marital funds and market forces (*id.*). Here, although the wife was not

involved in the renovations of the property to the extent that the wife was in *Heine*, it is clear that the property's appreciation in value, as in *Heine*, had nothing to do with the husband's down payment. In fact, the appraiser testified that market forces accounted for the greatest increase in value. Moreover, as noted above, the parties treated the property as their marital residence. They lived in it since 1978, raised their child there, and the wife, as the Special Referee found, maintained the property by vacuuming, raking leaves, cleaning up after workers, as well as by doing many other chores typical of a person living in a marital residence. To deprive the wife of her equitable share of the value of this property is not only contrary to settled precedent, but also against public policy. The husband's half interest in the townhouse is therefore marital property subject to distribution.

Furthermore, "'[e]quitable distribution presents matters of fact to be resolved by the trial court, and its distribution of the parties' marital property should not be disturbed unless it can be shown that the court improvidently exercised its discretion in so doing'" (*McKnight v McKnight*, 18 AD3d 288, 289 [2005], quoting *Oster v Goldberg*, 226 AD2d 515, 515, *lv denied* 88 NY2d 811 [1996]). Here, the Special Referee and the trial court correctly considered the various factors listed in Domestic

Relations Law § 236(B)(5)(d) and determined that the wife was entitled to 35% of the marital assets. These factors included, inter alia, that "both parties had made economic and non-economic contributions to [the] 35-year-old marriage, their son and townhouse," as well as "the length of the marriage, and the wife's direct and indirect contributions as a spouse and mother." On these facts, it cannot be said that the trial court improvidently exercised its discretion.[4]

The dissent seeks to divest the wife of her equitable share of the townhouse by reclassifying it as separate property. As such, the dissent argues that the husband is not only entitled to the down payment, but also to one half of the appreciation of the townhouse pursuant to Domestic Relations Law § 236(B)(1)(d)(3), which states that separate property includes "the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse." The dissent then posits that since the wife cannot show that her contributions to the property had any effect

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[4]The wife challenges this distribution, claiming 50%. However, this issue is not properly before us because she never filed a cross appeal. Were we to consider the issue, we would nonetheless affirm. "Equitable distribution does not necessarily mean equal distribution" (*McKnight*, 18 AD3d at 289). Here, the husband made the greater contribution to the marital assets, financial and otherwise.

on its appreciation, such appreciation is not marital property subject to distribution.

The flaw in the dissent's analysis is that it incorrectly classifies the townhouse as a "separate" business rather than a marital residence because the husband and his mother formed a partnership, rented some of the apartments, used rent receipts to pay the mortgage and taxes, and refinanced to do major renovations. But title in property is not what defines marital property (Domestic Relations Law § 236[B][1][c]), and the formal partnership between plaintiff and his mother was not formed until four years after the property was purchased. The fact that the marital residence can also be used to generate income, such as in *Heine*, does not therefore reclassify marital property into separate property. Thus, *Hartog v Hartog* (85 NY2d 36 [1995]), *Xikis v Xikis* (43 AD3d 1040, 1041 [2007], *lv denied* 10 NY3d 704 [2008]) and *Pauk v Pauk* (232 AD2d 386, 391-392, *lv dismissed* 89 NY2d 982 [1996]), relied on by the dissent for purposes of determining a nontitled spouse's right to the appreciation in value of separate property, are inapposite. *Hartog* is instructive, however, in that it shows the Court's reluctance to deprive a spouse of her equitable share of marital assets (*see Hartog*, 85 NY2d at 45-47 [to force the nontitled spouse to show with "mathematical, causative or analytical precision" that her

efforts contributed to the increase in value of separate property would be "contrary to the letter and spirit of the relevant statutes," "inconsistent with legislative intent," and "at odds with the purport of this Court's precedents construing the Legislature's directives"]).

Moreover, it is not for this Court to dictate what a "normal" marriage should be. That the wife spent most of her time in one apartment, but showered and practiced the piano in the apartment used by the husband, is of no moment. Married couples are free to live by whatever arrangement suits them best. Clearly, if the wife were an artist and used one of the units as her studio and spent most of her time there, no one would blink an eye. That the wife chose not to invest any of her funds in the down payment because her preconditions were not met by the husband is also irrelevant. Had she wanted the house without any preconditions but simply did not have funds to contribute toward the down payment, the townhouse would still have been the marital residence for the reasons stated above.

Accordingly, the judgment of the Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered June 22, 2007, awarding defendant a divorce with legal fees and distributing the marital assets, and judgment, same court (Laura Visitacion-Lewis, J.), entered October 10, 2007, awarding defendant a money

judgment in the principal sum of $385,234.14, should be affirmed, without costs.

All concur except Catterson and McGuire, JJ. who dissent in an Opinion by McGuire, J.

McGUIRE, J. (dissenting)

In this divorce action, the record establishes that defendant wife fell woefully short of meeting her burden of showing that she contributed to the appreciation of a building purchased by plaintiff husband and his mother as a business venture. Accordingly, I respectfully dissent.

The parties were married in 1970 but have lived apart for approximately the past 30 years, though sharing occasional meals until 1997. There is one child of the marriage who was born in March 1973. The record indicates that the parties contributed equally to the child's upbringing. The record also indicates that the parties had a tacit agreement that the wife was free to keep her own money and to do whatever she wanted with it, except that both were to share equally in the costs of the child's education and transportation expenses. The parties initially had one joint checking account (the Amalgamated Account) that they opened when they first married and that the record shows was kept solely for the convenience of depositing joint tax refund checks.

After residing in rental apartments during the first few years of their marriage, the husband, in August 1978, purchased a five-story building located on West 107th Street. Because the wife wanted a maid and living quarters for the maid, as well as a litany of other criteria to which the husband would not agree,

the wife did not participate in the purchase.

The purchase price of the building was $130,000, with a $30,000 down payment. The husband testified that at the time of the purchase he did not have the requisite funds. He was able to produce the $30,000 down payment from money received from his grandparents: $15,000 represented a bequest that he would have received and the other $15,000 the husband's mother was going to repay to the grandparents.

Shortly after purchasing the building, the husband conveyed a one-half interest to his mother, as a joint owner. Thereafter, from 1982 to 2001, the husband and his mother operated the building as a formal partnership. In 1982, a partnership account was opened at Citibank (the Citibank Account), into which rents and mortgage funds were deposited. The husband testified that he managed the building together with his mother.

Shortly after the husband purchased the building, he and the wife moved into one of the 10 apartments located in the building and paid rent to the building partnership each month. For the first few months, the couple lived together in apartment 1 but after the wife got sinusitis, she moved into apartment 3, for which she paid rent. Then, after a burglary occurred in

apartment 3, the wife moved into apartment 2, and used apartment 1, where husband was still living, to practice piano and take baths.

At the hearing before the Special Referee, the wife testified as follows as to her contributions to the business venture: initially, she purchased some furniture for the marital apartment; she "occasionally" swept and vacuumed the hall in front of the apartment entrance; she would clean up the lobby after workers finished certain renovations; she purchased a $600 vacuum cleaner to clean the lobby three times a week; she cleaned the mailbox vestibule; she swept the interior and exterior steps and used bleach to clean dog excrement from the sidewalk; and she raked leaves from a maple tree in the backyard starting in 1996. Furthermore, she testified that during one summer, when the husband went to France to visit his mother, she bagged the garbage and put it out because she did not like how the hired man was doing it. She also stated that she washed lobby curtains and cleaned lobby windows as well as polished the lobby mirror; finally, she decorated the marital apartment.

In addition to these services, the wife testified that she purchased a $45 carpet and a $500 Formica countertop for the marital apartment, as well as paying $700 for flooring in the foyer. She also testified that she paid $400 for a foyer mirror,

and paid for couches, a basement door installation, a linen closet, bathroom cabinets and a chandelier. Not surprisingly, she offered no testimony from any appraiser or other expert that these routine and minor maintenance efforts and equally minor expenditures for ordinary costs of living somehow enhanced the value of the building itself. Indeed, it defies common sense to think that, for example, raking leaves and occasionally cleaning dog excrement contributed a farthing to the appreciation of the building. Surely a buyer would pay the same price if these maintenance efforts did not take place until the day before the building was shown to the buyer.

Undisputed evidence established as well that the husband collected rents and was in charge of the management of the building. The husband and his parents paid rent to the partnership (the parents began paying rent when they moved into the building in the spring of 1989).

The expert witness appraiser testified that the building was valued at $2,350,000 and that it would be attractive as either a rental property or as an owner-user property. He testified that the most attractive apartments, 3, 4 and 5, contributed to the appreciation, but the wife played no role in the appreciation attributable to these apartments. It was undisputed, after all, that these apartments were renovated and paid for by the

husband's mother. Even more critical here is that the appraiser testified without contradiction that the greatest increase in value was from "market forces." He explained that in 2004 and 2005, passive market forces alone increased the building's value by 2% per month, and by 1% per month since that time, up to the time of trial in July 2006.

Following the hearing, the Special Referee found that the wife "was not interested in the investment without an agreement to numerous preconditions . . . and that since husband could not meet wife's pre-conditions, he invested in the building with his mother." He also found that "[a]t all times building expenses were paid from rent proceeds." He further found:

> "[Wife] did not decorate the common areas, or apartments when they became vacant. She performed the following activities: sweeping or vacuuming the front hallway and stairs by her current apartment, polishing the mirror and windows in the entry hall by the mailboxes, and cleaning the front steps with pure bleach and water. At some point [in] time during one unspecified summer[], she became unhappy with the worker [husband] had engaged for maintenance while he was away in France, so she pitched in with bagging the garbage herself. Since her retirement, [wife] has also raked leaves each fall from the maple tree in the back yard. At no time did she engage in rent collection."

He further found:

> "At no time did [wife] contribute funds for the townhouse from the time of purchase until the present day. At all times parties agree that [husband] carried all the maintenance expenses for the matrimonial apartment, the utilities, and phone bills, and other maintenance costs."

Understandably, the Special Referee did not rely on the wife's marginal contributions to the maintenance of the building. Rather, the Special Referee determined that the wife contributed to the building through her role as spouse and mother. He concluded that while the property began as separate property, the wife's direct and indirect contributions rendered the husband's half interest in the building marital property and that the wife was entitled to 35% of that marital property.[1]

The court confirmed the Special Referee's report in the judgment of divorce, entered June 22, 2007. A money judgment was entered on October 10, 2007 in favor of the wife in the amount of $393,118.22. The husband appeals, in this consolidated appeal, from both the judgment of divorce and the money judgment.

Domestic Relations Law § 236(B) creates two distinct categories of property: marital property that is subject to equitable distribution, and separate property, which is not (*see Price v Price*, 69 NY2d 8, 11 [1986]). The statute defines the term "marital property" to include "all property acquired by either or both spouses during the marriage" (Domestic Relations

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[1]The Special Referee determined that husband's one-half interest in the building, minus a $309,396 mortgage and minus $30,000 of husband's separate property used to purchase the property, was marital property. He valued the property at $2.625 million, making the husband's interest, minus these deductions, equal to $1,127,802.

Law § 236[B][1][c]), and the Court of Appeals has held that the term marital property must be construed broadly so as to give effect to the concept that marriage is an "economic partnership" (*Price*, 69 NY2d at 15). Separate property, which must be more narrowly construed, includes property "acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse" (Domestic Relations Law § 236[B][1][d][1]). Separate property also includes "property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (Domestic Relations Law § 236[B][1][d][3]). Property acquired during marriage is presumed to be marital property, and the party seeking to establish that particular property is separate property bears the burden of proof (*see* Domestic Relations Law § 236[B][1][c]; *DeJesus v DeJesus*, 90 NY2d 643, 652 [1997]).

Initially, the husband met his burden of proving that the subject building was purchased as his separate property. He purchased it in his own name with funds received by him as a gift (*see Spector v Spector*, 136 AD2d 939 [1988]). It is undisputed that the only money that the husband invested in the building was his initial $30,000, all of which was given by his grandparents. It is also undisputed that the wife did not contribute

financially to the initial purchase and that none of the wife's funds were ever used to pay for building expenses. Indeed, the Special Referee found that:

> "At all times the building expenses were paid from the rent proceeds, taxes. Taxes were billed in the names of [husband's mother] and [husband] and paid from the building account."

It is undisputed, moreover, that improvements to the building, including a new boiler and roof, were financed both by capital contributions from the husband's mother, his partner, and by proceeds derived from mortgage refinancings.

The wife's claim that the husband failed to trace the origins of the down payment, by failing to produce the cancelled checks given to him, is without merit. The husband testified that the money came from his grandparents, and the wife did not challenge this assertion in any way. She did not testify that husband possessed, or could have possessed, sufficient marital funds to pay the $30,000 down payment. Nor did she testify that the fact of the $30,000 gift was unknown to her. Indeed, she did not present any alternative account of how her husband acquired the $30,000. Her sole objection rests on the untenable claim that because the husband cannot produce the cancelled checks that would have been returned to his grandparents, he failed to meet his burden. The husband's inability to produce checks returned

to the grandparents some 28 years ago certainly does not preclude a finding that the $30,000 was a gift (*see Chiotti v Chiotti*, 12 AD3d 995 [2004] [defendant's inability to produce a complete paper trail from gift or inheritance to trial does not require a finding that the property was not a gift or a bequest, particularly as there was no evidence suggesting other possible sources of the accounts]).

Equally without merit is the wife's claim that the $30,000 the husband received as a gift somehow transmuted into marital property. While the wife asserts that the checks produced by the husband at the closing came from "the parties' joint Citibank account," there is uncontroverted evidence in the record that the only "joint" bank account that the parties shared was the Amalgamated Account.

Turning to the main point of contention, since the husband established that the building was his separate property, it was incumbent upon the wife to show that she contributed to the active or passive appreciation in the building's value. In *Pauk v Pauk* (232 AD2d 386, 391-392 [1996], *lv dismissed* 89 NY2d 982 [1997]), the Court held:

> "In order to obtain equitable distribution of the appreciation in value of the wife's separate property, the husband was required to demonstrate the manner in which his contributions resulted in the increase in

> value and the amount of the increase that was attributable to his efforts. The husband failed to sustain this burden, and the testimony at trial established that the appreciation was caused by an upturn in the real estate market" (internal citations omitted). *See also Hartog v Hartog* (85 NY2d 36 [1995]) and *Xikis v Xikis* (43 AD3d 1040 [2007], *lv denied* 10 NY3d 704 [2008]).

Under this controlling standard, the wife utterly failed to establish that the appreciation in value of the husband's half-interest in the building was caused by either her direct contributions to the building or through her efforts as spouse and mother. The record is clear that the wife refused to participate in the purchase of the building. The record also makes plain that the wife's claimed efforts made on the building's behalf were actually performed for her own benefit and on a sporadic basis. At best, the sum total of the wife's contributions to the building constituted basic maintenance that did nothing to increase the value of the building or to undermine the expert appraiser's unequivocal and uncontradicted testimony.

Of course, Domestic Relations Law § 236(B)(5)(d)(6) explicitly recognizes that indirect contributions of the nontitled spouse (e.g. services as spouse, parent and homemaker, and contributions to the other spouse's career or career potential) are as relevant to equitable distribution calculations as direct contributions. However, nothing in the record supports

the conclusion that the wife made any indirect contribution to the building's appreciation in value by conduct that enabled the husband to spend more time in the development of the property. In fact, the record is clear that, as the Special Referee found, "[f]or the past 28 years the parties have lived apart, although they shared occasional meals until 1997." The Special Referee noted that in 1988 through 2001, rent was paid by the husband for the marital apartment without any contribution by the wife; during this period the parties were already occupying different spaces in the building and they had roughly equal salaries and equal parental obligations (the wife kept her earnings and left it to the husband to pay utilities and other household expenses).[2]

Furthermore, nothing remotely indicates that the wife devoted more time than the husband to raising their son or that the husband was able to devote more time to the building because of the wife's conduct. The evidence bearing on these subjects, in brief, is as follows. At the time of the marriage in August 1970 the husband was a teacher for the New York City Board of

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[2]At the outset of the trial, the parties stipulated to equalize their pensions and tax deferred annuities with the New York City Board of Education. As a result, the husband transferred $326,601 from his total fund to the wife's total fund of $520,520.

Education, and the wife was a full-time student pursuing a master's degree in education with a part-time job at TWA (which she maintained for 12 years). In the winter of 1971, she obtained a job as a teacher with the Board of Education. During her pregnancy, the wife worked at both her jobs until February 1973. She returned to work in September 1973, almost six months after the couple's son was born. As the wife testified, she and the husband both contributed to the care of their son during that six-month period. She stopped teaching in 1977 and took a one-year nursing course and then worked as a licenced practical nurse. She returned to teaching, however, in the fall of 1978, but worked two nights a week that fall at a nursing home, and continued to teach until her retirement. Until 1973, the parties lived on the husband's paycheck. After the wife returned to work in September 1973, the husband took a one-term paternity leave to take care of their son. He also taught at night school and drove a cab during vacation. As the wife testified, the husband took care of their son when she worked nights.

It bears emphasizing once again that the only evidence of the property's appreciation was supplied by the expert witness appraiser, who testified that the increase in the building's value was almost entirely attributable to "market forces" (*see Price*, 69 NY2d at 18 ["where the appreciation is not due, in any

part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market forces . . . the appreciation remains separate property, and the nontitled spouse has no claim to a share of the appreciation"]). The other, much less significant, reason for the appreciation of this separate property of the husband does not provide a shred of support for the wife's position. As the appraiser testified, certain renovations paid for by the husband's mother played a role in the appreciation, and the physical layout of the building made it attractive as either a rental property or as an owner-user property. The wife obviously did not contribute in the slightest to either component of the appreciation. In short, the wife's claim that the appreciation was due to her direct and indirect efforts is a pure makeweight. It is at odds with the appraiser's uncontradicted testimony and with all the other evidence adduced at the hearing.

The majority assumes that because the building was purchased during the parties' marriage the husband's interest in the building is entirely marital property. Thus, although it acknowledges "[t]hat plaintiff used separate property for the down payment and that the property was titled in his and his mother's name," the majority baldly asserts that plaintiff's "half interest in the property is a marital asset." In doing so,

the majority ignores basic statutory precepts regarding equitable distribution, namely that separate property includes both property "acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse" (Domestic Relations Law § 236[B][1][d][1]) and "the increase in value of separate property, *except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse*" (Domestic Relations Law § 236[B][1][d][3] [emphasis added]). Thus, to obtain an interest in the building, the burden rested on the wife to demonstrate the extent to which the building's appreciation was due to her contributions or efforts. As discussed above, she failed to do so. The majority is correct in suggesting that the wife was not required to establish with mathematical, causative or analytical precision the nexus between her contributions to improve the building and the appreciation in value of the building (*see Hartog*, 85 NY2d at 47). However, that a causative contribution need not be established with precision does not mean that it need not be established at all.[3]

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[3]Even if there were some factual basis for finding that indirect efforts of the wife played some causative role in the appreciation of the building (and there is not), only that *part* of the appreciation would be marital property. As the Court of Appeals stressed in *Hartog*, "*to the extent* that the appreciated value of separate property is at all aided or facilitated by the

The majority's reliance on *Heine v Heine* (176 AD2d 77 [1992], *lv denied* 80 NY2d 753 [1992]) is woefully misplaced. In *Heine*, the husband supplied the down payment for the purchase of a five-story townhouse with separate property. But, unlike the wife in this case, the wife in *Heine* made substantial contributions to the building's appreciation -- she supervised all of the extensive renovations thereto, and marital funds were used to pay for those renovations as well as the building's mortgage. In this case, by contrast, the wife did not supervise any (or play any role in) renovations to the building and marital funds were not used to pay for renovations to the building or the mortgages on the building.

At bottom, the majority's conclusion that all of the appreciation of the husband's interest in the building is marital property is not grounded in either the facts or the law. Instead, the majority repeatedly stresses that the building "served as the[] [parties'] marital residence" and that the parties "raised their son [in the building]." In addition, the majority characterizes the building as "valuable" and makes repeated references to the length of the parties' marriage and

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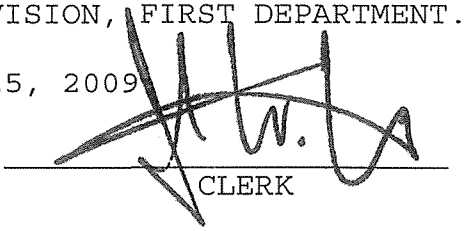
nontitled spouse's direct or indirect efforts, *that part of the appreciation is marital property subject to equitable distribution*" (85 NY2d at 46 [emphasis added; other emphasis deleted; internal quotation marks omitted]).

the wife's age. Of course, none of this has any relevance to the critical legal issue here -- whether the wife demonstrated the extent that the building's appreciation was due in part to her contributions or efforts.

Finally, I concur with the majority that the record demonstrates that the Citibank Account is marital property. Although the account was opened to maintain rents and mortgage funds obtained by the partnership, those funds were commingled with marital property, i.e., deposits of money earned by the husband from his management of a separate building, proceeds from the husband's other business interests and wages earned by the husband. The husband acknowledged that he could not attribute any portion of the funds in the Citibank Account to any particular source of money because the funds in the account were "a mishmash." Thus, he failed to trace adequately the source of the funds in that account and consequently failed to rebut the presumption that all of the funds in the account are marital property (*see McManus v McManus*, 298 AD2d 189 [2002]; *Pullman v Pullman*, 176 AD2d 113 [1991]).

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

ENTERED: JUNE 25, 2009



CLERK