SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 15, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

946 Michael DiFilippo, et al.,
Plaintiffs,

Index 13066/05
84955/05

-against-

Parkchester North Condominium, et al.,
Defendants.

- - - - -

Parkchester North Condominium, et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

-against-

Blueprint Plumbing Corp.,
Third-Party Defendant-
Appellant-Respondent.

Catalano Gallardo & Petropoulos, LLP, Jericho (Theodore W. Ucinski of counsel), for appellant-respondent.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 15, 2008, which, to the extent appealed from, granted third-party defendant Blueprint's motion for summary judgment dismissing the third-party claims for common-law negligence, contribution and indemnification, but denied dismissal of so much of the third-party complaint for

contractual indemnification, and denied so much of third-party plaintiffs' (Parkchester) cross motion for summary judgment on their claim for contractual indemnification, unanimously affirmed, without costs.

The main action is against a property lessee and its manager for employment-related injuries and alleges claims based on common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The Parkchester defendants brought a third-party action against the injured worker's employer, for, inter alia, contractual indemnification. The motion court dismissed all of plaintiff's claims except those based upon Labor Law § 241(6).

Based on issues of fact as to who created the dangerous condition (water and debris on the floor) causing plaintiff's slip and fall, the motion for summary judgment and cross motion for summary judgment as to contractual indemnification were properly denied.

The indemnification agreement would be enforceable if the indemnitee is found not negligent, but nevertheless vicariously liable to plaintiff for Blueprint's negligence under the nondelegable duty Labor Law § 241(6) imposes (see General Obligations Law § 5-322.1[1]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193-194 [2004]). Parkchester is not however entitled to summary judgment on its indemnification claim because, on this record, there are the above-noted issues of fact as to whether

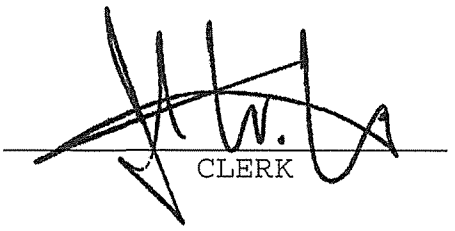
Parkchester is at fault for plaintiff's Labor Law § 241(6) claim.

In its lack-of-preservation argument, third-party defendant "raises a legal argument that appears on the face of the record and could not have been avoided if brought to [third-party plaintiffs'] attention at the proper juncture, the record on appeal is sufficient for its resolution, and the issue is determinative" (*Baker v Bronx Lebanon Hosp. Ctr.*, 53 AD3d 21, 27 [2008]). Third-party defendant argued that third-party plaintiffs were negligent and thus precluded from enforcing the indemnification contract. Because this issue was considered by the motion court, it is properly before us for review.

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

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

ENTERED: SEPTEMBER 15, 2009



Gonzalez, P.J., Tom, Nardelli, Moskowitz, Renwick, JJ.

1063 The Chief Judge of the State of New York, et al.,
Plaintiffs-Respondents,

-against-

The Governor of the State of New York,
Defendant,

The Speaker of the New York State Assembly, et al.,
Defendants-Appellants.

Index 400763/08

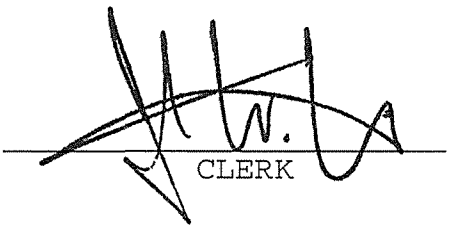
Schlam Stone & Dolan, LLP, New York (Richard H. Dolan and Erik S. Groothuis of counsel), for appellants.

Wachtell, Lipton, Rosen & Katz, New York (Bernard W. Nussbaum of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 16, 2009, which, insofar as appealed from as limited by the briefs, upon a search of the record granted plaintiffs summary judgment on their third cause of action, unanimously affirmed for the reasons stated in this Court's decision in *Larabee v Governor of State of N.Y.* (__ AD3d __, 880 NYS2d 256 [2009]), without costs.

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

ENTERED: SEPTEMBER 15, 2009



Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

83 Janet R. Marks, Ph.D., Index 603265/04
Plaintiff-Respondent-Appellant,

-against-

Sharon P. Smith, et al.,
Defendants-Appellants-Respondents.

Putney, Twombly, Hall & Hirson LLP, New York (James E. McGrath, III, of counsel), for appellants-respondents.

Law Offices of Stephen L. Cohen, Chatham (Mark D. Marderosian of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 20, 2008, which denied the parties' respective motions for summary judgment, modified, on the law, to grant defendants' motion in its entirety, the complaint dismissed, and otherwise affirmed, with costs. The Clerk is directed to enter judgment in favor of defendants accordingly.

In 1996, plaintiff and defendant Fordham University entered into a written agreement, entitled "Faculty Contract," under which Fordham appointed plaintiff to a two-year, tenure-track associate professorship in the Faculty of Business, subject, however, to the following proviso:

> "Faculty member will be serving as Associate Dean for Academic Affairs for the Faculty of Business. The term of appointment of this contract will be suspended until full-time faculty status begins. Salary will be paid as an administrator and not on a faculty line until full-time faculty status begins."

The contract (which does not contain a merger clause) fails to specify any rate of salary for either the administrative position or the faculty position. Neither does the contract specify the time of plaintiff's transfer from administrative to faculty status, or the events that would trigger that transfer.

From 1996 until early 2002, plaintiff served as an associate dean; in 2002, her an annual salary was $121,000. In February of 2002, plaintiff announced that she was resigning her deanship, effective March 8, 2002, and would thereupon assume her duties as an associate professor. Defendant Smith, who was Dean of Fordham's Graduate School of Business Administration at all relevant times, testified that, in a conversation that took place on or about February 6, 2002, she told plaintiff that all teaching assignments for the already-commenced spring term had been filled, and therefore requested that plaintiff delay resigning her administrative position until the beginning of the Fall 2002 term or, alternatively, the beginning of the Summer 2002 term; plaintiff, however, refused to do so. Nonetheless, Fordham accepted plaintiff's resignation of her deanship and advised plaintiff that her faculty appointment would go into effect at the beginning of the Fall 2002 term, whereupon she would receive an annual salary of $70,000. Fordham further

stated that plaintiff's benefits would continue without interruption, and offered her the opportunity to teach two summer courses, for which she would receive two ninths of her faculty salary. As stated in her affidavit, plaintiff refused to teach any summer courses.

When plaintiff's resignation of her administrative position became effective in March 2002, Fordham stopped paying her salary but continued her benefits, as it had promised. Plaintiff advised Fordham that she considered the university to have breached her contract both by ceasing to pay her $121,000 administrative salary in March 2002 and by stating its intention to reduce her salary to $70,000 once she began teaching in the fall. On the basis of this position, plaintiff told Fordham in August 2002 that she was refusing to accept any teaching assignment for the Fall 2002 term. By letter dated September 3, 2002, Fordham advised plaintiff that it was terminating her employment on the ground that she had breached her contract by refusing to accept a teaching assignment for the Fall 2002 term. Plaintiff subsequently commenced this action against Fordham and two of its senior administrators for monetary damages and declaratory relief. On appeals by both sides from Supreme Court's denial of their respective motions for summary judgment, we modify to grant defendants summary judgment dismissing the

complaint in its entirety.

Plaintiff's first cause of action seeks damages for Fordham's alleged breach of her contract "by purporting to reduce her annual salary when she relinquished her deanship position." Plaintiff's contract does not specify a rate of compensation or a method for determining compensation, nor does the contract prohibit Fordham from reducing her salary upon her transfer from administration to faculty. Accordingly, absent extrinsic evidence of a greater obligation, the contract is enforceable only to the extent it is construed to require that plaintiff's compensation be set at a rate that is reasonable in comparison with the range of compensation Fordham customarily paid to holders of comparable faculty positions during the same period (*see Kenneth D. Laub & Co. v Bear Stearns Cos.*, 262 AD2d 36 [1999]). The record establishes, as a matter of law, that Fordham satisfied this obligation. Defendant Hollwitz, Fordham's Vice President of Academic Affairs, testified, without contradiction, that, as a matter of general practice, a Fordham administrator who transferred to the faculty would receive a lower salary as a faculty member than he or she had received as an administrator. Hollwitz further testified that plaintiff's faculty salary was set at $70,000 because that amount "was somewhere in the middle of the distribution of Associate

Professor of Management Systems salaries."

Plaintiff did not come forward with any extrinsic evidence to support her contention that Fordham, in setting her faculty salary at $70,000, breached any contractual obligation the parties had left unstated in their written agreement. While plaintiff submitted an affidavit asserting in conclusory fashion that her own "research" showed that the "average salary" for an associate professor of business at Fordham was "nearly $75,000" during the 2001-2002 academic year, this factual claim, even if accurate, falls far short of providing a basis on which a factfinder could reasonably determine that the $70,000 annual rate at which Fordham set plaintiff's faculty salary was not reasonably consistent with the university's customary practice in compensating holders of comparable positions at the time. Since this was all that plaintiff's contract required of Fordham with regard to setting her faculty compensation, and the record establishes that this obligation was satisfied, Fordham is entitled to summary judgment dismissing the first cause of action.

Plaintiff's second cause of action seeks damages for Fordham's alleged breach of contract by "stopp[ing] pay[ment] [of] her annual salary beginning on March 9, 2002," the day after her last day as a dean. Plaintiff fails, however, to identify any basis in the record for a determination that Fordham was

required to continue paying her an administrative salary after she voluntarily resigned her administrative position. Further, nothing in the parties' contract obligated Fordham to start paying plaintiff her faculty salary (which, as discussed above, was legitimately set at a lower rate than her administrative salary) immediately upon her relinquishment of her administrative position where, as here, plaintiff unilaterally chose to resign her deanship in the middle of the spring term, when no teaching assignments were available. In this regard, it is significant that the University Statutes, which are incorporated by reference into plaintiff's contract, establish that the primary responsibility of a Fordham faculty member is to teach. While plaintiff claims that "research and committee work," not just teaching, are part of a faculty member's job, she does not identify any particular research project or committee work that she intended to initiate or continue as a full-time faculty member upon resigning her deanship. In essence, plaintiff would have us construe the contract to require Fordham to pay her for doing nothing; this is an interpretation we decline to adopt. Considering the difficult situation that plaintiff herself created, Fordham acted reasonably in advising plaintiff, upon her resignation of her deanship, that it intended to commence her full-time faculty status at the opening of the following fall term, and accommodating her in the interim by continuing her

benefits without interruption and by offering to assign her two summer courses to teach, for which she would have been paid two ninths of her annual faculty salary. Since plaintiff identifies no basis, either in the contract or in extrinsic evidence, for imposing a greater obligation on Fordham, the latter is entitled to summary judgment dismissing the second cause of action.

Plaintiff's third cause of action seeks damages for Fordham's alleged breach of contract "by purporting to terminate her employment in September 2002." The record, however, establishes as a matter of law that Fordham was entitled to terminate its contract with plaintiff in response to her repudiation of that contract by refusing to accept any teaching assignment for the Fall 2002 term, which refusal lacked any justification, as discussed above (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 77 [2002] [one party's repudiation of contract discharges the other party's obligations thereunder]). To the extent the third cause of action seeks damages based on Fordham's termination of plaintiff's contract without following the internal procedures for termination of a faculty member specified in the University Statutes, the claim still must fail as a matter of law because the contract provided that "[t]he term of [plaintiff's] appointment [to the faculty] . . . will be suspended until *full-time faculty status* begins" (emphasis added). The record establishes that plaintiff never

attained full-time faculty status -- indeed, in August 2002, she specifically rejected the opportunity to assume such status -- and she therefore was not entitled to have her termination considered through the procedures specified in the University Statutes (*cf. B. Man Yoon v Fordham Univ.*, 216 AD2d 184, 185 [1995] [reinstating tenured faculty member's cause of action against university "seeking payment of (his) salary . . . until and unless he is dismissed in accordance with . . . the university's Statutes," although reinstatement was precluded by expiration of the limitation period for a CPLR article 78 proceeding]). In any event, plaintiff has no right to hold Fordham to adherence to the disciplinary protocols of its University Statutes when the record establishes that plaintiff effectively abandoned her faculty appointment, thereby becoming the first party to breach her contract, by flatly refusing to accept any teaching assignment for the Fall 2002 term.

The fifth cause of action seeks a declaration that "(a) University officials failed to terminate [plaintiff's] employment according to the procedures dictated in . . . the University Statutes; and (b) she is now and will remain a tenure-track Associate Professor in the Business School unless and until the University invokes and follows those procedures." Relief of this nature cannot be obtained through a plenary action, and must be sought by way of a proceeding pursuant to CPLR article 78 (*see*

Maas v Cornell Univ., 94 NY2d 87, 92 [1999]). Plaintiff did not commence this action until October 2004, more than two years after Fordham terminated her employment in September 2002 and long after the expiration of the four-month limitation period applicable to an Article 78 proceeding (CPLR 217). Accordingly, Fordham is entitled to summary judgment dismissing the fifth cause of action (*see Risley v Rubin*, 272 AD2d 198 [2000], *lv denied* 96 NY2d 701 [2001]; *cf. B. Man Yoon v Fordham Univ.*, *supra*). In any event, as previously discussed in connection with the third cause of action, the record establishes that plaintiff (by her own free choice) never attained the full-time faculty status required to trigger the term of her faculty appointment, and she therefore was not entitled to the benefit of the procedures provided in the University Statutes.

In her fourth cause of action, plaintiff seeks damages based on the two individual defendants' alleged tortious interference with her contractual relations with Fordham. To begin, for the reasons discussed above, the record establishes that Fordham did not breach plaintiff's contract. Since the breach of a contract is an essential element of a tortious interference claim (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]), plaintiff cannot prevail on this cause of action as a matter of law. Even if there were evidence that Fordham had breached the contract, summary judgment dismissing the cause of action would

still be appropriate. Plaintiff fails to identify any evidence in the record tending to show that defendants Smith and Hollwitz (who were, at the relevant times, the dean of Fordham's Graduate School of Business Administration and Fordham's Vice President of Academic Affairs, respectively) acted outside the scope of their employment and committed independent torts or predatory acts directed at her (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). Smith and Hollwitz were plaintiff's superiors, and, the dispute whether proper procedures were followed notwithstanding, there is no evidence that they were not acting on behalf of defendant university and within the scope of their authority (*see Nu-Life Constr. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 107 [1994], *lv dismissed* 84 NY2d 850 [1994]) or that they were motivated by self-interest (*see Kartiganer Assoc. v Town of New Windsor*, 108 AD2d 898, 899 [1985], *appeal dismissed* 65 NY2d 925 [1985]). It does not avail to save the claim that plaintiff alleges that Smith and Hollwitz, in acting adversely to plaintiff on Fordham's behalf, were motivated by an alleged desire to retaliate against her for supporting the position of Fordham's clerical employees in a collective bargaining dispute with the university.

While our dissenting colleague takes the position that the record establishes some breach of contract by Fordham (and would even grant plaintiff summary judgment on this point), he fails to

identify any particular provision of the agreement with plaintiff -- or even any alleged oral promise to her -- that was breached by Fordham. Again, in early February 2002, before plaintiff resigned her administrative position (at her own instance), she was told by defendant Smith (according to Smith's uncontradicted deposition testimony) that no faculty position was available at that time, since there were no unfilled teaching assignments. Plaintiff nonetheless insisted on resigning her deanship in the middle of the spring term, rejecting Smith's reasonable request that she continue in administration until she could begin teaching, either in the fall or in the summer. These matters are all evidenced in the record by Smith's testimony.

Smith also testified (again, without contradiction) that it would have been contrary to Fordham's policy and practice to begin paying plaintiff her faculty salary before she assumed teaching duties. While the dissent points out that teaching is one of several duties of a faculty member set forth in the University Statutes, this does not change the fact that it is uncontroverted on this record that it was Fordham's established policy not to start paying a faculty member until the start of a term in which he or she commenced teaching. The dissent would have us rewrite the parties' agreement to require Fordham to apply special rules to plaintiff, and to give her uniquely favorable treatment, by paying her a faculty salary during a

period of about six months (March through August 2002) in which she was not teaching any classes. This we decline to do. We would add that the invocation by plaintiff and the dissent of a faculty member's responsibilities other than teaching rings rather hollow, given that, as previously noted, plaintiff has never identified -- neither in her contemporaneous writings, in her deposition testimony, nor in her written submissions in this litigation -- any particular "research" project or other faculty-related activity in which she intended to engage during the interval between resigning the deanship in March 2002 and the beginning of the fall term the following September.

In the final analysis, the dissent takes the position that, once plaintiff (on her own initiative) resigned her deanship in the middle of a term, Fordham was obligated to begin paying her a faculty salary immediately, even though no teaching assignments were available and it was the school's policy not to begin a faculty appointment until the faculty member could be given a teaching assignment. Nothing in the parties' written agreement supports the dissent's view that Fordham had any such obligations to plaintiff. Indeed, the dissent, by emphasizing that Fordham failed to give plaintiff "any notice whatsoever" that her administrative salary would stop when her resignation went into effect, seems to acknowledge implicitly that the parties' agreement did not require Fordham to grant plaintiff what would

have been, in effect, a six-month paid vacation upon her voluntary resignation from the deanship.

The dissent asserts that, because Smith's statements to plaintiff in their February 2002 conversation were somehow "less than unequivocal," such statements provide grounds for expanding Fordham's contractual obligations to plaintiff. We do not follow this reasoning. In any event, contrary to the dissent's contention, Smith's uncontradicted testimony establishes that plaintiff -- a doctorate-holding university administrator -- should have well understood from her conversation with Smith in early February 2002 that, because there were no unfilled teaching assignments at that time; it was Fordham's expectation and desire that she remain in her administrative position until she could be given a teaching assignment in the fall (which was Fordham's preference) or, if plaintiff insisted on leaving the deanship earlier, in the summer. The logical implication of what Smith told plaintiff was that the latter's abrupt resignation of the deanship in March 2002 would result in the interruption of her salary.[1]

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[1]The following excerpts from Smith's deposition testimony are representative:

> "What I said to [plaintiff] was that a faculty position normally begins in the beginning of an academic year. That is the preferred time for all faculty positions to begin. If they begin midyear, then half of the teaching obligation for the entire year would still be due. A[s] a less preferred option, a faculty position could begin no later

In closing, we note that the routine administrative actions by Fordham of which plaintiff complains -- such as sending plaintiff an August 8, 2002 letter (which followed "numerous unsuccessful attempts to contact [her]") setting forth her class assignments for the forthcoming fall term -- are not rendered "egregious" by the dissent's so characterizing them. We also disagree with the dissent's evident view that the support for plaintiff's position lacking in the parties' written agreement (or even in any alleged oral promise) can be supplied by the gracious remarks about plaintiff made by defendant Smith in a February 22, 2002 memorandum she issued to personnel of the

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than the summer term for the graduate school which would accommodate a three-course teaching load which is half of the normal teaching load for Faculty of Business."

"My option [offered to plaintiff] was that she could be a full-time faculty member if she taught half of her -- if she began it in academic year '01-'02, she would have to teach three courses in academic year '01-'02. The only possibility for teaching three courses in academic year '01-'02 would be in the summer term at the graduate school since the spring term was already underway . . ."

"The other option was the normal option which would be beginning academic year '02-'03 which would begin in the fall term."

"I said I accepted her decision to move from administrative position to a faculty position and that would mean it would begin in academic year '02-'03 because this academic year was not only well underway, in essence the staffing was completed for the undergraduate school because we were already into the spring term . . . We were into the second trimester of the graduate school. The only thing left was the third [summer] trimester of the graduate school."

School of Business (e.g., "the attractions and challenges of research have lured [plaintiff] to leave administration for the full time faculty life"). We decline to punish an employer for speaking about an employee with generosity and civility.

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

CATTERSON, J. (dissenting)

I must respectfully dissent because defendants Smith and Hollwitz both acknowledged and, in Smith's case, lauded the plaintiff's decision to move to her faculty position to conduct research "effective March 9, 2002" but stopped her salary as of the same date without any notice whatsoever to the plaintiff. In my opinion, by so doing the defendants breached the plaintiff's employment contract on March 9, 2002. Thus, she was not contractually obligated to accept any of the classes assigned to her on August 8, 2002, five months after the cessation of payment of her salary.

Moreover, in my opinion, the defendants' explanation that the plaintiff's salary would be resumed on September 1, 2002 because that was the start of the new academic year was as nonsensical as it was egregious, if by that defendants meant she would be compensated as of September 1. The plaintiff was informed of her assigned classes in a memo dated August 8, 2002. The memo also informed her that classes started on August 28, 2002. The memo therefore appears to assume that plaintiff not only would teach four days' worth of scheduled classes but would engage in the required preparation for those classes prior to August 28th without any compensation whatsoever.

The plaintiff's Faculty Contract clearly states: "Salary will be paid as an administrator and not on a faculty line until

full-time faculty status begins." The majority bases its determination that the stoppage of salary is not a breach of contract by the University on its view that the plaintiff's full-time faculty status could not begin until plaintiff commenced teaching classes. Consequently, the majority finds that once the plaintiff decided to relinquish her administrative position, which decision was acknowledged and accepted, she was rightfully deprived of a salary because she could not be assigned to teach classes mid-semester.

In my opinion, the teaching of classes as a condition for a full-time faculty position is neither stated in the one-page contract nor is it reflected in the record containing the incorporated University Statutes on policies and procedures. In fact, the relevant section in the Statutes on Responsibility of Faculty lists eleven responsibilities of faculty ranging from (1) "[s]atisfactory fulfillment of teaching duties in assigned courses or their equivalents" through (11) "Cooperation in the observance of University regulations." In between are nine other responsibilities that do not relate to teaching classes. For example, (6) relates to "[i]nvolvement in significant scholarly research"; (7) relates to "[s]cholarly publication"; (8) refers to "[p]articipation in learned societies and professional organizations." The chapter does not state that a faculty member *must* engage in each and every responsibility listed in any given

semester, nor does it specify that engaging in any one of the enumerated responsibilities is mandatory in each and every semester.

As for teaching requirements, Chapter Three, Section 4-03.02 of the Statutes provides only that: a faculty member *may not exceed,* in any year, an average of three courses per semester; that a modification of this teaching load "shall be approved by the Dean and the Vice President for Academic Affairs"; and that the course load "may be reduced for individual faculty members engaged in major research projects [...]"

Hence, it could not be clearer that there is abundant flexibility as to the required faculty responsibility of teaching classes in any one semester. Indeed, the Statutes clearly indicate that a teaching load can be modified and/or reduced (with no stated minimum) simply by approval from the Dean and Vice President for Academic Affairs; and moreover that it can be done so for faculty members engaged in research.

In this case, the letters and memos from defendant Smith, the *Dean* of the Graduate School of Business Administration, and from defendant Hollwitz, the *Vice President of Academic Affairs,* responding to the plaintiff's February 6, 2002 letter establish precisely that: both the requisite approval of the necessary administrators, as well as an indication that research is the faculty responsibility in which plaintiff was to engage upon

moving to her faculty position.

The sequence of memos and letters following the plaintiff's letter were as follows: First, she received a memo dated February 8, 2002, from Smith in which Smith acknowledged the plaintiff's request to "move *to your* faculty position" (emphasis added). The one paragraph memo continued: "As I have already indicated in our conversations, I accept your decision" (emphasis added) and ended with the sentence: "Your faculty appointment and its timing will be set from (*sic*) [the] Vice President for Academic Affairs office."

On February 12, 2002, the plaintiff replied that there was no need to wait for either the appointment or its timing since she was already appointed to the faculty. In my opinion, this was a correct observation since her one page "Faculty Contract" signed on November 25, 1996 states that: "Fordham University hereby appoints Janet Marks to the faculty of the University." The contract further specifies that her faculty rank is associate professor in the Faculty of Business. The contract includes a section titled: Special provisions: "*Faculty member will be serving as* Associate Dean for Academic Affairs for the Faculty of Business [...] Salary will be paid as an administrator and not on a faculty line until full-time faculty status begins" (emphasis added). The last paragraph of the contract preceding the plaintiff's signature states: "I hereby accept this appointment

as a member of the faculty of Fordham University."

The contract provides that the term of her appointment as a full time faculty member, which puts her on a tenure track with a seven year probationary period from the date of the appointment will be suspended until she assumes full-time faculty status. However, the contract notably omits any prohibitions or restrictions as to the timing of her assumption of a full time faculty position.

In any event, within 10 days of the plaintiff's letter, wherein she drew defendant Smith's attention to these contractual provisions, Smith issued a memo on February 22nd, 2002 to "All Faculty, Administrators and Staff." The memo stated, in relevant part:

> "[I]t is not surprising that the attractions and challenges of *research* have lured one of our administrators to leave administration for the full time faculty life. Janet Marks, who was appointed Associate Dean for Academic Affairs and Administration *and* Associate Professor in Management Systems in 1996, has decided to leave her dean's post and move to faculty effective March 9, 2002. I am certain that you join me in expressing appreciation [...] and wish her fulfillment and happiness as she dedicates her energies to *research* and teaching" (emphasis added).

Three days later, on February 25th, 2002, defendant Hollwitz wrote the plaintiff a one-paragraph letter stating:

> "I write to acknowledge your decision to move from your administrative position as associate dean to your faculty position as associate professor effective March 9, 2002. Your salary effective for the academic year 2002-03 will be $70,000. You have the option to earn as much as two-ninths of this amount during this academic year if you choose to teach as many as two courses during the summer term."

In both latter written communications of acknowledgment, the date of the plaintiff's move to a faculty position was noted as "effective March 9, 2002." There could be no clearer acceptance, acknowledgment or approval of the plaintiff's move to full-time faculty status as of that date. Further, none of the written communications memorialized any objections by the defendants or referenced any difficulties caused by the plaintiff in choosing to make her move mid-semester.

Therefore, the majority's reliance on an initial conversation that the plaintiff engaged in with defendant Smith prior to submitting her letter of February 6, 2002, is misguided. In any event, I believe the majority mischaracterizes defendant Smith's deposition testimony as to that conversation. There is simply no testimony where defendant Smith claims to have unequivocally told the plaintiff that "no faculty position was available at that time, since there were no unfilled teaching assignments." Nor is there any testimony as to the plaintiff "rejecting Smith's reasonable request that she continue in administration until she could begin teaching, either in the fall or in the summer."

On the contrary, the record reflects that, in her deposition, Smith testified as follows as to her reaction upon being told of plaintiff's decision to move to the faculty appointment:

> "I raised no objection to that decision, understood her appointment allowed for that decision with a faculty line to be held for her but questioned the timing of the decision with an understanding of the time involved in searching for a replacement and the timing of the issues that were involved in her position as dean."

Throughout her deposition, again and again, defendant Smith testified in less than unequivocal terms such as: "preferring" the plaintiff to move to faculty at the beginning of the academic year; that moves to faculty "normally" occurred at the beginning of an academic year; and that Smith's concern was that "I had no understanding of how [a faculty position] could begin at any other time [...]" and "expected that the move would therefore coincide with that sort of timing." Indeed, on being asked: "Did you say 'No, you can't do that?'", Smith replied: "No."

Moreover, Smith did not testify that she told the plaintiff that her salary would be stopped if she moved to a faculty position mid-semester, and nothing in her deposition testimony indicates that she informed the plaintiff that university policy and procedure required the plaintiff to make a move only at the beginning of an academic year. However, within just a week of their memos, the defendants unilaterally and without notice stopped the plaintiff's salary payments entirely as of March 9, 2002 - a fact that the plaintiff did not become aware of until March 26, 2002 when she memorialized the fact in her next communication to the Office of Academic Affairs.

It was only after this query letter about the salary stoppage that defendant Smith, who had lauded the plaintiff's plans to assume a faculty position effective March 9, 2002, for the purpose of *research*, attempted to explain why the plaintiff's regular faculty salary had been stopped. In the letter of April 5, 2002, Smith wrote: "Since you requested that the change occur in mid-semester, it was not possible to assign you ordinary teaching responsibilities for the Spring 2002 term. Therefore, your regular faculty salary will resume [...] September 1, 2002."

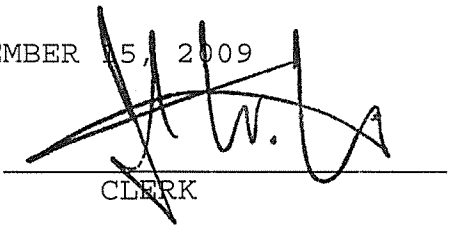
In my opinion, the plaintiff's letter of May 23, 2002 correctly observed that the defendants had breached the contract. In response, on June 3, 2002, Smith stated disingenuously, "You will note that the University did not refuse to accept your own timetable [...] and [did not] claim that you breached your employment contract if you refused to continue your administrative duties until the Fall 2002." The obvious conjecture to be made here is that the University did not so claim because it could not so claim, given that the contract is silent as to the method and timing of any transition by the plaintiff. Nowhere does the record reflect defendants' plea that she continue her administrative duties, much less that she refused such plea.

That defendant Smith states that the University did not claim a breach of contract by plaintiff, yet without notice

stopped her salary is an incomprehensible and egregious position. Thus, in my opinion, the defendants were in breach of contract as a matter of law, and therefore summary judgment should be granted to the plaintiff on liability with a remand on the amount of damages to be awarded.

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

ENTERED: SEPTEMBER 15, 2009



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Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

440 Richard Hauptner, et al., Index 7606/04
Plaintiffs-Respondents-Appellants,

-against-

Laurel Development, LLC, et al.,
Defendants-Respondents,

B&V Contracting Enterprises, Inc., et al.,
Defendants-Appellants-Respondents.

[And A Third-Party Action]

O'Connor Redd, LLP, White Plains (Joseph A. Orlando of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCiccio, New York (Brian J. Isaac of counsel), for respondents-appellants.

Kral Clerkin Redmond Ryan Perry & Girvan, New York (Rhonda D. Thompson of counsel), for respondents.

Order, Supreme Court, Bronx Country (George D. Salerno, J.), entered on or about July 8, 2008, which, to the extent appealed from, granted the motion of defendants Laurel Development and Howard Lowentheil, Inc. for summary judgment dismissing the complaint as against them and the cross motion of the B&V defendants to dismiss the claim for punitive damages, and denied plaintiffs' cross motion to dismiss the affirmative defense of culpable conduct, unanimously modified, on the law, to the extent of granting plaintiffs' cross motion to dismiss the affirmative defense of all defendants and third-party defendants that any damages suffered by plaintiffs were caused in whole or in part by

reason of the negligence, want of care, assumption of risk, or other culpable conduct on the part of plaintiff Richard Hauptner, denying summary judgment dismissal as against defendant Lowentheil, and reinstating the complaint as against Lowentheil, and otherwise affirmed, without costs.

The undisputed facts of this case are that on September 24, 2003, plaintiff, Richard Hauptner, was sitting on the rear deck of his house with his grandson when a 30' aluminum extension ladder fell from the wall against which it was leaning and knocked Hauptner unconscious into his pool. Hauptner was rescued by his grandson. A few hours later, Hauptner and his grandson found the ladder laying across the top of a brick wall that separates his backyard from a condominium complex that was under construction at the time. Plaintiff then chained the ladder to his fence.

It is further undisputed that the subject ladder belonged to a subcontractor, B&V Contracting Enterprises, which entered into a contract with the general contractor for carpentry work on the condominium development. The following day, B&V's general foreman told Louis Trojan, the general contractor's project manager, that the ladder fell onto Hauptner's property, and that Hauptner refused to return it. Trojan went to plaintiff's house and gave him insurance information whereupon plaintiff returned the ladder.

As result of the accident, Hauptner sustained numerous injuries and underwent orthopedic surgery on both knees and on his left shoulder. On January 27, 2004, Hauptner and his wife commenced this action against Laurel Development (Laurel), the owner of the condominium development, Howard Lowentheil, Inc. (Lowentheil), the general contractor, and B&V Contracting Enterprises and B&V Contracting Associates (B&V), the subcontractor. Plaintiffs sought compensatory and punitive damages for personal injuries, alleging defendants' negligence in permitting a dangerous condition to exist at the premises and failing to warn of the dangerous condition.

Defendants Laurel and Lowentheil joined issue on March 24, 2004 with general denials and affirmative defenses including plaintiff's comparative fault, and cross claims for contribution and indemnification against B&V. On June 10, 2004, B&V joined issue with general denials and affirmative defenses including plaintiff's culpable conduct and cross claims for contribution and indemnification against Laurel and Lowentheil.

Defendants Laurel and Lowentheil moved for summary judgment dismissing the complaint or in the alternative, indemnification on their cross claims. They asserted that they had neither created nor had notice of the unsecured ladder as a recurring or ongoing condition, and were therefore not liable. Defendant B&V cross-moved for summary judgment dismissing plaintiffs' punitive

damage claim and opposed Laurel and Lowentheil's motion for indemnification on a common law indemnity claim. B&V argued that there was ample evidence to show that Laurel and Lowentheil had actual or constructive notice of the unsecured ladders. B&V also maintained that punitive damages should not be awarded in this contract claim because defendants' conduct did not satisfy "the very high threshold of moral culpability."

Plaintiff cross-moved to dismiss all the affirmative defenses of culpable conduct asserted by defendants because defendants failed to show how or in what manner plaintiff caused or in any way contributed to a ladder falling into his yard while he was sitting in his back yard. Plaintiff further alleged that punitive damages should be awarded because defendants' conduct transcended mere carelessness.

On July 8, 2008, the motion court granted summary judgment in favor of Laurel and Lowentheil, dismissing them from the action, dismissed plaintiff's punitive damage claim and denied plaintiff's cross motion for dismissal of the affirmative defense of plaintiff's culpable conduct. The court found that Laurel and Lowentheil satisfied their burden to show that "they neither created or caused the ladder to be left unsecured during the construction of the condominium units" and there was no evidence establishing that "the unsecured ladder was visible" or establishing "the period of time that the condition existed prior

to the accident."

For the reasons set forth below, we find the motion court erred in granting summary judgment to Lowentheil, and in declining to dismiss the affirmative defense of plaintiff's culpable conduct.

It is well settled that in a premises related action, owners and general contractors may be held liable for injuries caused by a defective condition if it is demonstrated that the owner or general contractor created the condition or that it had actual or constructive notice of the condition for such a period of time, that, in the exercise of reasonable care, it should have corrected the problem *(see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" *(Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Plaintiffs made out a prima facie case by asserting that Lowentheil, the general contractor, had notice that a dangerous condition existed. Plaintiff pointed to an August 28, 2003 inspection report prepared by Pro Safety Service, the site safety inspector, which stated that "housekeeping needed to be addressed and ladders needed to be secured and at 4 to 1 ratio ... and

ladder system needs to be secured and have guard rail to exposed side, also must extend 3' above final step." A subsequent report on September 15 did not mention any problem with unsecured ladders, but neither did it state that the ladder problem documented in the prior inspection report had been resolved. Moreover, the record does not reflect any evidence or statements to show that Lowentheil put any safety procedures into practice to prevent further problems with unsecured ladders. Thus, Lowentheil had notice of a problem with unsecured ladders almost one month prior to the accident, and it existed long enough for Lowentheil to remedy it.

Additionally, Lowentheil's general manager, Trojan, testified at deposition that he made frequent inspections of the site; that his job responsibility was to ensure "[s]afety first" at the site and that he spent 95% of his time "walking the site" and walked the site at the end of each work day to ensure that everything was secure. Furthermore, he was the person to whom the inspections report was to be submitted. Although Trojan testified that he could not recall the August 28 report, it is apparent that he had the opportunity to discover or to know about the unsecured ladder prior to the accident. Defendant's failure to discover a condition that should have been discovered is "no less breach of due care than a failure to respond to actual notice" (*Blake v City of Albany*, 48 NY2d 875, 877 [1979]).

The motion court further erred in denying plaintiff's cross motion to dismiss the affirmative defense of plaintiff's culpable conduct raised by all defendants and third-party defendants. Given the facts of this case, such affirmative defense is totally devoid of merit and should be dismissed as a matter of law. Comparative negligence has been defined as "intentional exposure to a danger of which the plaintiff is aware" (*see Sundt v New York State Elec. & Gas Corp.*, 103 AD2d 1014, 1015 [1984], *appeal dismissed* 63 NY2d 771 [1984]). There is no evidence whatsoever that plaintiff expected that any ladder from the construction site would fall into his backyard. His mere knowledge that there was a construction project in progress with ladders in use does not render him comparatively negligent (*id.* at 1015-1016).

Plaintiffs' invocation of the doctrine of res ipsa loquitur is unavailing as against Laurel inasmuch as the record clearly demonstrates the ladder was not in that defendant's exclusive control (*see Finucane v Negri*, 301 AD2d 626 [2003]). The claim for punitive damages was properly dismissed because plaintiff failed to plead or prove wanton or reckless conduct on the part of any defendant warranting such relief (see *Sladick v Hudson Gen. Corp.*, 226 AD2d 263, 264 [1996]).

We have considered appellants' remaining arguments and find them unavailing.

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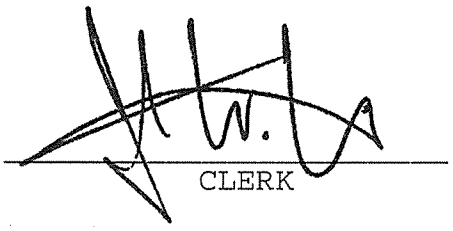

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McGuire, J.P., Acosta, DeGrasse, Abdus-Salaam, JJ.

625-
625A Index 600275/06

AWL Industries, Inc., et al.,
Plaintiffs-Respondents,

-against-

QBE Insurance Corp.,
Defendant-Appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Howard B. Altman of counsel), for appellant.

Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 17, 2007, which granted plaintiffs' motion for a declaration that defendant is obligated to defend and indemnify AWL Industries, Inc. in the underlying action, unanimously affirmed, with costs. Order, same court and Justice, entered December 22, 2008, which denied defendant's motion to renew, unanimously affirmed, with costs.

Plaintiff AWL served as the general contractor on a demolition and construction project and retained River Trucking & Rigging, Inc. as a subcontractor. An employee of River was injured while working on the project and commenced an action against AWL to recover damages for his injuries. A contract between AWL and River required River to name AWL as an additional insured on River's insurance policy. The insurance policy that QBE Insurance Corp., the defendant in this action, issued to

River has an additional insured endorsement that applies only "[a]s required by written contract." The parties dispute whether, prior to the date of the employee's accident, the contract had been executed by the parties.

Plaintiffs (AWL and its insurer) commenced this action against QBE for a declaration that AWL is an additional insured under River's policy. Plaintiffs moved for summary judgment on the complaint. Plaintiffs also sought to strike QBE's answer based on its failure to comply with a conditional order requiring it to provide responses to certain disclosure demands. QBE opposed the motion. By an order dated October 11, 2007, Supreme Court granted that portion of the motion seeking summary judgment and declared that QBE was required to defend AWL in the personal injury action and indemnify AWL for any judgment resulting from that action. The court left "unaddressed" that portion of the motion seeking to strike QBE's answer. Supreme Court denied QBE's subsequent motion to renew plaintiffs' prior motion. This appeal by QBE from both orders ensued.

We need not decide whether Supreme Court correctly granted plaintiffs summary judgment, because plaintiffs were entitled to have QBE's answer struck. Plaintiffs made a motion to strike QBE's answer based on its failure to respond to several of plaintiffs' disclosure demands. By an order dated October 16, 2006, Supreme Court resolved that motion by requiring QBE to

respond to those demands within 30 days of the date of the order. The order stated that "In the event that defendant does not comply with this [order] with[in] this 30 Day period, the answer will be struck." By an order dated November 8, 2006, the court extended to December 8, 2006 QBE's time to comply with the conditional order. In their motion papers, dated February 20, 2007, plaintiffs asserted that QBE, in violation of the conditional order, had not provided plaintiffs with numerous documents they had demanded, including documents in QBE's claims file regarding the personal injury action, and documents, notes and correspondence pertaining to AWL's tender of the defense in the personal injury action to QBE. In opposition to that motion, QBE did not dispute that it had failed to comply with the conditional order. Thus, the self-executing conditional order became absolute on December 8, 2006 (*see e.g. Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008]; *Ensley v Snapper, Inc.*, 62 AD3d 403 [2009]; *Tejeda v 750 Gerard Prop. Corp.*, 272 AD2d 124 [2000]; *VSP Assoc. v 46 Estates Corp.*, 243 AD2d 373 [1997]; *see also Foster v Dealmaker, SLS, LLC*, 63 AD3d 1640 [2009]).

Accordingly, QBE was required to demonstrate both a reasonable excuse for its failure to comply with the order and a potentially meritorious defense to the action (*see Ensley, supra; Tejeda, supra*). QBE asserted that its prior counsel failed to

notify QBE's claims handling company that the court had ordered QBE to provide the disclosure requested in plaintiffs' demand for disclosure. QBE, however, acknowledged that its claims handling company had received QBE's prior counsel's affirmation opposing plaintiffs' motion to strike QBE's answer, the motion that generated the October 16 conditional order. QBE, through its claims handling company, was therefore aware that plaintiffs had asserted that QBE failed to respond to plaintiffs' disclosure demands and were seeking to have QBE's answer struck. At bottom, QBE offered nothing more than a perfunctory claim of law office failure by its prior counsel, which was insufficient to excuse its failure to comply with the conditional order (*see generally Okun v Tanners*, 11 NY3d 762 [2008]; *Walker v City of New York*, 46 AD3d 278, 280-281 [2007]).

We note, too, that the excuse for QBE's failure to comply with the conditional order came from QBE's subsequent counsel, who did not assume representation of QBE until February 2007, approximately two months after QBE's deadline to comply with the conditional order passed. Thus, QBE's subsequent counsel's assertions as to why QBE failed to comply with the conditional order were not based on personal knowledge.

In sum, the conditional order striking QBE's answer became absolute, QBE failed to demonstrate a reasonable excuse for its failure to comply with that order, and consequently plaintiffs

are entitled to judgment in their favor. Because we conclude that QBE's answer should have been struck and that plaintiffs are entitled to judgment on the complaint (and a declaration in their favor) for that reason, we need not and do not pass on whether a triable issue of fact exists regarding whether a "written contract" between AWL and River existed on the date of the worker's accident.

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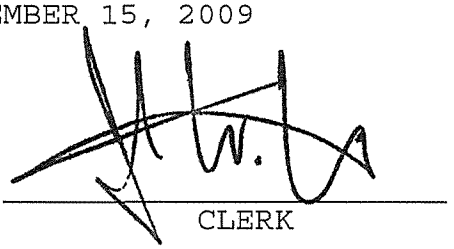

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

807 Hattie Wilson, etc., Index 115305/97
Plaintiff-Appellant, 590973/98
591052/98
-against- 590974/98
591051/98

The City of New York, et al.,
Defendants,

Metropolitan Transportation Authority, et al.,
Defendants-Respondents.

- - - - -

Krzysztof Belzek,
Plaintiff-Appellant,

-against-

Lehrer, McGovern, Bovis, Inc.,
Defendant-Respondent,

ETS Contracting, Inc.,
Defendant.

- - - - -

Ryszard Kruzynski,
Plaintiff-Appellant,

-against-

Lehrer, McGovern, Bovis, Inc.,
Defendant-Respondent,

ETS Contracting, Inc.,
Defendant.

[And Other Actions]

Alexander J. Wulwick, New York, for appellants.

Newman Myers Kreines Gross & Harris, P.C., New York (Michael H. Zhu of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 15, 2008, which granted defendants respondents'

motion to set aside the jury verdicts as to each plaintiff on damages and ordered a new trial on that issue, unanimously reversed, on the law and the facts, without costs, the verdicts reinstated, but the awards for past and future pain and suffering, Wilson's and Belzek's awards for past lost earnings and Kruzynski's award for future lost earnings vacated, and each matter individually remanded for a new trial solely as to such damages, unless that corresponding plaintiff, within 30 days of service of a copy of this order, stipulates to reduce the applicable awards as follows, and to the entry of judgment in accordance therewith: Plaintiff Wilson's award reduced for her decedent's past pain and suffering from $1.25 million to $900,000, for future pain and suffering from $2.5 million to $135,000, and for past lost earnings from $233,000 to $198,580; plaintiff Belzek's award reduced for past pain and suffering from $1.25 million to $900,000, for future pain and suffering from $4,875,000 to $3,510,000, and for past lost earnings from $332,000 to $330,000; and plaintiff Kruzynski's award reduced for past pain and suffering from $1.25 million to $900,000, for future pain and suffering from $3 million to $2,025,000, and for future lost earnings from $490,000 to $389,184.

Plaintiffs brought this action to recover for injuries they sustained as a result of lead intoxication caused by their inhaling fumes while engaged in demolition work at Grand Central

Terminal. The jury found defendants liable and awarded damages for past and future pain and suffering and lost earnings. Defendants moved to vacate the verdict on the grounds that plaintiffs' summation was prejudicial and that the damages awards were excessive and unsupported by the evidence. The trial court set aside the damages verdict based on prejudicial language in the summation, but never reached the issues raised in the motion concerning damages.

We find that the court erred in setting aside the damages verdicts based on the claimed summation errors. Many of the summation remarks challenged on appeal were not objected to and defense counsel did not ask for any curative instructions or seek a mistrial with regard to them. Thus, defendants failed to properly preserve their objections to these comments (*see Lucian v Schwartz*, 55 AD3d 687, 689 [2008], *lv denied* 12 NY3d 703 [2009]; *Bennett v Wolf*, 40 AD3d 274, 275 [2007], *lv denied* 9 NY3d 818 [2008]). Nor have defendants shown error so fundamental that it caused a gross injustice (*see Duran v Ardee Assoc.*, 290 AD2d 366, 366-367 [2002]).

As to those summation complaints that were preserved, the court sustained several of the objections and on one occasion admonished counsel. Another time the court struck the comment and directed the jury to disregard it. In any event, after a 7-week trial with numerous witnesses and exhibits, thousands of

pages of testimony and lengthy closing statements, these remarks were unlikely to have affected the outcome (*see Pareja v City of New York*, 49 AD3d 470, 470 [2008]), especially in light of the strength of plaintiffs' case. All three plaintiffs testified as to the numerous physical and neurological injuries they suffered, and compelling medical evidence was presented linking their symptoms to their exposure to lead at Grand Central Terminal.

Although several of counsel's comments about defendants' expert medical witness, including calling him a "hired gun," were improper and would have been better off left unsaid, they did not "create a climate of hostility that so obscured the issues as to have made the trial unfair" (*Duran v Ardee Assoc.*, 290 AD2d at 367, *quoting Balsz v A & T Bus Co.*, 252 AD2d 458, 459 [1998]; *see also Binder v Miller*, 39 AD3d 387, 387 [2007]). In fact, the jury had ample reason to reject this expert's testimony and accept plaintiffs' claims. Plaintiffs' medical expert concluded that their injuries were caused by lead intoxication at Grand Central Terminal. In contrast, defendants' expert theorized that Wilson, Kruzynski, perhaps Belzek, and a fourth plaintiff who had settled, all coincidentally suffered from Parkinson's disease, a conclusion even the expert himself found "very unusual." Moreover, this witness conceded that he had never treated any adult patients with lead intoxication in his 30 years of practice. In light of this testimony, which the jury reasonably

found implausible, there was no danger that the jury was so influenced by counsel's remarks that they reached a verdict unsupported by the evidence (*see Calzado v New York City Tr. Auth.*, 304 AD2d 385, 385 [2003]).

Likewise, the suggestion by plaintiffs' counsel that the jury put itself in plaintiffs' shoes to determine the appropriate damages, although improper, was not so egregious as to warrant setting aside the verdict (*see Young v Tops Mkts., Inc.*, 283 AD2d 923, 924 [2001]). *Liosi v Vaccaro* (35 AD2d 790 [1970]) and *Weintraub v Zabotinsky* (19 AD2d 906 [1963]), relied upon by defendants, do not stand for the proposition that making such a comment during summation automatically warrants setting aside a verdict. In these two cases, it was the court, in its charge, that improperly directed the jury to use this incorrect standard for determining how to compensate the plaintiffs for their injuries. Here, defendants raise no objection to the court's charge. Furthermore, the court instructed the jury that the summation remarks were not evidence and that the jury was bound to accept the law as charged and reach a verdict based on the evidence presented.

Although defendants' complaints about the summation do not warrant vacatur of the jury's damages verdict, we find that the pain and suffering awards and some of the lost earnings awards are excessive because they are not supported by the record and

they deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]).[2] Accordingly, we have reduced these lost earnings awards to the highest amount that can be justified by the evidence. We decline to disturb the awards of $1 million to Belzek for future lost earnings and $182,000 to Kruzynski for past lost earnings because these awards are reasonable compensation in light of the W-2s in evidence.

The lost earnings awards must be vacated to the extent indicated. Contrary to defendants' claims, there was no need for plaintiffs to mitigate damages because the testimony of medical and vocational witnesses demonstrated that plaintiffs' injuries were permanent, rendering them unemployable (*see Williams v Turner Constr.*, 2 AD3d 217, 217 [2003]; *Djelosaj v Gaines Serv. Leasing Corp.*, 237 AD2d 223, 224 [1997]).

Kruzynski's claim for lost wages is not barred by the Court of Appeals' decision in *Balbuena v IDR Realty LLC* (6 NY3d 338 [2006]), a case relied on by defendants both in the trial court and on appeal. *Balbuena* held that a plaintiff's presence in this country without authorization, standing alone, is insufficient to deny a claim for lost earnings (6 NY3d at 361). Here, however, there is no evidence in the record as to Kruzynski's immigration

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[2] Even though the verdicts were not reduced to a judgment, and the trial court did not specifically address the amount of the awards in its order setting the verdicts aside, that order necessarily brings up for review on this appeal the appropriateness of the damages awards, which both sides briefed.

or citizenship status and thus, *Balbuena* is inapplicable.

Nevertheless, defendants maintain that lost earnings cannot be awarded where a plaintiff submits a false document to his employer. In support, they point to language in *Balbuena* where the court concluded that "in the absence of proof that [the] plaintiffs tendered false work authorization documents to obtain employment, [] IRCA [the Immigration Reform and Control Act of 1986 (8 USC § 1324a *et seq.*)] does not bar maintenance of a claim for lost wages by an undocumented alien" (6 NY3d at 363). There was no evidence at trial, however, that Kruzynski filed false employment documents or otherwise violated IRCA. Indeed, there was no testimony at all as to how Kruzynski obtained any of his jobs.

Defendants misconstrue the record in making this argument. At trial, Kruzynski testified as to what his social security number is, and a review of his W-2s introduced into evidence shows this number on those documents. Although he used what he termed "a temporary number from the IRS" and not his social security number on some of his tax returns, that fact alone does not establish that he filed any false work authorization documents. Thus, the language in *Balbuena* cited by defendants is not implicated here and we need not determine, on this appeal, what the consequences would have been if Kruzynski had submitted a false document to obtain employment.

The jury's awards for past and future pain and suffering are excessive and must be reduced to the extent indicated. The evidence demonstrated that each of the plaintiffs had substantially similar symptoms, including memory loss, headaches, fatigue, loss of appetite, aching joints and muscles, depression, loss of libido and night sweats. Kruzynski further experienced tremors, spasms, nervousness, weakness, numbness in his extremities, motor control problems, stomach pain, suicidal ideation and trouble sleeping. Belzek experienced loss of concentration, weakness, suicidal ideation, stomach pain, numbness in his extremities, nausea, dizziness and a decline in general intellectual functioning. Wilson suffered from shaking episodes, loss of concentration, difficulty sleeping, tremors, spasms, nervousness and a decline in general intellectual functioning, learning, processing speed, verbal abilities and visual perception.

Although these injuries are serious and permanent, we find that the jury's awards for past and future pain and suffering deviate materially from what would be reasonable compensation under the circumstances (CPLR 5501[c]; *Donlon v City of New York*, 284 AD2d 13 [2001]) as measured by awards approved in similar cases (*see Paek v City of New York*, 28 AD3d 207 [2006], *lv denied* 8 NY2d 805 [2007]; *Reed v City of New York*, 304 AD2d 1 [2003], *lv denied* 100 NY2d 503 [2003]). Additionally, Wilson died a year

and a half after the trial and plaintiff's representative concedes that his award for future pain and suffering must be reduced accordingly. Defendants' claim that they are entitled to a new trial on Wilson's damages because he died from cancer after the trial is not properly before us because it is based on facts not in the record.

Defendants may seek relief before the trial court with regard to collateral source setoffs and calculations regarding the future damages awards (*see* CPLR 4545[c], 5041[e]). We have considered defendants' remaining contentions and find them unavailing.

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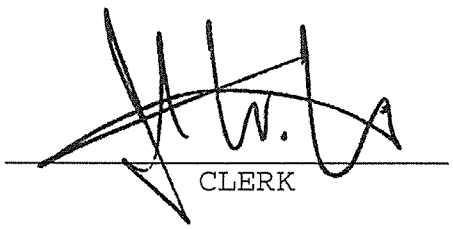

CLERK

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

913 Rapp B. Properties, LLC, Index 117952/05
Plaintiff-Respondent-Appellant,

-against-

RLI Insurance Company, et al.,
Defendants-Appellants-Respondents.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Tara C. Fappiano of counsel), for RLI Insurance Company and Alea North America Insurance Company, appellants-respondents.

Marcia Goffin, New York, for City Outdoor, Inc. and NPA East Billboard, Inc., appellants-respondents.

Weg and Myers, P.C., New York (Dennis T. D'Antonio of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Edward Lehner, J.), entered November 10, 2008, which denied the parties' respective motions for summary judgment, unanimously modified, on the law, the motion by RLI and Alea North America (the insurers-defendants) granted and the complaint and all cross claims dismissed as against them, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly in favor of said defendants.

Plaintiff seeks indemnification under the insurers' policies for damage to its building's south wall as a result of collapse, an allegedly covered peril, which occurred "[o]n or about July 19, 2005 and continuing thereafter." The complaint cites damage consisting of "severe cracking, bulging, splaying and

displacement of the exterior brick facade." The insurers disclaimed coverage on the ground that the damage was "due to wear & tear and gradual deterioration not collapse." Collapse with respect to buildings is defined as follows under the policies' additional coverage provisions:

> a. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose;
>
> b. A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse;
>
> c. A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building;
>
> d. A building that is standing or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

The interpretation of an unambiguous provision of an insurance contract is a question of law for the court (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]. Accordingly, regardless of the cause or causes of the damage, it was error for the court to deny the insurers' motion, because there was no collapse within the meaning of the policies. Michael H. Rappaport, plaintiff's managing member, testified that the building and its south wall were still standing three months after the damage was observed in July 2005. Standing alone, Rappaport's testimony suffices to belie any claim that the wall's

collapse was "abrupt" within the meaning of the additional coverage provisions. John Paul Murray, plaintiff's architect, observed displacement of brick masonry units and opined that there was an "imminent risk that the wall would completely collapse." In light of subparagraph b above, which excludes imminent collapse from the definition, Murray's affidavit does not bring the occurrence within the coverage of the policies. In *Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.* (35 AD3d 177 [2006]), this Court held that a building that was "shown to have had two-to-three-inch-wide cracks in its facade and was sinking, out of plumb, and leaning" did not meet a materially identical definition of collapse. Rappaport's affidavit is also unavailing insofar as he claims to have discovered that bricks had fallen from the inside of the wall where it was covered by sheetrock and tile. As noted above, the wall was still standing. Tellingly, Rappaport describes the condition as hidden "decay," a phenomenon which, by definition, does not occur abruptly.

There exists, however, a triable issue of fact as to whether the damage to the building was caused by a 624 square foot vinyl outdoor sign installed by defendants City Outdoor and NPA East Billboard (the sign defendants). In this regard, Murray opined that the tension created by tightly stretching the sign against its fasteners contributed to the failure of the south wall. According to Murray, the vinyl is stretched to a pressure of up

to 170 pounds per square inch. The sign defendants' assertion that Murray, an architect, is unqualified to render such an opinion lacks merit. The profession of architecture involves "the application of the art, science, and aesthetics of design and construction of buildings . . . including their components and appurtenances . . . wherein the safeguarding of life, health, property and public welfare is concerned" (Education Law § 7301).

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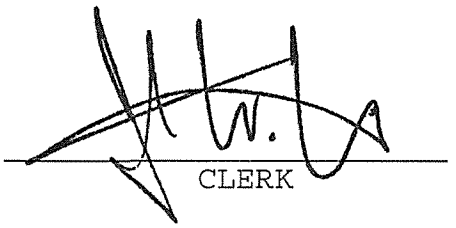


CLERK

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

915 Christopher Nicholas, Index 116437/05
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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

Martin R. Munitz, P.C., New York (Martin R. Munitz of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 10, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

On July 3, 2005, plaintiff allegedly fell on an internal stairway in a building owned by defendant New York City Housing Authority (NYCHA). At his deposition he was asked whether the accident occurred because his foot slipped, because he tripped, or whether he fell for any other reason. Plaintiff definitively responded that he slipped. Plaintiff was then asked whether there was something on the step that caused him to slip. He responded, "Yes, it was wet." He could not identify the substance. Subsequently, the following question and answer

ensued:

> Q. Was there anything -- other than the water, was there anything else about the condition of the step that caused you to fall?
>
> A. No.

Plaintiff testified that before the accident, he never had any problems with the staircase and had never made any complaints to NYCHA about the steps. He also did not know how long the step had been wet before the accident.

After discovery, NYCHA moved for summary judgment dismissing the action on the grounds that it did not create the unidentified wet substance on the step, nor did it have actual or constructive notice of the condition. Plaintiff opposed and claimed, for the first time, in an affidavit, that the cause of his accident was "a defective/broken stair." He also submitted an affidavit from an engineer who opined, inter alia, that the condition of the concrete nosing of the step from which plaintiff fell constituted a violation of the building code "by reason of being irregularly and grossly pock-marked and missing its steel nosing."

The court denied NYCHA's motion. After concluding that NYCHA made a prima facie showing that it had no notice of a wet condition that allegedly caused plaintiff's fall, the court nevertheless found that plaintiff raised a triable issue of fact as to whether the broken stair contributed to his fall.

We reverse. NYCHA met its prima facie burden of

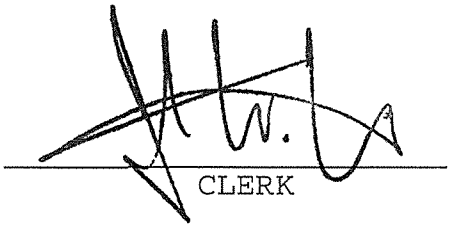
demonstrating that it neither created the condition, nor had actual or constructive notice of the defective condition which caused plaintiff's fall (*see e.g. Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249-250 [1984], *affd* 64 NY2d 670 [1984]). In opposition, as the motion court found, plaintiff failed to demonstrate otherwise.

Instead, plaintiff, who had unequivocally testified that the sole cause of his fall was the wet condition of the step, sought to add a new theory, i.e., that the defective step caused his fall. It is evident that his affidavit was tailored to avoid the consequences of his deposition testimony, and constitutes feigned evidence that should be rejected (*see e.g. Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp.*, 50 AD3d 469 [2008]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [2007]).

Thus, in the absence of any bona fide question of fact as to defendant's liability, the complaint should have been dismissed.

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

ENTERED: SEPTEMBER 15, 2009



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Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

977 In re Iyanah D. and Another,

Children Under the Age of
Eighteen Years, etc.,

Daniel D.,
Respondent-Appellant,

Saiidja Phillips,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Chadbourne & Parke LLP, New York (Keith Levenberg of counsel), and Doors Legal Services Center, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for ACS, respondent.

Michelle F. P. Roberts, New York, Law Guardian.

Order, Family Court, New York County (Jody Adams, J.), entered on or about January 14, 2008, which, after a fact-finding hearing, determined that respondent had neglected his daughter Iyanah and derivatively neglected his daughter Ariella, unanimously reversed, on the law, without costs, and the charges of neglect dismissed.

Family Court's finding of neglect was based solely on the condition, observed on one particular day, of the apartment where respondent father and Iyanah resided. The court adopted petitioner's allegation that the subject apartment's living room was cluttered with plastic bags containing clothes and home

appliances, there were unwashed dishes in the kitchen, and an odor was emanating from dirty cat litter, and concluded by a preponderance of the evidence that this constituted neglect. Specifically, the court determined, without analysis, that these seemingly unsanitary conditions of the home posed an imminent danger to Iyanah. We recognize that although there may have been a lengthy history with respondent's family and the court, based on the sparse record before us, the unsanitary condition of the apartment, standing alone, was insufficient as a matter of law to find neglect. While the condition of the apartment was hardly ideal, it did not place the child's physical, mental or emotional state in imminent danger of impairment (*Matter of Devin N.*, 62 AD3d 631 [2009]). There was no evidence that the then month-old Iyanah was endangered by the condition of the apartment; petitioner conceded it did not inspect the room in which respondent claimed she slept,[3] and the child was not removed until more than two weeks after the single observation by the case worker of respondent's apartment.

Petitioner first observed the premises on October 6, 2005 but did not remove Iyanah from the home until October 24. It was error to find neglect and imminent danger to the well-being of the child based on this single visit. The record is devoid of

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[3] Respondent testified that he never brought Iyanah into the living room, but that he cleaned the room where she stayed in daily.

any indication that petitioner made any attempt, after its first visit, to see whether the conditions were improving or to confirm respondent's explanation for the condition, namely, that the plastic bags in the living room had been packed in preparation for a move to new living quarters. In fact, the case worker testified that when she returned to the premises to remove Iyanah, she did not observe the condition of the apartment. Apart from the fact that the derivative neglect petition as to Ariella was filed nearly a year after Iyanah was removed, inasmuch as the finding of neglect as to Iyanah was error, the derivative neglect of Ariella was also in error.

Finally, we reject petitioner's argument that because the Family Court entered a dispositional order after its Order of Fact-Finding, respondent was required to perfect his appeal from that later order, rather than from the fact-finding determination. This Court has the discretion "to treat the appeal as taken from th[e appropriate] order" (*Matter of Dakota K.*, 267 AD2d 1054 [1999]; *see also* CPLR 5520[c]).

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

ENTERED: SEPTEMBER 15, 2009

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CORRECTED ORDER - SEPTEMBER 25, 2009

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

984 Richard Scuderi, Index 115286/04
Plaintiff-Respondent,

-against-

Independence Community Bank Corp., et al.,
Defendants-Respondents-Appellants,

Kane Brothers Carpeting, Inc., et al.,
Defendants-Appellants-Respondents.

Cohen, Kuhn & Associates, New York (Steven Balson-Cohen of counsel), for appellants-respondents.

Morris Duffy Alonso & Faley, New York (Pauline E. Glaser of counsel), for respondents-appellants.

Greenberg & Greenberg, LLP, New York (Simon Q. Ramone of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 22, 2008, which, to the extent appealed from, (1) denied the motion of defendants Kane Brothers Carpeting and Showplace Flooring (Kane/Showplace) for summary judgment insofar as it sought dismissal of plaintiff's Labor Law § 200 and common-law negligence claims and the cross claims for common-law indemnification or contribution asserted against them, and (2) granted plaintiff leave to supplement his bill of particulars and awarded plaintiff partial summary judgment as to liability against defendants Independence Community Bank Corp. and 172 East 4th Street Tenants Corp. (Independence and Tenants Corp.) on his

the extent of dismissing, as against Kane/Showplace, plaintiff's Labor Law § 200 claim and Independence and Tenants Corp.'s cross claim for contractual indemnification, denying plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 241(6) against Independence and Tenants Corp., and otherwise affirmed, without costs

Plaintiff was a carpenter employed by a nonparty general contractor that hired Kane/Showplace as subcontractors for a project to renovate the premises owned by Tenants Corp. and leased by Independence. Plaintiff claims he was injured when he tripped over debris consisting of, inter alia, cardboard boxes and twine, allegedly belonging to Kane/Showplace.

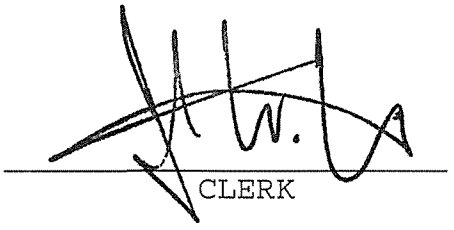
Kane/Showplace moved to dismiss plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence claims, and to dismiss co-defendants' cross claims for contractual and common-law indemnification and contribution, asserting that they were neither an owner nor a general contractor, and were not negligent. Since Kane/Showplace were neither owners nor general contractors, liability cannot be assessed against them under either Labor Law § 200 (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 [2009]) or § 241[6] (*see Kelarakos v Massapequa Water Dist.*, 38 AD3d 717 [2007]). However, summary judgment dismissing plaintiff's common law negligence claim and co-defendants' cross claims for common law indemnification and contribution is

precluded inasmuch as triable issues of fact exist here as to whether Kane/Showplace were present at the site when plaintiff was injured, and whether they created the debris on which plaintiff claims he fell (*cf. Urban; Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [2007]). Dismissal of the contractual indemnity claim is appropriate, as Independence and Tenants Corp. failed to produce the contract supporting such claim.

The court properly granted plaintiff's motion to supplement his bill of particulars to assert a violation of the Industrial Code, based on an allegation long known to all defendants, and thus causing no prejudice (*see Baten v Wehuda*, 281 AD2d 366 [2001]). However, the trial court erroneously granted plaintiff's motion for partial summary judgment on the issue of liability on his § 241(6) claim against Independence and Tenants Corp. There exists a question of fact as to whether plaintiff's accident was in fact caused by debris, and thus it cannot be said, as a matter of law, that defendant owners were liable under the provisions of the Industrial Code.

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

ENTERED: SEPTEMBER 15, 2009



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SEP 15 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

753-754-754A
Index 114613/07

x

Joel Vig,
Plaintiff-Appellant,

-against-

The New York Hairspray Co., L.P.,
Defendant-Respondent.

x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered July 22, 2008, granting defendant's motion to dismiss the amended complaint alleging employment discrimination based on a disability in violation of Executive Law § 296 and the Administrative Code of the City of New York § 8-107, from the order, same court and Justice, entered July 8, 2008, which granted defendant's motion to dismiss the amended complaint, and from the order, same court and Justice, entered October 1, 2008, which, to the extent appealable, denied plaintiff's motion to renew.

Spizz & Cooper, LLP, Mineola (Harvey W. Spizz of counsel), for appellant.

Proskauer Rose LLP, New York (Neil H. Abramson and Ian C. Schaefer of counsel), for respondent.

ACOSTA, J.

This case requires us to evaluate the sufficiency of a complaint alleging disability discrimination under the New York State Human Rights Law (State HRL, Executive Law Article 16) and the New York City Human Rights Law (City HRL, Administrative Code § 8-101, *et seq.*) in the context of a motion to dismiss for failure to state a cause of action.

Background[1]

Plaintiff was an actor and musician in defendant's production of the hit musical play *Hairspray*. Plaintiff filled multiple roles in the production: the principal, Mr. Spritzer, Mr. Pinky, the policeman, the flasher, and a prison guard. He also served as understudy for Harvey Fierstein in his role as Edna Turnblad and for Dick Latessa in his role as Wilbur Turnblad. In addition, plaintiff played the glockenspiel as a musician in the production.

Plaintiff fulfilled these duties for defendant pursuant to two written contracts -- an Actors Equity Association contract and a contract with the Associated Musicians of Greater New York (Musicians Union). Defendant requested that plaintiff perform under the additional contract so that it could comply

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[1]The facts are taken from the Amended Complaint and plaintiff's affidavit in support of the motion to renew.

with the Musicians Union's requirement for the minimum number of musicians required for a Broadway production. As a member of the Musicians Union, and pursuant to the collective bargaining agreement between the Union Local 802 and the League of American Theatres and Producers, plaintiff was guaranteed employment for the run of the show.

Factual Allegations

Plaintiff's Injury and Medical Leave

Plaintiff alleges that he was injured during the course of his employment when, during the opening musical number of a Wednesday matinee, he fell on stage in front of the audience, banging his right knee and twisting the left. Plaintiff alleges that after he completed the performance, he was evaluated by a physical therapist on call in the theater, who advised him not to continue performing until he consulted with a physician.

Plaintiff alleges he consulted with Dr. Philip Bauman, the orthopedist recommended by defendant, who referred him for an MRI exam that revealed plaintiff had suffered a tear in the meniscus, the cartilage in his left knee. Plaintiff alleges he was able to resume performing that Saturday night after being advised by the physical therapist that he could perform, but could not twist or jump during the show.

Plaintiff further alleges that during the first week of July

2004, after returning from a one-week vacation, he informed the stage manager that he intended to have surgery to repair the injury based on Dr. Bauman's recommendation. Plaintiff claims that the stage manager requested he delay the surgery, and he agreed. Plaintiff alleges that the stage manager then approved the date of August 18, 2004 for the surgery and for medical leave to recover thereafter, but instructed plaintiff to request the leave from Marc Borsak (the company manager), Lon Hoyt (the musical conductor), Clint de Ganon (the house contractor), and Frank Lombardi (the production stage manager). Plaintiff alleges that all these individuals approved his leave.

Prior to his leave, however, plaintiff alleges he was told by Laura Green, defendant's general manager, that under the Actors Equity contract, he was not eligible for the approved leave. Plaintiff alleges that Green advised him the contract did not permit leave where a performer had less then nine weeks remaining on his contract. Plaintiff was scheduled for the surgery on August 18, 2004, and his contract expired approximately seven weeks after the surgery, in early October. Plaintiff alleges that Green told him that he would be considered terminated from the show as of the date his "approved leave" began, August 17, 2004.

Plaintiff asserts, however, that the Musicians Union took a

different position, stating in a letter dated September 1, 2004 that as a "hired member of the orchestra" for the run of the show, he was entitled to and approved for medical leave.

Plaintiff alleges that he had the surgery as scheduled on August 18, 2004, and remained on what he thought was approved medical leave thereafter, receiving $400 per week in Workers' Compensation benefits and a permanency award from defendant's Workers' Compensation carrier for his injury.

Plaintiff alleges that Dr. Bauman provided defendant with updates on his condition during his rehabilitation until November 2004, when plaintiff notified Hoyt, de Ganon, Borsak and Green that he intended to return to the production on November 16.

Plaintiff avers that upon arriving at the theater on November 16, 2004, he was advised by the theater manager that Green had directed he not be permitted into the theater to resume his duties.

The Arbitration

Plaintiff also alleges that he commenced an arbitration against defendant pursuant to the Musicians Union contract, which guaranteed him employment for the run of the show. The arbitrator found, however, that plaintiff was more of an actor than a musician, and thus was bound by the Actors Equity contract. The arbitrator then found that plaintiff's Actors

Equity contract had expired in October 2004, and ruled that plaintiff need not be reinstated. Plaintiff initially sought to appeal the arbitrator's decision, but the Musicians Union declined to pursue it.[2]

The Instant Motion[3]

In April 2008, defendant again moved to dismiss the complaint for failure to state a cause of action, arguing, as it does now before this Court, that plaintiff provided "no factual basis" to state a claim for disability discrimination, but instead asserted legal conclusions in place of facts. Defendant argued that, as plaintiff has conceded, it allowed him to work every show until he had his surgery, granting him the reasonable accommodation of performing without twisting or jumping, despite the fact that such actions were germane to the show. Defendant further argued that plaintiff's termination occurred not when he was disabled, but rather when he was ready to resume his work.

Plaintiff counters that while he could not say defendant

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[2]Plaintiff challenges the ability of the arbitrator to rule on issues concerning the Actors Equity contract, as she was not an approved arbitrator for Actors Equity. As this is not an appeal from the arbitration decision, we take no position on the propriety of the arbitrator's ruling.

[3]This was defendant's second motion to dismiss the complaint for failure to state a cause of action. The first was denied without prejudice to renewal in February 2008, in an order that also granted plaintiff leave to replead his complaint.

directly told him he was terminated due to his disability, he nonetheless pleaded a prima facie case of disability discrimination. He argues that defendant perceived him to be disabled because of his torn meniscus and the permanency award he has received from Workers' Compensation. Plaintiff stated he was reasonably able to resume performing at the time of his termination, and that he was terminated without reason or cause.

The Decision of the Motion Court

The court held that plaintiff had failed to state a prima facie claim of disability discrimination, offering only conclusory allegations and failing to plead a causal link between his disability and his termination. The court noted plaintiff's assertion that defendant never gave him any valid reason for termination, and found his conclusion that defendant terminated him because of his disability to be mere speculation.

Discussion

In considering a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). In addition, employment discrimination

cases are themselves generally reviewed under notice pleading standards. For example, under the Federal Rules of Civil Procedure, it has been held that a plaintiff alleging employment discrimination "need not plead [specific facts establishing] a prima facie case of discrimination" but need only give "fair notice" of the nature of the claim and its grounds (*Swierkiewicz v Sorema N.A.*, 534 US 506, 514-515 [2002]). Applying these liberal pleading standards, we find that plaintiff has stated causes of action for violations of both the State and City HRLs based on disability discrimination.[4]

In making this determination, we note that the State HRL accords greater disability protection than the Americans with Disabilities Act,[5] and that the City HRL provides even broader protections still (*see e.g. Reilly v Revlon, Inc.*, 2009 US Dist LEXIS 45611, *36-37, 2009 WL 1391258, *14 [SD NY], citing *Giordano v City of New York*, 274 F3d 740, 753 [2d Cir 2001] ["The New York State Executive Law and the New York City Administrative

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[4]We note that plaintiff's initial complaint, while perhaps less artfully pleaded, also set forth causes of action for disability discrimination sufficient to withstand the motion to dismiss.

[5]For example, unlike the ADA, the State HRL definition of disability has no requirement that the physical or mental impairment substantially limit one or more major life activities of an individual (*compare* 42 USC § 12102[2] [ADA] *with* Executive Law § 292[21] [State HRL]).

have a broader definition of 'disability' than does the ADA; neither statute requires any showing that the disability substantially limits any major life activity"]).

Accordingly, to the extent the ADA and the case law thereunder are discussed in our analysis, it is done only to provide interpretative guidance and is not binding on our application of the more stringent protections accorded by the State and City HRLs *(see e.g.* 42 USC § 12201[b] ["Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures . . . of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities"; *see also,* New York City Administrative Code § 8-130 ["The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed"]).[6]

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[6]*See also* Local Law 85 of 2005 ("Restoration Act"), § 1. Through this enactment, the Council sought to underscore that the provisions of the New York City HRL should be construed independently from similar or identical provisions of New York State or federal statutes. Interpretations of New York State or federal statutes with similar wording may be used to aid in

The State Human Rights Law

Executive Law § 296(1)(a) provides, inter alia, that it is an unlawful discriminatory practice for an employer to discharge an employee on the basis of a disability (*Germakian v Kenny Intl. Corp.*, 151 AD2d 342 [1989], *lv denied* 74 NY2d 615 [1989]). Accordingly, in order to state a cause of action for disability discrimination under the State HRL, the complaint must allege that the plaintiff suffers a disability and that the disability caused the behavior for which the individual was terminated (*Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]).

Plaintiff sufficiently pleaded that he suffered a disability when he was injured during a performance of defendant's production. Indeed, as a result of his injury, plaintiff received a permanency award from Workers' Compensation. He further alleges that at the time of his termination in November 2004, when he was refused entry to the theater, he was nonetheless capable of resuming his employment as a performer. Defendant's stated reason for terminating plaintiff was directly related to his disability, or defendant's perception that he was disabled, i.e., that he was not eligible for the medical leave he

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interpretation of the New York City HRL, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise.

had taken following his surgery.

The Musicians Union Contract

Moreover, is it clear that the disability, surgery, and plaintiff's termination under the Actors Equity contract resulted in his termination under the Musicians Union contract as well, a contract that guaranteed him employment for the run of the show. Even assuming, arguendo, that the termination under the Actors Equity contract was proper, plaintiff can still state a cause of action for being terminated from his Musicians Union contract because of the disability. Absent from the letters sent by defendant to plaintiff in August 2004, threatening termination from the show, is any discussion of accommodating plaintiff under the terms of the Musicians Union contract.

Indeed, although the motion court failed to address plaintiff's cause of action for termination from the Musicians Union contract, defendant was explicitly advised by the union on three separate occasions, by letters dated September 1, October 25, and November 10, 2004, that plaintiff was a hired musician for the run of the show. In addition, the November 10 letter advised defendant that pursuant to the Musicians Union contract, plaintiff's termination had to be for "just cause."

The City Human Rights Law

Plaintiff also sufficiently stated a discrimination claim

pursuant to the City HRL. We separate the analysis because the disability provisions of the City and State HRLs are not "equivalent," and require distinct analyses.[7]

The City HRL provides a distinct definition of "disability," defining it purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8-102[16][a]).

Based on the facts discussed herein, plaintiff also stated in his complaint a cause of action for disability discrimination under the New York City HRL. Indeed, it is likely that even if plaintiff had been found not to have stated a cause of action under the State HRL, he would have stated a cause of action under the City HRL. Plaintiff has successfully pleaded he was disabled within the meaning of the City HRL, and that he was terminated from his employment because of it.

Accordingly, the judgment of Supreme Court, New York County (Carol Robinson Edmead, J.), entered July 22, 2008, granting

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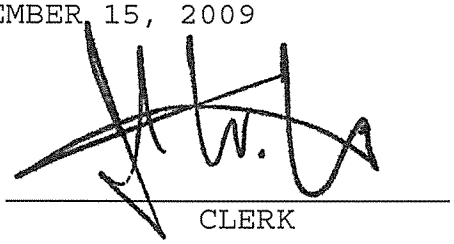
[7] By means of the Restoration Act, the City Council rejected the notion of equivalence among the HRLs and the ADA by "notif[ying] courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its state and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and © cases that had failed to respect these differences were being legislatively overruled" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 67-68 [2009]).

defendant's motion to dismiss the amended complaint alleging employment discrimination based on a disability in violation of Executive Law § 296 and the Administrative Code of the City of New York § 8-107, should be reversed, on the law, without costs, and plaintiff's claims pursuant to the State and City HRL reinstated. Appeal from order, same court and Justice, entered July 8, 2008, which granted defendant's motion to dismiss the amended complaint, should be dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered October 1, 2008 which, to the extent appealable, denied plaintiff's motion to renew, should be dismissed as moot, without costs.

All concur.

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

ENTERED: SEPTEMBER 15, 2009



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