SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 23, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2232 Antoni Wilinski, et al., Index 117632/05
Plaintiffs-Respondents,

-against-

334 East 92nd Housing Development Fund Corp., et al.,
Defendants-Appellants.

Gallo Vitucci & Klar, New York (Kenneth J. Kutner of counsel), for appellants.

Law Office of Souren A. Israelyan, New York (Souren A. Israelyan of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 23, 2009, which granted plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiffs' motion and to grant defendants' motion to the extent of dismissing the section 240(1) claim, and otherwise affirmed, without costs.

Plaintiff Antoni Wilinski, while engaged in the demolition of a wall, was struck in the head by two large pipes that had been standing unsecured following the removal of the floor and

ceiling above and toppled over when they were hit by debris from another wall undergoing demolition. The collapse of the pipes, like the collapse of a wall in *Misseritti v Mark IV Constr. Co.* (86 NY2d 487 [1995]), is not the "type of elevation-related accident that section 240(1) is intended to guard against" (*id.* at 491). "Rather, the accident that resulted in [plaintiff's] . . . injuries is the type of peril a construction worker usually encounters on the job site" (*id.*). Since both the pipes and plaintiff "were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability pursuant to Labor Law § 240(1)" (*Brink v Yeshiva Univ.*, 259 AD2d 265, 265 [1999]).

With respect to plaintiffs' Labor Law § 241(6) claim, however, defendants' argument that Industrial Code (12 NYCRR) §§ 23-3.3(b)(3) and (c) are inapplicable is unavailing. Defendants contend that 12 NYCRR 23-3.3(b)(3), which provides that parts of buildings "shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration," is inapplicable because there is no evidence that wind pressure or vibration caused the pipes to topple. A fair reading of the section, however, leads to the conclusion that the phrase "by wind pressure or vibration," does not attach to the words "fall" or "collapse," but only to the immediately preceding

words, "be weakened." Thus, the toppling of the pipes need not be shown to have been caused by wind pressure or vibration in order for liability to arise under the section.

12 NYCRR 23-3.3(c) provides that "[d]uring hand demolition operations, continuing inspections shall be made by designated persons . . . to detect any hazards . . . resulting from weakened or deteriorated floors or walls or from loosened material," and mandates protection against such hazards "by shoring, bracing or other effective means." Defendants contend that this provision is inapplicable because plaintiff's accident was the result not of any "weakened or deteriorated floors or walls or from loosened material," but of the performance of the demolition work itself. However, defendants, as summary judgment movants, failed to meet their burden of demonstrating the absence of questions of fact as to whether they complied with the standard of care required under the section, including the designation of persons to conduct the mandated inspections, and, as well, as to whether the pipes did not constitute "loosened material" (*see Cardenas v One State St., LLC*, 68 AD3d 436 [2009]).

Finally, we observe that the motion court did not err in considering defendants' untimely cross motion to the extent that it addressed the Labor Law causes of action that were the subject

of plaintiffs' timely motion (see *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [2006], *appeal dismissed* 9 NY3d 862 [2007]).

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

ENTERED: MARCH 23, 2010

CLERK

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

4237N In re New York State Division of Human Rights, Petitioner-Respondent, Index 1726/07

-against-

H&R Block Tax Services, Inc., et al., Respondents-Appellants.

Crane, Parente & Cherubin, Albany (Clemente J. Parente of counsel), for appellants.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about March 20, 2008, which granted petitioner's motion to compel respondents to comply with a subpoena duces tecum dated April 9, 2007 and directed respondents to produce the specified documents no later than 15 days after service of the order with notice of entry, and denied respondents' cross motion to quash the subpoena, affirmed, with costs.

In 2007, petitioner, New York State Division of Human Rights (DHR), served respondents with a subpoena seeking information related to the issuance or promotion, targeted at minorities and military families, of short-term "Pay Stub," "Holiday" or "Refund Anticipation" loans (collectively, RALs) collateralized by an imminent paycheck or an anticipated tax refund. The information sought included (1) a list of respondents' branches and

franchises in New York issuing or promoting RALs for the last three years, (2) the number issued from each location, (3) a list of the outlets for advertisements (such as newspapers, radio and billboards), and (4) the marketing plans for the loan products.

Executive Law § 296-a(1)(b) provides that it shall be an unlawful discriminatory practice for "any creditor or any officer, agent or employee thereof" to "discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status . . ." DHR is empowered "[u]pon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article" (Executive Law, § 295[6][b]). DHR is also empowered to "require the production for examination of any books or papers relating to any matter under investigation or in question before [it]," to issue subpoenas "at any stage of any investigation or proceeding before it" (Executive Law § 295[7]), and to "inquire into incidents of and conditions which may lead to tension and conflict among racial, religious and nationality groups and to take such action within the authority granted by law . . . as may be designed to alleviate such conditions, tension and conflict" (Executive Law § 295[11]). DHR's regulations further provide

that "[t]he commissioner, . . . or other officer or employee of the division designated for this purpose by the commissioner, may issue subpoenas duces tecum to require the production for examination of any books, payrolls, personnel records, correspondence, documents, papers or any other evidence relating to any matter under investigation or in question before the division" (9 NYCRR 465.14[a][2]). Pursuant to this authority, DHR's subpoena powers exist not only in conjunction with the filing of a complaint, but also in connection with DHR's power to conduct a general, informational investigation (*see Matter of Broido v State Commn. for Human Rights,* 40 Misc 2d 419 [1963]).

In rejecting respondents' argument that there was no minimum factual basis for the issuance of a subpoena because none of the respondents was a "creditor" within the meaning of Executive Law § 296-a, the motion court observed in part that the statute also covers any "officer, agent or employee of a creditor as well" and that "H&R Block [referring to respondents collectively] has specifically identified itself as an 'agent' of HSBC [HSBC Bank USA, National Association] for the purpose of offering RALs and is therefore covered by § 296-a." Respondents claim that they are not agents of HSBC because they did not market, offer or issue RALs. In this regard, respondents contend that although respondent H&R Block Tax Services, Inc. (Tax Services) is a party to the HSBC Retail Settlement Products Distribution Agreement

dated as of September 23, 2005, it is named in its capacity as franchisor of independently owned "H&R Block" franchise offices, not as an agent of HSBC for the RAL program, and that it is the independent franchisees that were appointed as HSBC's agents for distributing RALs.

Contrary to respondents' claims, there is sufficient evidence in the record to establish an agency relationship between HSBC and Tax Services for the purpose of facilitating or arranging the RAL program. True, the agreement states in its recitals that Tax Services is "the franchisor of Block Franchise Offices throughout the United States" and that HSBC desires to engage "each Franchisee as its agent to distribute Retail Settlement Products through Block offices." However, the agreement requires Tax Services to "use commercially reasonable efforts to cause their respective Franchisees to offer Retail Settlement Products through the Block Franchisee Offices" (art II, § 2.1[i]], art V, § 5.8) and to "provide the means for each of their respective Franchisees to agree to be bound by the terms of its Franchisee Distribution Agreement" (art V, § 5.8). The agreement further provides that HSBC and Tax Services "shall enter into one or more Franchisee Distribution Agreements with each applicable Franchisee" (art II, § 2.2[b]), that HSBC and Tax Services "shall enter into the Indemnification Agreement" (art II, § 2.2[e]) and that "Franchisors" "shall incorporate within

the Block Franchisee Policies and Procedures applicable to the Franchisees, Settlement Product Programs and Procedures substantially similar to those applicable to the Block Agents under this Retail Distribution Agreement with respect to the offering of Settlement products . . . and as HSBC may reasonably request" (art V, § 5.10). By these provisions, Tax Services, acting at the behest of HSBC, compels its franchises to market the RAL's in accordance with HSBC's policies and procedures, which suffices to deem Tax Services an agent of HSBC for the purpose of arranging and facilitating the RAL program.

In any event, even if we found that Tax Services or any other of the respondents was not an agent of HSBC with respect to the sale or marketing of RALs, that finding would not mandate that the subpoenas be quashed. When DHR is conducting an investigation into potential violations of Executive Law § 296-a, the reach of its subpoenas is not limited to persons or entities that are creditors or officers, agents or employees of a creditor (*cf. Matter of New York Republican State Comm. v New York State Commn. on Govt. Integrity*, 138 Misc 2d 790, 794-795 [1988], *affd* 140 AD2d 1014 [1988] *lv denied* 72 NY2d 803 [1988]). Accordingly, if a factual basis exists, DHR is entitled to issue subpoenas seeking documents from respondents that are relevant to its investigation, without regard to whether respondents are agents of HSBC. Here, independent reports containing extensive and

detailed information about the marketing and targeting of the RALs to minorities or military families provide the requisite factual support for petitioner's exercise of its power, on its own motion, to investigate possible violations of the Human Rights Law by H&R Block entities and, in conjunction therewith, to issue subpoenas to any entity possessing materials relevant to its investigation (*see* Executive Law §§ 295[6][b], [7]; 9 NYCRR 465.14[a][2]; *New York State Div. of Human Rights v Nationwide Mut. Ins. Co.*, 74 AD2d 16, 20 [1980], *affd* 53 NY2d 1008 [1981]).

Furthermore, whether or not respondents are agents, under the circumstances before us petitioner's investigation into the marketing of the RALs would not be preempted by federal law.

The National Bank Act (NBA) (12 USC § 21 *et seq.*) grants national banks the authority to exercise certain enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" (12 USC § 24 Seventh). Congress has authorized the Office of the Comptroller of Currency (OCC) to oversee the operations of national banks and to define these "incidental powers" (12 USC § 93*a*; *see NationsBank of N.C., N.A. v Variable Annuity Life Ins. Co.*, 513 US 251, 256, 258 [1995]). "[W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way" (*Watters v Wachovia Bank, N.A.*, 550 US 1, 12, *see* 13-15 [2007] [whether it was federal bank

or its operating subsidiary that performed mortgage activity, state laws as to licensing, reporting and visitation were preempted because they would interfere with the bank's federally authorized business]).

As noted in the concurring opinion, if respondents are not agents of HSBC with respect to the RALs, there would be no preemption under the NBA. On the other hand, if Tax Services, or any other respondent, is deemed an agent of HSBC in connection with the RAL program, *Watters* instructs that the proper preemption analysis focus on the activity being regulated rather than the actor who is being regulated (*Watters,* 550 US at 18 ["in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure"]).

In performing this analysis, we first note that NBA and OCC regulations do not preempt the field of national bank regulation (*see e.g. First Natl. Bank in St. Louis v Missouri*, 263 US 640, 656 [1924]). Rather, when Congress enacted the NBA, it created a "mixed state/federal regime[ ] in which the Federal Government exercises general oversight while leaving state substantive law in place" (*Cuomo v Clearing House Assn., L.L.C.*, __ US __, 129 SCt 2710, 2718 [2009]). "[N]ational banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy

their efficiency as federal agencies or conflict with the paramount law of the United States" (*First Natl. Bank in St. Louis*, 263 US at 656). Accordingly, "[s]tates are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers" (*Watters*, 550 US at 12; *cf. General Motors Corp. v Abrams*, 897 F2d 34, 41-42 [2d Cir 1990] ["(b)ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area"]). Thus, we must consider whether DHR's subpoenas affect HSBC's exercise of any authorized powers or whether it limits only activities of a third party that are otherwise subject to state regulation.

Here, DHR is not investigating HSBC's conduct and the investigation would not affect HSBC's ability or discretion to originate RALs. Rather, DHR is investigating whether marketing practices with respect to the RALs violate the State's Human Rights Law (*see SPGGC, LLC v Blumenthal*, 505 F3d 183, 191 [2007] [Connecticut gift-card law not preempted by federal law by its prohibition of seller's in-state sales of gift cards since enforcement did not interfere with bank's ability to develop and market gift cards, but interfered only with conduct of seller who bore costs of administering program, collected fees and

established terms and conditions of gift cards]; *Carson v H&R Block, Inc.*, 250 F Supp 2d 669, 674-675 [SD Miss 2003] [court rejected non-bank defendant's preemption argument because statute at issue did not prohibit banking activity, but rather prohibited third-party agent from misrepresenting bank products it was selling]). At most, the subpoenas "incidentally affect" the exercise of a bank's powers (*see e.g. Jefferson v Chase Home Fin.* 2008 WL 1883484, *12-14, 2008 US Dist LEXIS 101031, *36-42 [N.D. Cal. 2008] [general consumer protection laws not preempted by NBA or OCC regulations on claims against a national bank that it misrepresented how it would apply prepayments]; *Baldanzi v WFC Holdings Corp.*, 2008 WL 4924987, *2, 2008 US Dist LEXIS 95727, *5-7 [SDNY 2008] [stating that "[i]n contrast to findings of federal preemption in cases involving specific state regulations that conflict with the NBA, causes of action sounding in contract, consumer protection statutes and tort have repeatedly been found by federal courts not to be preempted," and holding that claim that national bank violated general consumer protection statute when it charged interest accrued for one or more days after principal balance on the loan had been paid was not preempted by the NBA or OCC regulations]); *Young v Wells Fargo & Co.*, __ F Supp 2d __, 2009 WL 3450988, *8-10, 2009 US Dist LEXIS 100419, *26-34 [SD Iowa 2009] [claims brought under state consumer protection statutes alleging that the national

bank defrauded customers by using a computer system that was programmed to automatically charge as many property inspection fees as possible irrespective of their reasonableness held not preempted]; *Mwantembe v TD Bank, N.A.*, __F Supp 2d __, 2009 WL 3818745, 2009 US Dist LEXIS 107140 [ED Pa 2009] [holding that state law claims of fraud regarding gift cards issued by national banks are not preempted by the NBA because gift cards are not specifically authorized by the OCC]; *Mann v Td Bank, N.A.*, 2009 WL 3818128, 2009 US Dist LEXIS 106015 [D.N.J. 2009] ["the state laws at issue in this case (regarding fraud under the New Jersey Consumer Fraud Act) do not prohibit Defendants from conducting a discreet banking activity. Rather, the state laws at issue prohibit Defendants from conducting a discreet banking activity in a certain manner"]).

Accordingly, given that respondents have not articulated, and we cannot discern, how enforcement of the Human Rights Law would prevent or significantly interfere with HSBC's ability to engage in the banking activity of issuing RALs, there is no preemption and respondents must comply with the subpoena, even if Tax Services, or any other respondent, is deemed an agent of HSBC in connection with the RAL program.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

I agree with the majority that respondents' challenges to the subpoena under New York law (i.e., Executive Law § 296-a) are unavailing because the reach of petitioner's subpoena power "is not limited to persons or entities that are creditors or officers, agents or employees of a creditor" and because there is ample factual support for the exercise of this power. I further agree that the subpoena should be upheld with respect to each of the respondents. I do not agree, however, with the majority's discussion of the preemption issue as it pertains to one of the respondents.

Respondents argue that "[i]f a state law improperly impairs, obstructs, or conditions the 'business of banking' conducted by a national bank, then it will be preempted, regardless of the manner in which the national bank determines to conduct that business, whether through its own employees, subsidiaries, or agents." In addition, respondents advance the distinct contention that the exclusive agent of a national bank can invoke federal preemption under the National Bank Act (NBA). In this regard, respondents rely, inter alia, on *Watters v Wachovia Bank, N.A.* (550 US 1 [2007] [holding that operating subsidiaries of national banks are entitled to the same immunity from state visitation as the national banks]).

To the extent respondents' challenge to the subpoena on

preemption grounds is based on the contention that petitioner cannot enforce generally applicable New York laws relating to the extension of credit against either the national bank that issued the RALs or its agents for the purpose of the RAL program, that contention is refuted by the Supreme Court's recent decision in *Cuomo v Clearing House Assn., LLC* (__ US __, 129 S Ct 2710, 2721 [2009]). In *Clearing House*, however, the Supreme Court also held that the issuance of an executive subpoena by the New York State Attorney General to a national bank would entail the exercise of "visitorial powers" that the NBA forbids the states from exercising (129 S Ct at 2721-2722). Thus, respondents' challenge to the subpoena is bolstered by *Clearing House* to the extent they are correct that an agent of a national bank, like a subsidiary of a national bank, can assert the rights of the national bank under the NBA.

However, respondents repeatedly state both in their main brief and their reply brief that, for the purpose of the RAL program, they are *not* agents of the national bank that extended the RALs at issue. I agree and would reject their preemption argument for this reason. The fact that certain other H&R Block entities and independent franchisees not named in the subpoena are such agents is of no moment as the business relationship between respondents and those agents is insufficient to entitle

respondents to the protections of the NBA (*see SPGGC, LLC v Blumenthal*, 505 F3d 183, 190 [2d Cir 2007]; *cf. County Court of Ulster Cty. v Allen*, 442 US 140, 155 [1979]).

The majority agrees with respondents that respondents H&R Block Tax and Business Services, Inc. and H&R Block Mortgage Corporation are not agents of the national bank for the purpose of the RAL program. Although I agree that neither of these two respondents are such agents, I disagree with the majority's conclusion that respondent H&R Block Tax Services, Inc. is such an agent of the national bank. The Distribution Agreement the majority relies on simply does not establish that respondents are wrong and Tax Services is an agent of the national bank for the purpose of the RAL program (*see generally New York Mar. & Gen. Ins. Co. v Tradeline [L.L.C.]*, 266 F3d 112, 122 [2d Cir 2001] [under "New York common law . . ., an agency relationship results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to act"] [internal quotation marks omitted]). Moreover, the mere fact that Tax Services is a franchisor of other H&R Block entities is not sufficient to establish that it is an agent of the franchisees (*Terrano v Fine*, 17 AD3d 449 [2d Dept 2005]).

In any event, I would regard the concession by Tax Services that it is not an agent of the federal bank for purposes of the

RAL program as fatal to respondents' preemption argument. After all, the status of Tax Services as such an agent is a necessary condition to quashing the subpoena on preemption grounds. However, the majority holds that "there is no preemption and respondents must comply with the subpoena, even if Tax Services, or any other respondent, is deemed an agent of HSBC in connection with the RAL program." That is so, according to the majority, because petitioner "is not investigating HSBC's conduct . . . [but] whether marketing practices with respect to the RALs violate the State's Human Rights Law."

Under the majority's analysis, petitioner could issue an executive subpoena to the national bank requiring it to produce all of its documents relating to the marketing of the RAL loans. The same rationale the majority employs here -- the investigation into marketing practices with respect to the RALS "would not affect [the national bank's] ability or discretion to originate RALs" -- would apply to such a subpoena. Although I need not decide the point, it is difficult to see how the subpoena could be upheld consistently with the provisions of federal law specifying that, with exceptions not relevant here, national banks are not subject to visitorial powers (*see* 12 USC § 484[a]; 12 CFR 7.4000[a]). The prohibited visitorial powers include the issuance of an executive subpoena requiring production of the bank's records, and nothing in the statute or the regulation --

or, for that matter, in *Clearing House* -- suggests that the prohibition turns on a nicety such as whether the subpoena or other visitorial power would incidentally or significantly affect the exercise of the bank's powers. None of the decisions of the district courts cited by the majority support its position that the subpoena is enforceable even if Tax Services is an agent of the national bank entitled to the same immunity from state visitation as the national bank. Two final points: first, the subpoena is not limited to records relating to the marketing of the loans; second, the marketing of the loans is hardly unrelated to the terms of the loans, as petitioner of course is not investigating the marketing of the loans because of its high regard for their terms.

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1073-
1073A Judd Rubin, Index 112489/05
Plaintiff-Appellant,

-against-

SMS Taxi Corp., et al.,
Defendants-Respondents,

RAZ Taxi Corp., et al.,
Defendants.

Kreindler & Kreindler, LLP, New York (Orla M. Brady of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. Kaplan, J.), entered February 11, 2008, that to the extent appealed from, granted the motion by defendants SMS Taxi and Lachheb for summary judgment dismissing the complaint for failure to demonstrate serious injury, except with respect to the claim for significant disfigurement, unanimously affirmed without costs. Order, same court (Paul Wooten, J.), entered December 23, 2008, that denied plaintiff's motion for clarification or reconsideration, unanimously reversed, on the law, without costs, the motion granted and the prior order clarified so as to state that once a jury determines plaintiff has met the threshold for serious injury, the jury may award damages for all of plaintiff's injuries causally related to the accident, even those not meeting

the serious injury threshold.

As the motion court found, defendants met their initial burden of producing evidentiary proof in admissible form sufficient to show that plaintiff's neck and back injuries did not meet any serious injury thresholds. Plaintiff's medical submissions were devoid of information to substantiate his 90/180 claim. The plaintiff also failed to raise an issue of fact as to any other category from Insurance Law § 5102 because he did not show: (1) what medical tests were performed, (2) the objective nature of the tests, (3) what the normal range of motion should be and (4) the significance of plaintiff's limitations. Plaintiff thus failed to raise an issue of fact as to the claims for permanent loss, permanent consequential limitation and significant limitation of use of a body part, system or function (*see Marsh v City of New York*, 61 AD3d 552 [2009]; *Valentin v Pomilla*, 59 AD3d 184, 186 [2009]). Further, plaintiff's unsworn affirmation is insufficient to explain his cessation of treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Plaintiff also failed to offer the requisite competent medical proof of incapacity during 90 of the first 180 days following the accident (*see Moses v Gelco Corp.*, 63 AD3d 548 [2009]; Dr. Valderrama's assertion that he advised plaintiff to take off from work until at least July 10 after the June 16 accident does not satisfy this requirement. Plaintiff's claimed

inability to perform his job was also not supported by documentation from his employer (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [2009]).

However, the motion court found that plaintiff did meet the serious injury threshold on his claim for significant disfigurement of a body part in that the scar on his face "is permanent, discolored and no treatment can improve it." This portion of the motion court's ruling is not an issue on appeal. At issue on the motion for clarification or reconsideration is whether or not plaintiff can still present to the jury the injuries the court found did not meet the "serious injury" threshold within the meaning of Insurance Law § 5102(d). "Once a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident" (*Obdulio v Fabian*, 33 AD3d 418, 419 [1st Dept 2006]; *see also Prieston v Massaro*, 107 AD2d 742 [2d Dept 1985]; *Marte v New York City Transit Auth.*, 59 AD3d 398, 399 [2d Dept 2009]). Consequently, plaintiff is entitled to present his claim involving facial scarring to meet the threshold for serious injury under Insurance Law § 5102(d)(iii) (significant disfigurement). Once a jury determines that plaintiff has met the threshold for serious injury, the jury may award damages for all of plaintiff's injuries causally related to

the accident, even those not meeting the serious injury threshold. Whether plaintiff's back and neck injuries were causally related to the accident are questions of fact for the jury to resolve.

The legislative intent of New York's No-Fault law was to "significantly reduce the number of automobile personal injury cases litigated in the courts," (*Licari v Elliot*, 57 NY2d 230, 236 [1982]) and to "weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d [1995]). Accordingly, once an alleged claim meets at least one of the serious injury thresholds, the statute's gate keeping function, to reduce caseloads by limiting what the courts adjudicate, is satisfied. As the case is already in the gate, so to speak, judicial economy is no longer a reason to preclude plaintiff from presenting to the jury all injuries causally related to the accident. This comports with the general principle that a plaintiff is entitled to recover damages that justly and fairly compensates him or her for *all* injuries proximately caused by the accident.

The court denied the motion for reconsideration or clarification of the initial order, but because it did address

the merits in adhering to the initial determination, the subsequent order is appealable (*see Nawi v Dixon*, 59 AD3d 363, 364 [2009]).

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

ENTERED: MARCH 23, 2010

CLERK

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

1599-
1600 American Home Assurance Company, et al., Plaintiffs-Respondents, Index 602858/08

-against-

Nausch, Hogan & Murray, Inc., et al., Defendants-Appellants.

Jenner & Block, LLP, Chicago, IL (David M. Kroeger of counsel), for Nausch, Hogan & Murray, Inc., appellant.

Crowell & Moring, LLP, New York (Harry P. Cohen of counsel), for Newman Martin and Buchan Limited, appellant.

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (Kathleen M. Sullivan of counsel), for respondents.

Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 1, 2009, that denied defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

Plaintiffs are ceding insurers. Defendants were their insurance brokers on certain contracts of reinsurance. In an arbitration related to this action that plaintiffs' reinsurer commenced, the arbitrators ordered the rescission of plaintiffs' contracts of reinsurance. After an 11-day hearing, the arbitrators found that broker Newman had tried to "slip one by" the reinsurer by failing to mention a fundamental change to the contracts of reinsurance in writing to the reinsurer's underwriter. The arbitrators also found that plaintiffs' brokers had hidden a problem about plaintiffs' data from the reinsurer.

The arbitrators ruled that the duty of utmost good faith (uberrima fides) and the heightened duty of disclosure that an insurance company and its agents owed to a reinsurer applied. Consequently, rescission was appropriate even if the misrepresentation was merely negligent rather than intentional. As a consequence of the rescission order, plaintiffs had to refund $12,185,253 to the reinsurers, allegedly still owe about $11,278,326 and incurred costs such as attorneys' fees while defending the arbitration. Plaintiffs also remain exposed to liability to their insureds for 100% of any covered losses because plaintiffs no longer have reinsurance.

In this lawsuit, plaintiffs sued their brokers who placed the reinsurance policies, blaming the brokers for the misrepresentations. In the first cause of action, the complaint seeks indemnity from the brokers for the entire repayment to the reinsurers. This cause of action presumes that the underlying arbitration award relied entirely on the misconduct of the brokers and that the insurers' liability to the reinsurers was secondary.

As an alternative, the second cause of action seeks pro rata contribution to the extent that the plaintiffs might have participated in the underlying misrepresentations. The remaining causes of action are for: (1) breach of fiduciary duty, (2) negligence in the placing and administering of the reinsurance

for plaintiffs and (3) unjust enrichment.

A motion to dismiss ensued that the motion court denied in its entirety. We now affirm.

The motion court properly upheld the common-law indemnity claim, notwithstanding dicta in the arbitration award that the insurers had committed "intentional and negligent acts, errors and omissions" including "negligent oversight of their agents." (*see Pollicino v Roemer & Featherstonhaugh*, 277 AD2d 666, 668 [2000]). The body of the decision did not mention negligent oversight and notably, the arbitrators found that the brokers had failed to inform plaintiffs about the problem with the data. Accordingly, the record is sufficient at this juncture to support a theory that plaintiffs' liability was vicarious only, and therefore an indemnity claim is appropriate *(see Urban v No. 5 Times Square Dev. LLC.* 62 AD3d 553, 557 [2009]). Nor was the indemnity claim a device to circumvent the statute of limitations (*see City Of New York v Lead Indus. Assn.*, 222 AD2d 119, 127 [1996]).

Defendants argue that the motion court should have dismissed the contribution claim because plaintiffs' liability derives from rescission of a contract and contribution lies only with respect to liability in tort, not in contract. Although research revealed no New York State case law allowing contribution when the underlying action results in the rescission of a contract,

plaintiffs do not really seek contribution for rescission. Therefore, under the circumstances of this case, it was proper to uphold the contribution claim.

CPLR 1401 authorizes contribution in cases where "two or more persons . . . are subject to liability for damages for the *same* personal injury, *injury to property* or wrongful death." (emphasis added). However, "purely economic loss resulting from a breach of contract does not constitute 'injury to property'" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw and Folley*, 71 NY2d 21, 26 [1987]; *see also Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [2009]).

Here, there is no question that the brokers are subject to liability for the "same" injury because the brokers stand accused of the same misrepresentations for which the insurer-plaintiffs were held responsible in the underlying arbitration. Nor do defendants contest that this case involves "injury to property" (*see Masterwear Corp. v Bernard*, 3 AD3d 305, 307 ["it is settled that any tortious act (other than personal injury), including conversion, resulting in damage constitutes an 'injury to property' within the meaning of CPLR 1401"]).

Instead, defendants argue that plaintiffs were never subject to "liability for damages" because the monies plaintiffs paid resulted from the rescission of the contract between plaintiff

and its reinsurer. As rescission merely returns the parties to the status quo, rather than awarding damages, defendants surmise plaintiffs merely seek the benefit of their bargain, the sort of economic loss that is not apportionable under a contribution theory (*see Children's Place,* 64 AD3d at 323-324).

However, defendants ignore the realities of how reinsurance operates and therefore overlook that plaintiffs have been subject to liability for damages. The arbitration did not involve a typical rescission that returns the parties to the status quo as if the contract had never occurred. The reinsurance was to provide coverage for a substantial portion of plaintiffs' primary layer risk in connection with its insurance policies. The loss of plaintiffs' reinsurance program left plaintiffs directly liable to the underlying insureds for 100% of the losses on their "all risks" insurance policies covering certain construction businesses located in the Southern Pacific Rim and on certain energy risk insurance policies. The arbitration decision ordering rescission also rendered plaintiffs liable to the reinsurer to reimburse the funds the reinsurer had already paid out under the reinsurance contract. Thus, plaintiffs are not merely deprived of the benefit of their bargain, but have actually had to cover far more of the underlying losses than they would have but for defendants' tortious conduct *(see Ruddy v Lexington Ins. Co.*, 40 AD3d 733, 735 [2007] [retail insurance

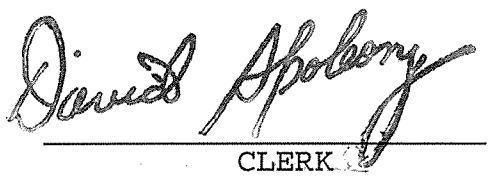
broker could maintain contribution claim against wholesale insurance broker for failure to obtain sufficient coverage]).

The negligence, breach of fiduciary duty and unjust enrichment claims accrued from the time of injury when the arbitrators ruled in 2007 and were therefore timely (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Whether the duty of utmost good faith between the parties rose to the level of a fiduciary one depends on the circumstances, and, giving plaintiffs the benefit of every inference, we should not resolve it at this juncture (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-22 [2005]; *compare Christina Gen. Ins. Corp. of New York v Great Am. Ins. Co.*, 745 F Supp 150, 161 [1990] *with Compagnie de Reassurance d'Ile de France v New England Reinsurance Corp.*, 944 F Supp 986, 995-996 [1996]).

In view of the foregoing, it is unnecessary to address the parties' other contentions.

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

ENTERED: MARCH 23, 2010



CLERK

Friedman, J.P., Catterson, Acosta, DeGrasse, Abdus-Salaam, JJ.

2087 In re Kendell R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Elisa Barnes, New York for appellant.

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about April 8, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

The court's finding was based on legally insufficient evidence. The police came upon appellant and other persons, who were pushing and shoving each other, and who appeared to an officer to be either fighting or "goofing around." Appellant and the others failed to comply with a directive to break it up and go away. When the police placed the group, including appellant, against a wall, they responded with obscene language but no acts of physical resistance.

By attempting to restore order, the police were performing an official function within the meaning of Penal Law § 195.05. However, "interference" under that statute must be "in part at least, physical in nature" (*People v Case*, 42 NY2d 98, 102 [1977]). Appellant did not struggle or do anything to interfere with the police, and he did not intrude himself into, or get in the way of, an ongoing police activity (*compare Matter of Davan L.*, 91 NY2d 88 [1997] [intrusion into narcotics operation]; *Matter of Joshua C.*, 289 AD2d 1095 [2001] [intrusion into investigation of domestic dispute]). Any physical contact between appellant and an officer was initiated by the officer. Appellant's failure to comply with the order to disperse, without more (*compare e.g. Matter of Quaniqua W.*, 25 AD3d 380 [2006]), lacked the requisite intentional physical component.

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2391 Elizabeth Forsythe, et al., Index 600914/07
Plaintiffs-Respondents,

-against-

Otsego Mutual Fire Insurance Company,
Defendant-Appellant.

Tell, Cheser & Breitbart, Garden City (Kenneth R. Feit of counsel), for appellant.

Patton, Eakins, Lipsett, Martin & Savage, New York (John G. Lipsett of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 9, 2009, which denied defendant's motion for summary judgment dismissing the complaint and for leave to amend its answer to assert the defense of fraud, unanimously modified, on the law, to grant so much of the motion as sought leave to amend, and otherwise affirmed, without costs.

Although defendant did not move for leave to amend until approximately two years after it answered the complaint, plaintiffs do not show, or even allege, prejudice or surprise as a result of the delay (*see* CPLR 3025[b]; *Arellano v HSBC Bank USA*, 67 AD3d 554 [2009]).

However, defendant failed to demonstrate as a matter of law that plaintiffs' proof of loss was fraudulent (*see Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 164-165 [1968]). Plaintiffs' explanation for their overvaluation of the loss, that the house

was uninhabitable and all their furniture destroyed, raises an issue of fact whether they intended to defraud defendant (*see Latha Rest. Corp. v Tower Ins. Co.*, 38 AD3d 321 [2007], *lv denied* 9 NY3d 803 [2007], *cert denied* 552 US 1010 [2007]; *Kyong Nam Chang v General Acc. Ins. Co. of Am.*, 193 AD2d 521 [1993]).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P. Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2398 Oui Cater, Inc., Index 100743/08
Plaintiff-Appellant,

-against-

The Lantern Group, Inc.,
Defendant-Respondent.

Vernon & Ginsburg, LLP, New York (Mel B. Ginsburg of counsel), for appellant.

Sperber Denenberg & Kahan, PC, New York (Eric H. Kahan of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered June 24, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The e-mails between the parties conclusively negate plaintiff's claim that the parties entered into a contract (*see Langer v Dadabhoy*, 44 AD3d 425 [2007], *lv denied* 10 NY3d 712 [2008]; *Aksman v Xiongwei Ju*, 21 AD3d 260 [2005], *lv denied* 5 NY3d 715 [2005]). Here, the e-mails expressed the parties' intention to enter into a contract at a later date. The e-mails referred to "Notes for Agreement" and a "draft contract" and

repeatedly referred to the formal contract signing, reflecting the parties' intent not to be bound until a formal agreement was signed (*Aksman*, 21 AD3d at 261-262).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2402 The People of the State of New York, Ind. 3346/06
Respondent,

-against-

Rodriguece Garcia, also known
as Carlos Rodriguez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Michael R. Sonberg, J.), rendered June 24, 2008, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree and sentencing him, as a second violent felony offender, to a term of 7½ years, unanimously affirmed.

The sentencing court properly denied defense counsel's request, made on the ground of alleged conflict of interest, for the appointment of new counsel in connection with defendant's motion to withdraw his guilty plea. We find no violation of defendant's right to conflict-free representation (*see Cuyler v Sullivan*, 446 US 335, 348-350 [1980]; *Hines v Miller*, 318 F3d 157, 162-164 [2d Cir 2003], *cert denied* 538 US 1040 [2003]).

Despite a lengthy colloquy with the court as to the nature of the alleged conflict, defense counsel was only able to state that defendant appeared to be making claims of ineffective

assistance and improper pressure to take the plea, without providing any details. "[A]s is frequently the case, if a defendant's allegations describe only competent counsel's candid advice about the risks of going to trial, counsel will not be placed in an actual conflict between advocating for his [or her] client's interests and his [or her] own" (*United States v Davis*, 239 F3d 283, 286-287 [2001]). Accordingly, we have frequently held there is no constitutional obligation to appoint new counsel for a "routine attorney-coercion claim" whose lack of merit can be readily ascertained (*see e.g. People v Cross*, 262 AD2d 223, 224 [1999], *lv denied* 94 NY2d 902 [2000]).

Defendant argues that the conflict of interest itself prevented his attorney from providing details, so that the court was unable to determine whether defendant's attorney-coercion claim merely involved strong advice to plead guilty, or something more sinister (*see e.g. Davis*, 239 F3d at 287 [counsel allegedly threatened to deliberately neglect case if client did not take plea]). However, there was nothing to prevent the attorney from at least revealing to the court, in camera if necessary, what her client was *alleging*, without admitting or denying anything.

Furthermore, defendant himself made no specific allegations about his attorney's performance. We reject defendant's argument that the court made an insufficient inquiry. The court engaged in a personal colloquy with defendant, who received a full

opportunity to offer anything he wished in connection with his motion to withdraw his plea. Defendant made only a generalized claim of being "forced" to take the plea, and the court adhered to its prior denial of the motion.

Finally, we note that there is nothing in the record to suggest that the plea was involuntary, or that counsel provided ineffective assistance in connection with either the plea or the motion to withdraw it.

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2403 In re James W., Sr.,
Petitioner-Appellant,

-against-

Theresa D.,
Respondent-Respondent.

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Yisrael Schulman, New York Legal Assistance Group, New York (Anya Emerson of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Naomi Buchman of counsel), Law Guardian.

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about August 14, 2007, which dismissed the petition for visitation, unanimously affirmed, without costs.

Given petitioner's repeated abductions of the parties' children, violations of court orders of visitation and protection, and long history of domestic violence against the children's mother, the court properly determined that visitation would not be in the children's best interests (*see Weiss v Weiss*, 52 NY2d 170, 175 [1981]; *Matter of B.G. v A.M.O.*, 57 AD3d 246 [2008], *lv denied* 12 NY3d 705 [2009]; *Matter of Maxamillian*, 6 AD3d 349, 351-352 [2004]; *Matter of Dyandria D.*, 304 AD2d 419 [2003]). Petitioner's record demonstrates his contempt for the authority of the court, his disregard for the safety and well-being of his children, and his failure to appreciate the

psychological impact of his repeated abductions on the children (*see Matter of Dyandria D.*, 304 AD2d 419 [2005]; *Gregory C. v Nyree S.*, 16 AD3d 142 [2005], *lv denied* 5 NY3d 702 [2005]).

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

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2405 The People of the State of New York, Ind. 2894/08
Respondent,

-against-

Jose Castro,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about January 7, 2009,

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

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

ENTERED: MARCH 23, 2010

CLERK

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

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2406 Maureen Adamo, et al., Index 102506/06
Plaintiffs-Appellants,

-against-

National Railroad Passenger Corp.,
et al.,
Defendants-Respondents.

Susan R. Nudelman, Dix Hills, for appellants.

Catherine A. Rinaldi, Jamaica (Christopher P. Yodice of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 3, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Maureen Adamo tripped and fell as she was ascending the stairs of a stopped escalator at Manhattan's Penn Station; she attributed the accident to the uneven spacing of the escalator's risers or steps. Following discovery, defendants satisfied their initial burden of showing, prima facie, the absence of material issues of fact by demonstrating, through competent evidence in the form of deposition testimony from the injured plaintiff, defendant Long Island Railroad's Assistant Facility Master and Amtrak's Building and Bridges Foreman at Penn Station, that the only problem with the stationary escalator was its need for a handrail replacement; that since a new part had

not been immediately available on site, one had been ordered; that it was up to the passengers to choose whether they wished to use the escalator as a stairway; that protocol required the placement of barricades only in front of escalators that were in the process of actual repair; that the injured plaintiff, who had an unobstructed view of the steps, must have been aware that the escalator was stationary but discerned nothing else unusual about it; that she also must have been cognizant of the configuration of the escalator, including its height differentials in the steps near the exit point because she had traveled on them on many occasions; and that her trip and fall was not caused by any defect in either the handrail or the step over which she tripped.

In *Schurr v Port Auth. of N.Y. & N.J.* (307 AD2d 837 [2003]), where the fact pattern was remarkably similar to the case at bar, this Court concluded (at 838) that the record contained "no evidence warranting the inference that the stopped escalator posed a reasonably foreseeable hazard to those who, like plaintiff, used it in the manner of a staircase to reach the next floor," since the "spacing of the stationary escalator risers was open and obvious." Plaintiffs seek to distinguish *Schurr* by the expert evidence they have proffered that defendants' failure to barricade the escalator violated industry safety standards and/or specific building and fire code rules and regulations, as well as LIRR internal operating rules. However, none of the provisions

set forth in their expert's affidavit or other submitted material suggests that the mere act of walking up and down a stopped escalator is unsafe or that the uneven spacing of risers or steps near the top or bottom somehow creates a dangerous condition. The temporarily stationary stairway did not present a reasonably foreseeable hazard (*see generally Jones v Presbyterian Hosp. in City of N.Y.*, 3 AD3d 225 [2004]), particularly in the absence of any allegation that it was in ill repair (other than the defective handrail, which plaintiffs have conceded was not causative), or that any of the steps, including the one on which she tripped, was defective or covered with debris.

We have considered plaintiffs' remaining arguments, including reliance on the doctrine of res ipsa loquitur, and find them unavailing.

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2407 Tomer Dicturel, Index 306843/08
Plaintiff-Appellant,

-against-

Hagi Dukureh,
Defendant-Respondent.

Hecht, Kleeger, Pintel & Damashek, New York (Ephrem J. Wertenteil of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 10, 2009, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

Summary judgment on the issue of liability should have been granted in this action for personal injuries sustained when plaintiff's vehicle was struck in the rear by defendant's vehicle. "When such a rear-end collision occurs, the injured occupant[] of the front vehicle [is] entitled to summary judgment on liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision" (*Johnson v Phillips*, 261 AD2d 269, 271 [1999]). Here, defendant's opposition failed to provide such a non-negligent explanation. Although defendant maintained that the accident was

the result of plaintiff stopping suddenly, this does not explain his failure to maintain a safe distance from the vehicle in front of him and is "insufficient to rebut the presumption that no negligence on plaintiff's part contributed to the accident" (*Soto-Maroquin v Mellet*, 63 AD3d 449, 450 [2009]; *see Verdejo v Aguirre*, 8 AD3d 63 [2004]; Vehicle and Traffic Law § 1129[a]).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2409 Michael Hurley, Index 106538/05
Plaintiff, 590952/05
591014/05

-against-

Best Buy Stores, L.P., et al.,
Defendants.

- - - - -

Schimenti Construction Company, LLC,
Third-Party Plaintiff-Respondent,

-against-

Sage Electrical Contracting, Inc.,
Third-Party Defendant-Appellant.

- - - -

Best Buy Stores, L.P., et al.,
Second Third-Party Plaintiff-Respondents,

-against-

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

Camacho Mauro & Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for appellant/appellant.

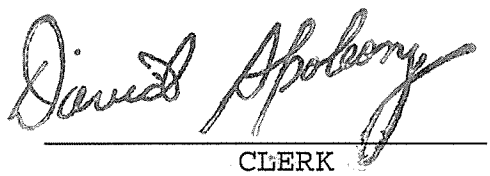
McManus, Collura & Richter, P.C., New York (Scott C. Tuttle of counsel) for respondent/respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 29, 2009, which, to the extent appealed from as limited by the brief, granted defendants' motion to extend the time to move for summary judgment, and granted third-party plaintiff Schimenti Construction indemnification against third-party defendant Sage Electrical Contracting, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to demonstrate "good cause" for their belated summary judgment motion (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). The fact that they switched counsel before their prior counsel could take steps for relief from plaintiff's negligence claims does not constitute good cause, since prior counsel should have been aware of various defenses and should have requested such relief in a timely manner in their first summary judgment motion (*see Breiding v Giladi*, 15 AD3d 435 [2005]; *see also Perini Corp. v City of New York*, 16 AD3d 37 [2005]). In light of this decision, we need not consider whether triable issues of fact would have precluded summary relief.

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

ENTERED: MARCH 23, 2010



CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2410 David Latchuk, Index 105908/05
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Cathleen Giannetta of counsel), for appellant.

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

Order, Supreme Court, New York County (Joan A. Madden, J.), entered June 17, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim and to amend his already supplemented bill of particulars to specify certain additional Industrial Code violations in connection with his § 241(6) claim, and denied so much of defendant's motion for summary judgment dismissing the §§ 240 and 241 claims, unanimously modified, on the law, plaintiff's motion for partial summary judgment on his § 240 claim denied, and otherwise affirmed, without costs.

While working at the George Washington Bridge, plaintiff allegedly fell from one of the bridge towers when his sandblasting hose exploded after he attempted to unclog it. Plaintiff maintains that although he used a spider basket to

access elevated levels of the tower, he needed to exit the basket to be able to perform sandblasting. He further maintains that after the explosion, he could not use the basket to descend to a safe level, and was forced to remove his safety harness to climb down to a lower platform, when he fell and sustained further injuries. In light of defendant's position that plaintiff should have remained in the basket and that his decision to climb down from the work area without utilizing the basket or safety harness was the sole proximate cause of his injuries, issues of fact are presented that cannot be resolved on a motion for summary judgment (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

The court properly found that the evidence demonstrated possible violations of some of the additional Industrial Code sections alleged in plaintiff's proposed amended bill of particulars, viz., 12 NYCRR 23-5.1(j)(1), 23-1.22(c)(2), 23-5.3(e) and 23-1.16(b). Plaintiff's belated identification of these sections entails no new factual allegations, raises no new theories of liability, and results in no prejudice to defendant

(*see Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [2000]).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2411 BG Records, Index 110252/06
Plaintiff-Respondent,

-against-

Jack Ancona,
Defendant-Appellant,

Nestseekers International,
Defendant.

Rose & Rose, New York (Paul Coppe of counsel), for appellant.

Law Office of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan S. Goldstein of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.H.O.), entered on or about February 18, 2009, which, insofar as appealed from as limited by the briefs, in an action arising out of a breach of a commercial lease, after a nonjury trial, awarded judgment to plaintiff in the principal amount of $54,000 and dismissed defendant Ancona's counterclaims, unanimously reversed, on the law, without costs, the complaint dismissed, and judgment awarded to defendant on his counterclaim for rent in the amount of $18,000. The Clerk is directed to enter judgment accordingly.

In finding that plaintiff was entitled to rescission of its lease pursuant to Real Property Law § 223-a, the court overlooked the language of the lease that specifically excepted that statute, and provided that, in the event that defendant was unable to deliver possession, plaintiff was entitled to a rent

abatement and not the cancellation of the lease. Accordingly, plaintiff's abandonment of the premises upon learning that a prior tenant claimed legal title thereto constituted a breach of the lease, entitling Ancona to damages (*see Fox Paper v Schwarzman*, 168 AD2d 604 [1990]).

Ancona did not provide documentation of the expenses for which he counterclaimed, and acknowledged that it was not until the end of the third month of the one-year lease that he completed the renovations that allowed the basement space in question to be legally rented as a separate unit and obtained a formal release of all claims to the space from the prior tenant. He is therefore awarded only the amount of rent for the nine-month period remaining on the lease ($54,000), minus the amount that was prepaid by the tenant ($36,000) (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2413 Westpoint International, Inc., et al., Plaintiffs-Respondents, Index 116832/07

-against-

American International South Insurance Company, Defendant-Appellant.

D'Amato & Lynch, LLP, New York (Kevin J. Windels of counsel), for appellant.

Sills Cummis & Gross P.C., New York (Jacob S. Buurma of counsel), and Sills Cummis & Gross P.C., Newark, NJ (Thomas S. Novak, Jr., of the New Jersey bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 17, 2009, which, insofar as appealed from, denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Although the underlying complaint contains some causes of action that are arguably subject to the insurance policy's "contract liability" exclusion, it alleges, in addition to a single cause of action for breach of contract, several causes of action sounding in tort and alleging statutory violations. Thus, defendant failed to demonstrate that the allegations cast the underlying complaint wholly within the exclusion, that no other reasonable interpretation of the exclusion is possible, and that no legal or factual basis exists that would potentially obligate

defendant to indemnify plaintiffs (*see Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]).

We reject defendant's apparent argument, based on *Maroney v New York Cent. Mut. Fire Ins. Co.* (5 NY3d 467, 472 [2005]), that the term "arising out of" in the contract liability exclusion is so broad as to comprehend any loss with even the slightest "causal relationship" to a breach of contract and that each cause of action in the underlying complaint stands in such a relationship to a breach of contract and is therefore excluded from coverage. *Maroney* is inapposite here, where, in addition to the contract claims, tort and statutory claims are asserted. An insurer has a duty to defend so long as there is any possibility of coverage under the policy, and here the possibility of coverage has not been eliminated (*see Frontier Insulation Contrs.*, 91 NY2d at 175).

Nor is there any merit to defendant's argument that, because the policy defines "Claim" to mean lawsuit, rather than cause of action, the determination of whether the exclusion applies must be based not on separate causes of action but on the complaint as a whole. This is an unduly rigid construction of the term "[c]laim" in light of the realities of litigation, as well as "a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable"

(*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 635 [1997] [internal quotation marks and citation omitted]). In any event, the thrust of the underlying action is not plaintiffs' breaches of the various contracts at issue, but their marginalizing of the underlying plaintiff lenders' shareholder rights and devaluing of their collateral, which actions give rise primarily to the tort and statutory claims asserted in the action and which would provide a basis for the action even in the absence of the agreements.

Although defendant makes much of it, the fact that the policy is not a "duty to defend" policy is not dispositive here (see *Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 41-42 [2005]), since the policy expressly requires defendant to *advance* defense costs, subject to recoupment of any amounts advanced for claims ultimately determined not to be covered. Having failed to demonstrate that there is no possibility of coverage, defendant cannot avoid its obligation to advance defense costs (*see e.g. Vigilant Ins. Co. v Credit Suisse First Boston Corp.*, 10 AD3d 528, 529 [2004]; *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, 1219 [2d Cir. 1995]).

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

ENTERED: MARCH 23, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2414N Liana Makkos, Index 350267/06
Plaintiff-Respondent,

-against-

Thomas Makkos,
Defendant-Appellant.

Clair, Greifer LLP, New York (Bernard E. Clair of counsel), for appellant.

Gersten Savage LLP, New York (Robert S. Wolf of counsel), for respondent.

Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered September 29, 2008, which, to the extent appealed from as limited by the briefs, found defendant had not met his stipulated obligation to pay plaintiff $250,000, and directed him to pay that sum within 30 days, unanimously affirmed, with costs.

The parties clearly and unambiguously agreed that defendant would pay $250,000 directly to plaintiff over a period of three years following the execution of their stipulation in 2003. It is undisputed that defendant failed to make these payments. He contends that plaintiff should be equitably estopped from raising that failure because he made voluntary payments to third parties

during that period. The court correctly rejected that argument without holding an evidentiary hearing.

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

ENTERED: MARCH 23, 2010

CLERK