SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 18, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2101-
2102-
2102A-
2102B Alexander M. Frame, Index 601736/04
Plaintiff-Respondent,

-against-

Kenneth L. Maynard, et al.,
Defendants-Appellants-Respondents.
- - - - - - -
R.H. Guthrie, et al.,
Cross-Claimant Plaintiffs-
Respondents-Appellants,

-against-

Kenneth L. Maynard, et al.,
Defendants-Appellants-Respondents.

_____

Kennedy Johnson Gallagher LLC, New York (James W. Kennedy of counsel), for appellants-respondents/appellants-respondents.

B. Joseph Golub, P.C., New York (Benjamin J. Golub of counsel), for Guthrie respondents-appellants.

William J. Dockery, New York, for Caroline Paulson and Paul Hines, respondents-appellants.

Leslie Trager, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered October 27, 2008, after a bench trial, inter alia,

awarding the principal amounts of $421,220.80 to plaintiff, $325,598.54 to cross-claimant Beatrice Guthrie and $162,799.27 to cross-claimant Paulson, and dismissing the cross claims of cross-claimant Hines, unanimously modified, on the law and the facts, the amounts awarded to Guthrie and Paulson vacated, Hines's cross claims for breach of fiduciary duty and constructive fraud reinstated, and the matter remanded for further proceedings as to damages in accordance with the opinion herein, and otherwise affirmed, without costs. Appeals from order, same court and Justice, entered on or about October 7, 2008, unanimously dismissed, without costs, as subsumed in the appeal from the judgment, and appeals from orders, same court and Justice, entered February 5, 2009 and April 24, 2009, unanimously dismissed, without costs, as academic.

Plaintiff Frame and defendant Maynard were the two general partners of a limited partnership (the partnership), formed in 1980, to acquire and operate a building at 5008 Broadway, and they acquired the underlying land as tenants in common. The eight limited partnership shares were acquired by Maynard, Guthrie, Paulson, Hines and others. Under the limited partnership agreement (the agreement), the net proceeds of a sale or refinancing of the "Project," defined as the building, were to be split 60-40 between the limited partners and the general

partners. Following a settlement agreement entered into in 1986, Frame conveyed his half-interest in the underlying land to the partnership and resigned as general partner. The agreement was amended to provide that Frame would receive 20% of the net proceeds of a sale or refinancing of the "real property in the Project," with the remainder to be split 25% to the general partner and 75% to the limited partners.

In May 2001, Maynard offered to acquire the limited partners' interest in the partnership property for $842,427. Maynard provided schedules to the limited partners representing that the value of the building, based on its cash flow as shown in historical profit and loss statements, was $665,074 or $842,427, depending on the capitalization rate used. A majority of the limited partners consented to Maynard's proposed acquisition of the property, i.e., the building and the 50% ownership interest in the land owned by the partnership, on his own behalf or for a wholly owned entity.

However, Maynard did not disclose to the limited partners that, since March 2001, he had been negotiating with the Community Preservation Corporation (CPC) to obtain a mortgage loan on the property at 5008 Broadway from the Federal Home Loan Mortgage Corporation (Freddie Mac) in the proposed amount of $1,550,000. During those negotiations, Maynard provided CPC with

"adjusted" historical profit and loss numbers, which supported the proposed loan amount. An appraisal prepared by an independent appraiser in connection with Maynard's loan application valued the building and land in the range of $2.2 million as of June 2001. In November 2001, Maynard sent checks in the amount of about $40,000 per share to the limited partners purportedly representing their share of the sale of the partnership property.

On February 7, 2002, Maynard assigned his right to acquire the partnership property to defendant 5008 Broadway Associates, LLC (5008 LLC) for nominal consideration, and a deed conveying the property to 5008 LLC was filed. On the same date, 5008 LLC received a mortgage loan from CPC in the amount of $1,485,000, leaving net proceeds of about $1 million. In late February, Maynard made an additional distribution to the limited partners of about $5,000 per share, purportedly representing final distribution of the partnership's assets.

At trial, Maynard testified that he never disclosed any facts concerning his negotiations with CPC for the proposed $1.5 million loan to the limited partners because he "simply didn't see any connection." He denied knowing that any appraisal had been prepared in connection with his mortgage application, and insisted that the representations he made to the limited partners

concerning value were true, while CPC and Freddie Mac were overvaluing the property. Regarding Frame's interest under the agreement, Maynard testified that he did not distribute any amounts to Frame because, after deducting the value of the half-interest in the land, there were no sales proceeds to distribute to him.

It is well established that the decision of the fact-finding court should not be disturbed unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Here, we defer to the trial court's findings that Maynard was not a credible witness, and that the limited partners, the loan mortgage officer from CPC and the appraiser who appraised the property generally were credible. We note as well that Maynard's testimony was at odds with common sense in important respects and was undermined by documentary evidence, including contemporaneous documents tending to establish what can scarcely be doubted in any event, i.e., that Maynard well knew of the appraisal.

The record amply supports the trial court's conclusion that Maynard breached his fiduciary duty. As a general partner, Maynard owed a fiduciary duty to the limited partners that continued "until the moment the buy-out transaction closed" (*Blue*

Chip Emerald v Allied Partners, 299 AD2d 278, 279 [2002]; *see Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 483 [2007]). That duty imposes a stringent standard of conduct that requires a fiduciary to act with "'undivided and undiluted loyalty'" (*Blue Chip Emerald*, *id.*, quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Meinhard v Salmon,* 249 NY 458, 463-464 [1928]). "Consistent with this stringent standard of conduct, . . . when a fiduciary . . . deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make 'full disclosure' of all material facts," meaning those "'that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer'" (*Blue Chip Emerald*, *id.*, quoting *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341 [2001]). It is beyond dispute that the facts relating to Maynard's negotiation of a mortgage loan of about $1.5 million, which required that the property be valued at over $2 million, had a bearing on the limited partners' consideration of Maynard's offer to acquire the property based on a valuation of $842,427 (*see Littman v Magee*, 54 AD3d 14, 17-18 [2008]; *Blue Chip Emerald*, 299 AD2d at 280). Since the consents were revocable and the partnership was not dissolved, Maynard had a continuing duty to inform the limited partners of material facts.

The trial court correctly found that Paulson and Guthrie, as

beneficiaries of this fiduciary relationship, were entitled to rely on Maynard's "representations and his complete, undivided loyalty" (*TPL Assoc. v Helmsley-Spear, Inc.*, 146 AD2d 468, 471 [1989]), and were not required to perform "independent inquiries" in order to reasonably rely on their fiduciary's representations (*id.*; *see also Andersen v Weinroth*, 48 AD3d 121, 136 [2007]). Guthrie was entitled to rely on her husband's assessment of the offer letter, and Paulson could rely on Maynard's affirmative duty to disclose material information when she questioned him about the "amazingly low" price. Neither was aware of any information that rendered their reliance unreasonable, or would cause them to question Maynard's representations (*see Littman*, 54 AD3d at 17; *cf. Global Mins. & Metals Corp. v Holme*, 35 AD3d, 93, 98-101 [2006], *lv denied* 8 NY3d 804 [2007]). Even if they had investigated further, there is no basis for finding that they would have uncovered the concealed facts (*see Anderson*, 48 AD3d at 136).

For the same reasons, we conclude that Hines justifiably relied on Maynard's oral and written representations concerning the value of the partnership property. Hines lived in South Carolina and, as an investor in three limited partnerships managed by Maynard, had relied on him for 20 years. Although he had doubts about aspects of the offer letter and had questioned

Maynard over the years about expenses, it was only in hindsight, after he learned that Maynard had created adjusted historical figures that supported a property valuation of over $2 million, that he realized that the offer letter was full of falsehoods. Under these circumstances, Hines's impressive educational and professional credentials do not warrant a finding that he did not justifiably rely on Maynard's material misrepresentations and omissions. Even if he had inquired further, there is no basis for finding that he could have discovered the concealed information, since Maynard testified he saw no reason to disclose it and did not know of the appraisal himself.

Regarding Frame's claim that Maynard breached the agreement, we agree with the trial court's finding that Maynard's interpretation of the agreement to exclude Frame from any distribution of net proceeds resulting from a sale of the partnership's property is neither credible nor comprehensible. To accept Maynard's argument would render meaningless the provision requiring distribution of the first 20% of proceeds of a sale or refinancing of the "Project" to Frame, and also would require interpreting the same term differently within the same section of the contract. The court properly accorded the words of the contract their "fair and reasonable meaning" consistent with the parties' "reasonable expectations" (*Sutton v East Riv.*

Sav. Bank, 55 NY2d 550, 555 [1982] [internal quotation marks and citations omitted]).

In considering the damages award, we note that the trial court's award apparently disregards the value of Maynard's half-interest in the land. We need not address the issue, as Maynard, the party adversely affected, does not raise any claim of error on this account. The general rule is that the measure of damages when a fiduciary has sold property for an inadequate price is the difference between what was received and what should have been received, so that the beneficiary of the fiduciary duty is placed in the same position he or she would have been in absent the breach (3 Scott, Trusts [3d ed], § 208.3, p 1687 [1967]). *Matter of Rothko* (43 NY2d 305 [1977]), however, established an exception to this general rule. In that case, the trustees of the artist Mark Rothko's estate engaged in self-dealing. Specifically, they sold paintings to galleries with which they were affiliated and the galleries promptly resold the paintings for up to 10 times the amounts paid to the estate. The Surrogate awarded damages in the amount of the difference between the sale price and the value of the paintings at the time of the trial. The Court of Appeals upheld the award, holding that this increased measure of damages is appropriate "where the breach of trust consists of a serious conflict of interest -- which is more than merely selling for too

little" (*Rothko*, 43 NY2d at 321). The *Rothko* court specified that the "serious conflict of interest" was the self-dealing of the trustees who sought to profit from the low sales prices to the detriment of the estate. Subsequent cases have upheld the *Rothko* rule in both estate and other fiduciary situations, awarding appreciation damages when a fiduciary has engaged in self-dealing (*e.g.*, *Matter of Witherill*, 37 AD3d 879, 881 [2007]; *Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 232 [2003]).

This case cannot be distinguished from *Rothko*. In both cases, the trial court found a breach of fiduciary duty as well as both constructive and actual fraud resulting from self-dealing by the fiduciaries. The *Rothko* court described the conduct of the estate trustees as "manifestly wrongful and indeed shocking" (*Rothko*, 43 NY2d at 314). Maynard's conduct in the present case is no less improper, especially given that he repeatedly assured the limited partners that the price he was offering was generous while simultaneously negotiating for a mortgage that presupposed a far higher valuation for the partnership property.

However, the trial court's determination to exclude Maynard's limited partnership share from the calculation of the limited partners' damages was improper. While a faithless servant forfeits his right to compensation, Maynard did not acquire his interest as a result of fraud or breach of duty, and

is not receiving any compensation on account of his share. Disregarding his share in calculating damages leads to an unwarranted windfall for the litigating limited partners, who are entitled only to their fair share of net proceeds received from the sale of partnership property at fair market value (*see Rothko*, 43 NY2d at 321-322). We have previously held that removal of Maynard as general partner is not an appropriate remedy in light of the dissolution of the partnership (39 AD3d 328 [2007]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2602-
2603 Foot Locker, Inc., Index 102084/07
Plaintiff-Appellant,

-against-

Omni Funding Corp. of America,
Defendant-Respondent.

_____

Simmons Jannace, LLP, Syosset (Adam M. Levy of counsel), for appellant.

Maidenbaum & Associates, PLLC, Merrick (Carol G. Morokoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 4, 2009, which, upon granting plaintiff's motion to reargue an earlier order, adhered to its prior determination denying plaintiff summary judgment, unanimously affirmed, with costs. Appeal from the prior order (same court and Justice), entered June 24, 2009, unanimously dismissed, without costs, as superseded by the appeal from the later order.

Defendant leased photocopiers to plaintiff for a period of 48 months pursuant to an equipment lease that would automatically renew for an additional 12 months if plaintiff failed to provide timely notice of cancellation and return the equipment at the end of the lease term to a place designated by defendant. The other relevant provisions of the lease, including its notice provision,

provide as follows:

> "CONDITION; USE; LOCATION; RETURN . . . Unless otherwise agreed in writing, on termination or expiration of the Term, Lessee will immediately return the Equipment to Lessor in as good condition as received, less normal wear and tear, to any place in the United States Lessor designates. Lessee will prepay expenses of crating and shipping by means Lessor designates and will insure the Equipment being shipped for its full replacement value.
>
> . . .
>
> "TITLE; RECORDING; NOTICES Lessor shall hold title to the Equipment. Lessee will keep the Equipment free and clear from any levy, attachment . . . Unless otherwise provided, the parties agree that this transaction shall be a true lease . . . The equipment is and will remain personal property no matter what its use or attachment to realty, but Lessee will not let it be attached to realty in any way that might cause it to become part of such realty. Lessee shall pay Lessor's fees for lease documentation and processing and for any governmental filings. All notices shall be given in writing and shall be effective when deposited in the U.S. mail, addressed to a party at its address shown on the front page of this Lease or at any other address such party specifies in writing, with first class postage prepaid."

Although the just quoted general notice provision appears to apply to all notices required by the lease, the lease specifically requires written notice in certain circumstances (e.g., paragraph 11, requiring written notice of breach of the clear title provision, and paragraph 14, requiring the lessee to

advise the lessor in writing of any loss within 10 days). In other circumstances, however, there is no such specific requirement (e.g., paragraph 12, providing that in the event of a breach, the lessee must cure the breach within 10 days after notice but not specifying that the notice must be in writing). The provision requiring the lessee to prepay expenses of "crating and shipping by means lessor designates" does not specifically require written notification, nor does it say that a "designation" is a notice. This appeal turns on how this provision should be interpreted.

Plaintiff timely provided written notice of cancellation but failed timely to return the equipment to defendant. Plaintiff ascribes that omission to defendant's refusal to provide written instructions on how properly to crate and ship the equipment, despite several requests for such instructions. Defendant insists that it complied with the lease by providing an oral instruction to use a private trucking company and that when plaintiff failed to return the copiers in a timely fashion, the automatic renewal provision was triggered.

The notice provision can reasonably be interpreted, as it is by plaintiff, to require written instructions for crating and shipping the copiers, but defendant's interpretation is also reasonable. A contract is ambiguous if "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d

570, 573 [1986]; *see also Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 [1999] [in situations "where internal inconsistencies in a contract point [] to an ambiguity, extrinsic evidence is admissible to determine the parties' intent"]). As parol evidence is necessary to interpret the contract, summary judgment is not warranted.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1993 Hugo Ramirez, Index 15424/05
Plaintiff-Respondent,

-against-

Cynthia Shoats,
Defendant-Appellant,

Everett Glaspie Construction, Inc.,
etc., et al.,
Defendants.

_____

Clark, Cuyler & Mederos, LLP, Brooklyn (Robert D. Clark of counsel), for appellant.

Shestack & Young, LLP, New York (Shibu J. Jacobs of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 26, 2009, which, to the extent appealed from, denied defendant-appellant building owner's motion for summary judgment dismissing the Labor Law § 240(1) and § 241-a causes of action as against her, affirmed, without costs.

Plaintiff was injured when a piece of corrugated metal covering the unfinished landing of a newly constructed stairway slipped under his feet, causing him to fall to the basement level of a building under construction. While defendant did not dispute at oral argument that plaintiff fell more than one story, the record is quite unclear as to which floor plaintiff fell from, a confusion that is perhaps due to which floor each party considers to be the "first" floor. In his affidavit in

opposition to summary judgment, plaintiff claims that he fell while using the "new stairway which connected the second floor to the first floor." Plaintiff testified that, at the time of his accident, temporary ladders connected the fourth floor to the third floor and the third floor to the second floor. Plaintiff testified that "everybody" used the stairway to descend from the second floor. He claims that "[i]f a temporary ladder affording access from the second floor to the first floor had been made readily available to me, I would have most definitely utilized it."

However, a reading of the record, plus the explanation from defendant's counsel at oral argument, supports a different location for the accident. This second scenario suggests that plaintiff had used a ladder to descend from his work area on the fourth floor to reach the third floor. Then, he utilized an unfinished staircase to descend from the third floor to the second floor (not from the second floor to the first). Under this scenario, the accident occurred at the base of the landing of the stairs near the second floor, and there would have been a ladder available as an alternative means of descent because it is undisputed that ladders connected the third floor to the second floor. Because it is unclear what floor plaintiff fell from, it is also unclear whether the stairway was the sole means of descent and thus a safety device within the meaning of Labor Law

§ 240(1) (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202 [2005]; *Crimi v Neves Assoc.*, 306 AD2d 152 [2003]. The conflicting testimony concerning where plaintiff fell and defendant's testimony that she observed a ladder connecting the first and second floors raise an issue of fact whether the stairway was the sole means of descent from plaintiff's work area.

The dissent is simply incorrect when it states that a permanently installed structure used as a passageway cannot be a statutory safety device (*see Jones v 414 Equities LLC*, 57 AD3d 65, 78 [1st Dept 2008] [criticizing as "based on an erroneous premise," the rule that collapse of a permanent structure cannot give rise to § 240(1) liability]; *see also Espinoza v Azure Holdings II, LP*, 58 AD3d 287, 291 [1st Dept 2008]).

Given that there is a question whether the stairway was plaintiff's sole means of access to and from his work area and thus was a safety device within the meaning of Labor Law § 240(1), the failure of the corrugated metal landing to protect plaintiff from falling through the stairs precludes a finding as a matter of law that plaintiff's conduct was the sole proximate cause of his injuries (*see Miraglia v H & L Holding Corp.*, 36 AD3d 456, 457 [2007], *lv denied* 10 NY3d 703 [2008]; *Osario v BRF Constr. Corp.*, 23 AD3d 202 [2005]; *Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [2005]). Nor was plaintiff a recalcitrant

worker as a matter of law. Plaintiff testified that the foreman had told him and his coworkers to use the staircase and that other workers had safely proceeded down the stairs ahead of him (*see Miraglia*, 36 AD3d at 456-457).

Because of these unresolved issues of fact, defendant, the moving party, has not carried her burden on summary judgment. Accordingly, the court was correct to deny her motion.

Nevertheless, even if plaintiff had an alternative way to get to and from his work area, the stairs provided the most efficient means of access. It flies in the face of common sense to require a worker to utilize a fabricated ladder built from wood at the work site over a seemingly completed staircase. The Court of Appeals has recently noted that we have historically read the Labor Law statute too narrowly (*see Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 603 ["The breadth of the statute's protection has, however, been construed to be less wide than its text would indicate"]). Given this recent admonition, it seems almost ridiculous to preclude recovery merely because plaintiff had an alternative means to descend from his work area, especially when that alternative route may have seemed more dangerous than the stairs plaintiff did utilize.

Plaintiff is also entitled to the protection of Labor Law § 241-a, stating: "Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction

or demolition shall be protected by sound planking . . .” The dissent would deprive plaintiff of the benefit of this statute because, given that his work area was on the fourth floor, he was not “working in or at the stairwell.” However, we must afford this statute a liberal interpretation (*see Seiger v Port of N.Y. Auth.*, 43 AD2d 339, 341 [1974] [“the statute here involved should be construed liberally”]). Should the version of events in plaintiff’s affidavit prove accurate, the only way for plaintiff to reach his work area was via the stairway. The danger the unsecured planking created on that singular route is a hazard that Labor Law § 241-a redresses, whether or not plaintiff’s task required his presence in that precise location at the work site.

We have considered defendant’s remaining contentions and find them unavailing.

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

McGUIRE, J. (dissenting)

I respectfully dissent. The majority's decision to uphold the Labor Law § 240(1) claim cannot be reconciled with well-established precedents of this Court and each of the other departments; the majority's decision to uphold the Labor Law § 241-a claim cannot be reconciled with the plain language of the statute and a well-established principle of statutory construction.

Plaintiff, who had been working on the fourth floor of the building installing windows, decided to exit the building to take a coffee break and fell while descending a permanently installed but unfinished interior staircase that had been constructed the day before. Specifically, plaintiff stepped on a piece of metal covering on the second-floor landing of the staircase and fell to the basement when the unsecured covering moved.

With respect to plaintiff's claim under Labor Law § 240(1), our decision in *Ryan v Morse Diesel, Inc.* (98 AD2d 615 [1983]) is controlling. In *Ryan*, the plaintiff was injured when, while carrying a bucket of bolts down a permanently installed but unfinished interior stairway, he stubbed his toe, fell and was injured. We reversed a jury verdict in favor of the plaintiff based on a violation of § 240(1), finding that under no construction of the statute could a "permanently installed stairway, used by the plaintiff as a place of passage, be deemed

to be a scaffold, hoist, stay, ladder, sling, hanger, block, pulley, brace, iron or rope," the safety devices specifically enumerated therein (*id.* at 616). We also found that "[t]he stairway was not a tool used in the performance of the plaintiff's work" but rather "was a passageway from one place of work to another" (*id.*). We specifically stated that "[t]he distinction is critical" and held that "[a]n accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240" (*id.*).

We made this same important distinction more recently in *Griffin v New York City Tr. Auth.* (16 AD3d 202 [2005]). Affirming the denial of a motion for summary judgment by certain defendants on a Labor Law § 240(1) claim, we explained that there were

> "issues of fact as to whether the structure from which [the plaintiff] fell was a permanently affixed ladder which provided the sole access to his work site and therefore a 'device' within the meaning of Labor Law § 240(1), or whether it was a permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute" (*id.* at 203 [citations omitted]).

Here, there is no comparable issue of fact: it is undisputed that plaintiff fell while descending the permanent but unfinished stairway, not a ladder providing the sole access to the work site and thus a safety "device" within the statute. Our decisions in

Ryan and *Griffin* are not oddities of the law peculiar to this Department. The Second, Third and Fourth Departments also have held that a permanent staircase is not a safety "device" within the meaning of the statute (*see Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [2d Dept 1999]; *Williams v City of Albany*, 245 AD2d 916 [3d Dept 1997], *appeal dismissed* 91 NY2d 957 [1998]; *Dombrowski v Schwartz*, 217 AD2d 914 [4th Dept 1995]).

The majority appears to be of the view that Labor Law § 240(1) would apply if "the stairway was the sole means of descent" from plaintiff's work area. Nothing in *Ryan*, however, suggests that another means of descent was available to the plaintiff or that the holding was predicated on the presence of another means of descent. Rather, the holding in *Ryan* was predicated on the permanent nature of the stairway as a passageway, which precluded it from being characterized as a "device" with the meaning of the statute.

If the staircase here was being used by plaintiff in lieu of a scaffold and was the sole means of access to the elevation level required to perform his work, it may be that it could then be deemed a "safety device" within the ambit of § 240(1) (*see Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept. 2008]). Given the facts of this case, however, that question is not before us. Plaintiff was neither using the staircase to accomplish his work nor was it the sole means of ascent or descent to his work area.

Rather, plaintiff was using the newly installed, permanent staircase as a passageway. "An accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240. The appropriate statute is subdivision 6 of section 241" (*Ryan*, 98 AD2d at 616 [citations omitted]).

Although there is some confusion in the record, it is clear that plaintiff fell from the second floor landing. It also is clear that temporary ladders were built and used at the site. Indeed, plaintiff ascended to the fourth floor earlier that morning by using two ladders, one connecting the fourth and the third floors and one connecting the third and second floors. Moreover, it is undisputed that those ladders were still present at the site when plaintiff used the newly installed, permanent staircase. But, in any event, even assuming that plaintiff fell while descending from the second floor to the first floor (as opposed to while descending from the third floor to the second floor), the majority is wrong as it is undisputed that a permanent exterior staircase connected the first and second floors. Thus, no matter where the accident occurred, plaintiff had an alternative means of descent.

Likewise, because plaintiff was not working in the stairwell at the time of his accident, the motion to dismiss the claim pursuant to Labor Law § 241-a also should have been granted. The statute specifies that "[a]ny men working in or at . . .

stairwells of buildings in course of construction . . . shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men . . .” Since it is undisputed that plaintiff was not working in or at the stairwell, the claim is foreclosed by the plain language of the statute. The statute applies when “men [are] working in or at . . . stairwells,” not “in, near or at . . . stairwells” or when the stairwell “is the only way . . . to reach [the] work area.” The majority broadens the reach of the statute, and introduces additional uncertainty concerning its reach, by impermissibly reading into it words that the Legislature could have but did not include (*see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995]).

The Decision and Order of this Court entered herein on September 14, 2010 is hereby recalled and vacated.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3337 The People of the State of New York, Ind. 2210/03
Respondent,

-against-

Roosevelt Mack,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered January 14, 2010, resentencing defendant to a term of 4½ years, with 3 years' post release supervision, unanimously affirmed.

Pursuant to CPL 440.46, the court reduced defendant's sentence on his drug conviction, which had been 7 to 14 years, to a determinate term of 4½ years, to be followed by 3 years of post-release supervision. On this appeal, he does not challenge his new prison term, which he has completed, but seeks a reduction of his postrelease supervision term.

Defendant argues that his waiver of appeal is not valid because the court advised him that the Drug Law Reform Act of 2009 (DLRA) offer was conditioned upon a waiver of his right to appeal only after the reduced sentence had been imposed.

There is no question that the right to appeal may be waived

as a condition of a sentence (*see People v Seaberg*, 74 NY2d 1 [1989]). However, a sentencing court must afford the defendant an opportunity to appeal from the initial DLRA order "*before* making the ultimate decision as to whether to accept it" (*People v Rosado*, 70 AD3d 1332, 1333 [2010], emphasis in original).

Here, defendant received the exact sentence he agreed to and pursuant to the terms of his resentencing, it was imposed nunc pro tunc. This gave defendant credit for the time he already served, thus making him immediately eligible for release. Defendant was represented by counsel and had adequate time to discuss the written waiver of appeal before signing it and proceeding with the agreed upon sentence. While the better practice would have been for the court to have addressed this issue during discussion of the proposed new sentence as stated in *Rosado*, the facts herein do not warrant a reduction of defendant's sentence, which is the only relief he seeks on this appeal. Under these circumstances, we find that the failure to discuss the waiver of appeal requirement does not invalidate the waiver (*see People v Paniagua* 45 AD3d 98 [2007], *lv denied* 9 NY3d

992 [2007]; *People v Bennett*, 31 AD3d 298 [2006], *lv denied* 7 NY3d 846 [2006]).

In any event, we find that the three-year period of postrelease supervision is not excessive, and we see no reason to reduce it.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3341 The People of the State of New York, Ind. 4443/07
Respondent,

-against-

Bernard Solomon,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 29, 2008, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree (two counts), theft of services and criminal mischief in the fourth degree, and sentencing him to consecutive terms of 2 to 6 years on each of the forged-instrument counts, to run concurrently with concurrent one-year terms on each of the remaining counts, for an aggregate term of 4 to 12 years, unanimously modified, as a matter of discretion in the interest of justice, by running all sentences concurrently, for an aggregate term of 2 to 6 years, and otherwise affirmed.

This case stems from two separate incidents whereby defendant used forged instruments to gain access to the New York City subway. In the first incident, defendant was caught using altered MetroCards. In the second, he used a reduced-fare card

intended for the disabled and senior citizens, and when arrested, was found to be in possession of six altered MetroCards. The two counts of criminal possession of a forged instrument in the second degree required the People to establish that defendant knew the instrument was forged, and that he possessed it with the intent to defraud.[1]

Defendant contends that on the second count of criminal possession of a forged instrument, his conviction was improper because the trial court improperly defined a MetroCard as a "debit card" for the purpose of instructing the jury on the statutory presumption of fraudulent intent to use the MetroCards.[2] Penal Law § 170.27 states, "A person who possesses two or more forged instruments, each of which purports to be a credit card or debit card, as those terms are defined in [General Business Law § 511], is presumed to possess the same with knowledge that they are forged and with intent to defraud, deceive or injure another." Defendant did not preserve his challenge to the court's charge, and we decline to review it in the interest of justice. As an alternative holding we find no

---

[1]"A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10" (Penal Law § 170.25).

[2]The instruction was relevant to the first count as well, but defendant does not raise the issue with respect to that count.

basis for reversal.

General Business Law § 511(9) defines a "debit card" as "a card . . . issued by a person[3] to another person which may be used, without a personal identification number, code or similar identification number, . . . to purchase. . . services." A MetroCard meets this definition inasmuch as it can be used without a code to purchase a service, namely, a subway ride (*see People v Stokes*, 69 AD3d 409 [2010], *lv denied* 14 NY3d 844 [2010], *quoting People v Thompson*, 99 NY2d 38 [2002]). The fact that Penal Law § 165.15 treats debit cards and all thefts of transportation services in separate subsections is irrelevant to the fact that a MetroCard meets the statutory definition of a debit card under Penal Law § 170.27 and General Business Law § 511(9).

Defendant's claim regarding the court's *Sandoval* ruling is also without merit. That ruling, which permitted inquiry as to defendant's record but precluded the prosecutor from identifying any of defendant's prior convictions, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 459 [1994]).

We are persuaded, however, that defendant's sentence of 4 to

---

[3]The definition of "person" includes a "corporation" (*see* § 511[2]) – in this case, the MTA.

12 years warrants modification – given the nonviolent nature of these offenses and defendant's documented mental health issues – to the extent of running the sentences imposed under counts 1 and 2 concurrently with each other.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3420-
3421 In re Lah De W., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Takisha W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings-on-Hudson, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

_____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about February 11, 2009, which, upon a fact-finding determination that respondent mother neglected the subject children, placed the children, with the mother's consent, with the Commissioner of Social Services until the completion of the next permanency hearing, affirmed with respect to the fact-finding determination, and the appeal otherwise dismissed, without costs.

Regarding the order of disposition, no appeal lies from an order entered on the consent of the appealing party (*see Matter of Tyshawn Jaraind C.*, 33 AD3d 488 [2006]). Moreover, the placement has been rendered moot as the date scheduled for the

next permanency hearing has passed (*see Matter of Stephon Elijah G.*, 63 AD3d 640 [2009]).

The finding that the mother neglected all five of her children, including the eldest, Lah De, who was speech-impaired and developmentally disabled, was supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[f][i], 1046[b][i]), which established that the children were at imminent risk of harm due to the mother's inadequate supervision, her continued use of marijuana even after the neglect petition was filed, and her failure to bring the children for several scheduled medical appointments. Records at the shelter where the mother and her children resided showed, inter alia, that she had, on several occasions, left her children, then ages 14, 11, 6, 5 and 1, unattended at the shelter, and permitted them to ride the subway late at night without her. These findings as to all the children clearly belie the implication of the dissent that the finding regarding the oldest child was limited to just one incident (*see Matter of Sasha B.*, 73 AD3d 587 [2010]).

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

FREEDMAN, J. (dissenting in part)

I respectfully dissent from so much of the majority opinion as affirms the determination that respondent mother neglected Lah De, age 14. While I agree that the mother used poor judgment in allowing the children to ride the subway late at night on one occasion under the supervision of Lah De and the 11-year-old Joseph, I find that incident insufficient for finding that she neglected Lah De. Although Lah De had a speech impediment (which his mother refused to characterize as a developmental disability), he was attending school regularly at the proper grade level for his age, was supposed to be receiving occupational therapy, and had traveled on the subway alone on prior occasions. During his 14 years, he was well cared for and had no other health problems that had not been addressed. There is no evidence in the record that he could not communicate with adults. To the extent there was evidence that the other children had been left in his care on other occasions, it was for brief time periods. For these reasons, I agree with the recommendation

of the Law Guardian and would vacate the finding of neglect as to Lah De. With respect to the other children, I concur with the majority.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3630 The People of the State of New York, Respondent, Ind. 1562/09

-against-

J. Ventura-Almonte, Defendant-Appellant.

_____

Scott H. Greenfield, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O., at suppression hearing; Maxwell Wiley, J. at suppression motion, plea and sentence), rendered November 18, 2009, convicting defendant of criminal possession of marijuana in the second degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence established that the officer's decision to search defendant's car during a lawful traffic stop was based, at least in part, on the smell of marijuana emanating from the car. That factor, standing alone, was sufficient to provide probable cause for the search (*see e.g. People v Badger*, 52 AD3d 231 [2008], *lv denied* 10 NY3d 955 [2008]).

We reject defendant's contention that, because of the alleged insufficiency of the People's response to his suppression motion, he was entitled to have the motion granted summarily. In

opposing defendant's motion to suppress the marijuana recovered from his car, the People "submitt[ed] that such evidence was lawfully obtained and den[ied] all allegations to the contrary." This was sufficient to meet their burden of "refus[ing] to concede the truth of facts alleged by defendant" (*People v Weaver*, 49 NY2d 1012, 1013 [1980]), and the court properly ordered a hearing.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3631 Stephanie Byrne, as Administrator of the Estate of Angela Kirkland, Plaintiff-Respondent, Index 17408/05

-against-

New York City Transit Authority, Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Pulvers, Pulvers & Thompson, LLP, New York (Stacy L. Thompson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 15, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The claim of negligence in allowing a slippery condition to persist in the aisle of the bus is precluded, as a matter of law, by the undisputed fact that the slip and fall occurred during a rainstorm. Defendant is not obligated to provide a constant remedy for the tracking of water onto a bus during an ongoing storm (*Morazzani v MTA N.Y. City Tr.*, 67 AD3d 598 [2009]). Furthermore, the nature of plaintiff's decedent's injuries, and her description of the incident at the statutory hearing, were insufficient to satisfy the requirement of showing that the bus's departure was sudden, causing a jerk or lurch that was unusual

and violent (*see Urquhart v New York City Tr. Auth.*, 85 NY2d 828 [1995]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3632 In re Andrea Palmer, Index 401501/09
Petitioner,

-against-

John Rhea, as Chair of the New York City Housing Authority, et al.,
Respondents.

_____

Steven Banks, The Legal Aid Society, Staten Island (Teresa K. DeFonso of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated April 29, 2009, terminating petitioner's Section 8 subsidy on the ground that she engaged in abusive and threatening behavior toward NYCHA personnel, unanimously modified, on the law, to vacate the penalty of termination and remand the matter to NYCHA for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marcy S. Friedman, J.], entered February 2, 2010), otherwise disposed of by confirming the remainder of the determination, without costs.

NYCHA's finding that petitioner engaged in abusive and threatening behavior towards NYCHA personnel (*see* 24 CFR 982.552[c][ix]; *see also* 24 CFR 982.1[a][1]) is supported by substantial evidence (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]), including, in

particular, the testimony of the personnel involved (*see Matter of Berenhaus*, 70 NY2d 436, 443-444 [1987]). However, the penalty of termination of petitioner's Section 8 subsidy is so disproportionate to the offense as to shock our sense of fairness. While petitioner's conduct certainly should not be condoned, the incidents did not rise to the level of physical interaction, and nothing in the record shows that petitioner posed a risk to other tenants or had been a problematic tenant in the past (*see Matter of Peoples v New York City Hous. Auth.*, 281 AD2d 259 [2001], citing *Matter of Spand v Franco*, 242 AD2d 210 [1997], *lv denied* 92 NY2d 802 [1998], *Matter of Winn v Brown*, 226 AD2d 191 [1996], and *Matter of Milton v Christian*, 99 AD2d 984 [1984]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3633 In re Esther H.,
Petitioner-Respondent,

-against-

Eddie H.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Kenneth Walsh, Brooklyn, for respondent.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about October 13, 2009, which, upon a determination, after a fact-finding hearing, that respondent committed the family offenses of menacing in the second and third degrees, reckless endangerment in the second degree, disorderly conduct, and harassment in the second degree, granted petitioner a two-year order of protection against respondent, unanimously modified, on the law, to vacate the finding of harassment in the second degree, and otherwise affirmed, without costs.

The Referee having properly struck petitioner's testimony as to a course of harassing conduct committed by respondent that had been alleged and adjudicated in a prior proceeding, the evidence was legally insufficient to establish harassment in the second degree under Penal Law § 240.26(3) (*see People v Wood*, 59 NY2d 811, 812 [1983]). The Referee's remaining findings were supported by a fair preponderance of the evidence.

The Referee properly denied respondent's motion for a mistrial based on the ruling that the evidence of a course of harassing conduct would not be considered in the fact-finding determination, because respondent was not prejudiced by that ruling.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3634 Diontech Consulting, Inc., Index 600321/08
Plaintiff-Appellant,

-against-

New York City Housing Authority, et al.,
Defendants-Respondents,

ABC Corp., etc.,
Defendant.

_____

King & King, LLP, Long Island City (Peter M. Kutil of counsel), for appellant.

Sonya M. Kaloyanides, New York (Stephen W. Goodman of counsel), for New York City Housing Authority, respondent.

Hollander & Strauss, LLP, Great Neck (Michael R. Strauss of counsel), for PMS Construction Management Corp., respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered March 18, 2009, which granted the motions by defendants Housing Authority and PMS Construction Management to dismiss the complaint, unanimously affirmed, without costs.

After the Housing Authority, as owner, and defendant PMS, as construction manager, entered into a contract with respect to various capital construction projects, PMS entered into another contract with plaintiff herein, as trade contractor, agreeing to perform roofing and asbestos abatement work at a certain project. PMS subsequently directed plaintiff to proceed with the performance of its work, but later advised plaintiff that the job had to be temporarily suspended because funding had been delayed.

When the funding then became available and PMS notified plaintiff it was about to resume work, plaintiff demanded payment of delay damages, and commenced this action when payment was not forthcoming.

We agree with the motion court's determination that this action is barred by the releases that plaintiff signed. In that regard, plaintiff has conceded that the project in question was completed by May 10, 2007, but in September and November of that year, it executed two documents whereby it forever released, waived and discharged defendants from any and all causes of action, suits, debts, accounts, damages, encumbrances, judgments, claims and demands whatsoever.[1] In that respect, it is well settled that absent fraudulent inducement or concealment, misrepresentation, mutual mistake or duress, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim that is the subject of the release (*see Littman v Magee*, 54 AD3d 14, 17 [2008]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [2006], *lv denied* 8 NY3d 804 [2007]). However, plaintiff proposes that notwithstanding the arising of its claims prior to the execution of the subject releases, the negotiation of a solitary change order on or about August 14, 2007 somehow indicates that the releases were not

[1]It should be noted that another such release was executed by plaintiff in January of 2007.

intended to encompass payment for its supposed extra work.

Although a party may, by its conduct, implicitly recognize that a right to additional payment has not been extinguished by the releases in question (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495 [2010]; *E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642 [2007]), there is simply no course of conduct here that could conceivably be construed as an acknowledgment by PMS or the Housing Authority of plaintiff's right to further payment, inasmuch as the second and third extremely broad releases were signed by plaintiff after PMS had endeavored to arrange for plaintiff to accept a change order, in August 2007, for work that had not been performed. Moreover, while the releases are themselves sufficient to require dismissal of this action, dismissal was also warranted by plaintiff's failure to comply with the contractual requirement for timely notice of its claim, which was a "condition[] precedent to suit or recovery" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]). The contract also prohibited, by its terms, the recovery of delay damages (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]), and contrary to plaintiff's argument that this matter falls within the exception to the rule favoring the enforceability of no-delay-damages clauses, the delay herein was caused solely by the Housing Authority's lack of funding; it cannot be said that such

delay was unforeseeable at the time the agreement was executed, or was so great or unreasonable as to be deemed equivalent to abandonment of the contract (*id.* at 312).

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

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3635 & M-5164 John M. Ferolito, etc., et al., Plaintiffs-Appellants, Index 600396/08 590967/08

-against-

Domenick J. Vultaggio, et al., Defendants-Respondents.

- - - - - -

Don Vultaggio, et al., Third-Party Plaintiffs,

-against-

Richard N. Adonailo, Third-Party Defendant,

Patriarch Partners LLC, Third-Party Defendant-Appellant.

_____

Milbank, Tweed, Hadley & McCloy LLP, New York (Andrew E. Tomback of counsel), for John Ferolito, Richard N. Adonailo, JF Capital, L.P., JMF Investment Holdings, Inc. and Elizabeth Ann Barulic, appellants.

Evan Sarzin, P.C., New York (Evan Sarzin of counsel), for John Ferolito, Jr., appellant.

Brune & Richard LLP, New York (Hillary Richard of counsel), for Arizona Beverage Acquisition, LLC and Patriarch Partners, LLC, appellants.

Cadwalader, Wickersham & Taft LLP, New York (Louis M. Solomon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 17, 2009, which denied plaintiffs' and third-party defendant's respective motions for summary judgment, granted defendants' cross motion for summary judgment, dismissed count one of the complaint, and declared that restrictions on the

transfer of corporate interests, as set out in a shareholders' agreement between plaintiffs and defendants, were valid and enforceable, unanimously affirmed, with costs.

In 1998, the plaintiff and defendant groups, each of whom held a 50% interest in a closely held enterprise, entered into an agreement whose intended purpose was to maintain appropriate and businesslike relationships among the parties and to assure continuity of ownership and management of their enterprise. Included in this agreement was a provision limiting the sale or transfer of either group's interest in the enterprise to "Permitted Transferees," defined as an affiliate; a lineal descendant, lineal ancestor, sibling or spouse of a party (or personal representative in case of death); a trust, corporation or partnership whose interests are held by the transferring party; and any other party.

A restraint on the transferability of stock will be upheld if it is reasonable, in accordance with public policy, and effectuates a lawful purpose (*Levey v Saphier*, 54 AD2d 959, 960 [1976], *lv denied* 41 NY2d 805 [1977]; *see generally* 18A Am Jur 2d, Corporations § 570). Restrictions on the transfer of stock are not uncommon in closely held corporations (*see Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 543 [1957]; *Sulkow v Crosstown Apparel Inc.*, 807 F2d 33, 37 [2d Cir 1986]), as they effectively protect day-to-day corporate operations. "Such restrictions are

considered to be reasonable [where] they do not represent an 'effective *prohibition* against transferability,' but merely limit the group to whom the shares may be transferred" (*Matter of Gusman*, 178 AD2d 597, 598 [1991] [quoting *Allen*, 2 NY2d at 542, emphasis in original], *lv denied* 80 NY2d 753 [1992]). Under such circumstances, the relevant question is whether restrictions on transferring shares in a closely held corporation are "reasonable in light of the circumstances and the purposes sought to be accomplished" (*Benson v RMJ Sec. Corp.*, 683 F Supp 359, 373 [SD NY 1988]).

Considered in light of the larger business transaction between plaintiffs and defendants, the restraint on alienation set forth in the agreement is reasonable in light of the circumstances and the purposes sought to be accomplished. The parties, after some negotiation and with the aid of counsel, entered into a valid agreement whereby they sought to ensure managerial continuity of their closely held business by limiting the alienation of stock to a prescribed class of transferees. The restraint furthers the intended purpose and ensures its effectuation. Furthermore, this case does not present facts demonstrating that the restraint was imposed on a shareholder from the outside, by a corporate bylaw, or by a more

sophisticated party (*compare Allen v Biltmore Tissue Corp.*, 2 NY2d 534, *supra*; *Rafe v Hindin* (29 AD2d 481 [1968], *affd* 23 NY2d 759 [1968]).

M-5164 ***Ferolito, etc., et al. v Vultaggio, et al.***

Motion to dismiss appeals as moot, and other related relief, denied.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3636 In re Danielle Sandow, et al., Index 108898/08
Petitioners-Appellants,

-against-

State of New York Division of
Housing and Community Renewal,
Respondent-Respondent,

135 West 13th Street, LLC,
Intervenor-Respondent.

_____

Cardozo Bet Tzedek Legal Services, New York (Leslie Salzman of counsel), for appellants.

Gary R. Connor, New York (Eu Ting of counsel), for DHCR, respondent.

Kossoff & Unger, New York (Michael D. Nachtome of counsel), for 135 West 13th Street, LLC, respondent.

_____

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered June 4, 2009, dismissing this proceeding to challenge respondent DHCR's determination that, upon the termination of single family residential rental and occupancy, the subject apartments would remain rent-stabilized and not revert to rent-control status, unanimously affirmed, without costs.

Petitioners are Manhattan tenants at 133 West 13th Street, a building owned by intervenor 135 West 13, LLC. The two apartments in question, which had been rent-controlled, were decontrolled pursuant to March 14, 1957 orders that stated the decontrol would be "effective only so long as the newly created

housing accommodations are rented for single family occupancy." Those orders were authorized by the Rent Control Law (*see* New York City Administrative Code § 26-403[e][2][i][2]).

As conceded by petitioners, the apartments became rent-stabilized with the enactment of the Emergency Tenant Protection Act of 1974 (ETPA), which applied to all housing accommodations that were "heretofore or hereafter decontrolled, exempt, not subject to control, or exempted from regulation and control" under the existing Local Emergency Housing Rent Control Act of 1962 (*see* McKinney's Uncons Laws of NY § 8623[a]). The New York City Council's incorporation of ETPA's language into the protections of rent stabilization was "a clear declaration that both the State Legislature and the City Council intended that to the extent that the Emergency Tenant Protection Act applied, it should supersede pre-existing exemptions" (*Axelrod v Starr*, 52 AD2d 232, 235 [1976], *affd* 41 NY2d 942 [1977]). ETPA's applicability to temporarily decontrolled apartments removed such apartments from coverage under the preexisting law, in the absence of any applicable exclusion (*see Matter of Zeitlin v New*

York City Conciliation & Appeals Bd., 46 NY2d 992 [1979]).

Accordingly, the apartments in question are no longer subject to reversion to rent-control status upon cessation of the condition of decontrol.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3637-
3637A Jeanne Sorensen Leff, Index 117424/06
3637B Plaintiff-Appellant,

-against-

Fulbright & Jaworski, L.L.P., et al.,
Defendants-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Frank V. Floriani of counsel), for appellant.

Patterson Belknap Webb & Tyler, LLP, New York (Frederick B. Warder of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Marilyn Shafer, J.), entered July 29, 2009, dismissing the complaint, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered July 2 and 15, 2009, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In New York it is well established that absent fraud, collusion, malicious acts or similar circumstances, the draftsperson of a will or codicil is not liable to the beneficiaries or other third parties not in privity who might be harmed by his or her professional negligence (*see Mali v De Forest & Duer*, 160 AD2d 297 [1990], *lv denied* 76 NY2d 710 [1990]). Defendants demonstrated that while they represented plaintiff in her estate planning and other matters, she was not in privity with them with regard to her late husband's estate

planning. The absence of such privity remains a bar against her estate malpractice claims (*Estate of Schneider v Finmann*, 15 NY3d 306 [2010]).

Plaintiff's subjective belief that she had engaged in joint estate planning or was jointly represented with her late husband is insufficient to establish such privity (*Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451 [1993], *lv denied* 82 NY2d 654 [1993]). Contrary to plaintiff's contention, this case is not akin to *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo* (259 AD2d 282 [1999]), in which the plaintiff beneficiary was intimately involved in the estate planning and relied upon the attorney's advice in the course of establishing a sham corporation intended to avoid estate taxes. Indeed, plaintiff herein was never involved in the planning of the estate and did not rely on any advice related thereto that might sustain her claim.

Plaintiff cannot bring her claim pursuant to the "approaching privity" standard outlined in *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood* (80 NY2d 377, 383 [1992]). There is no evidence that defendants knew and intended that their advice to plaintiff's late husband was aimed at affecting plaintiff's conduct or was made to induce her to act. Nor is there evidence that plaintiff relied upon defendants' advice to her detriment. Significantly, the standard is not

satisfied when the third party was only "incidentally or collaterally" affected by the advice (*see id.*).

In any event, plaintiff cannot recover damages that are grossly speculative (*see Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1999], *lv denied* 94 NY2d 759 [2000]). Defendants demonstrated that plaintiff could not satisfy the causation element of her malpractice claim because she could not prove that her inheritance would have increased if defendants had advised her late husband about a separation agreement that required him to leave half of his probated estate to his son. While plaintiff suggests various things her late husband could have done to ensure her more money than she eventually received, she cannot prove precisely what he would have done had he received different advice. Therefore, she cannot establish that but for defendants' failure to advise her late husband of the separation agreement, she would have received more money. In this regard, we note that plaintiff's late husband had the right to reduce her inheritance

at any point in time.

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

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3638 The People of the State of New York, Ind. 2331/08
Respondent,

-against-

Trevor Roberts,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler 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 (Bonnie G. Wittner, J.), rendered on or about December 23, 2008,

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

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

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

3639 R&R Capital LLC, et al., Index 604080/05
Plaintiffs-Appellants,

-against-

Linda Merritt, etc.,
Defendant-Respondent.
- - - - - -
Hogan & Hartson, LLP,
Intervenor-Appellant.

_____

Certilman Balin Adler & Hyman, LLP, East Meadow (Paul B. Sweeney of counsel), for R&R Capital LLC and FTP Capital, LLC, appellants.

Vandenberg & Feliu, LLP, New York (Bertrand C. Sellier of counsel), for Hogan & Hartson, LLP, appellant.

Cozen O'Connor, New York (John B. Galligan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 5, 2010, to the extent appealed from as limited by the briefs, granted, in part, defendant's motion for "clarification," granted, in part, defendant's motion to amend her counterclaims, and, sua sponte, granted leave to defendant to assert counterclaims against plaintiffs and plaintiffs' counsel pursuant to Judiciary Law § 487, unanimously reversed, on the law, with costs, the motion denied, and the matter remanded for trial of the remaining counterclaims before another Justice.

Defendants' proposed new counterclaims alleging a fraud on this Court and a violation of Judiciary Law § 487 plainly lack merit, and therefore should have been rejected (*see Thomas*

Crimmins Contr. Co. v City of New York, 74 NY2d 166, 170 [1989]). Prior decisions of this Court have established law of the case that plaintiffs and their counsel had made no misrepresentations or otherwise acted fraudulently, deceptively, or in bad faith in any of the litigations in question (60 AD3d 528 [2009]; 63 AD3d 565 [2009]). The order on appeal also violates the principles of comity and full faith and credit by revisiting issues decided by Delaware and Pennsylvania courts. Nor is there a viable counterclaim for indemnification since any indemnification rights defendant had were against the LLCs owned by the parties, and, therefore, were within the sole jurisdiction of the Delaware Chancery Court, which has already ruled that plaintiff has no such rights. As plaintiff demonstrates a reasonable concern about the court's appearance of impartiality, we direct that the matter be reassigned to another Justice for trial of the remaining counterclaims (*see Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 287 [2007], *revd on other grounds* 11 NY3d 810 [2008]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3640 The People of the State of New York, Ind. 560/05
Respondent,

-against-

Celeste Ortiz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 18, 2009, resentencing defendant to a term of 1 year, with 1 year of postrelease supervision, unanimously affirmed.

The court granted defendant's CPL 440.46 application to reduce her sentence for her conviction of third-degree criminal sale of a controlled substance, and imposed the minimum sentence permitted by law. Defendant requests this Court to modify her determinate sentence in the interest of justice to a one-year definite sentence of imprisonment, which would not require postrelease supervision. Defendant maintains that CPL 440.46 should not be interpreted to permit only a determinate sentence upon resentencing, but should be construed as also permitting the alternative dispositions authorized under Penal Law §§ 60.04 and 70.70 for an initial sentence for a class B drug felony,

including a definite sentence of one year. However, by its express terms, CPL 440.46 only permits a defendant to apply for resentencing to a determinate term.

Since defendant received the minimum legal resentence, we have no authority to reduce it further in the interest of justice (*see* CPL 470.20[6]). In any event, regardless of how the statute should be interpreted, we perceive no basis for reducing defendant's sentence.

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3641 In re Robert Rucker, Index 103531/09
Petitioner-Appellant,

-against-

NYC/NYPD License Division,
Respondent-Respondent.

_____

Robert Rucker, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered June 15, 2009, dismissing this proceeding to annul a determination denying petitioner's application for a premises residence handgun license, unanimously affirmed, without costs.

Judicial review of an administrative determination is limited to whether it was arbitrary or capricious or without a rational basis in the administrative record, and once it is determined that the agency's conclusion had a sound basis in reason, the judicial function comes to an end (*Matter of Partnership 92 LP & Bldg. Mgt. Co. Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [2007], *affd* 11 NY3d 859 [2008]). Respondent's denial of petitioner's application was not arbitrary and capricious, and had a rational basis. Petitioner's failure to notify respondent of the fact that he had changed his residential and business addresses, that he had caused an order of protection to be issued against his child's

mother, and that he was the subject of 21 domestic incident reports casts doubt on his character and fitness to possess a firearm (*see Matter of Kozhar v Kelly*, 62 AD3d 540 [2009]; *Matter of Del Valle v Kelly* (37 AD3d 311 [2007]).

The fact that there may be errors in some of the incident reports is of no moment because petitioner failed to raise that issue below, and it is thus unpreserved for appellate review (*see O'Neill v Julav Realty*, 2 AD3d 194 [2003], *lv denied* 2 NY3d 701 2004]). In any event, there are approximately 17 domestic incident reports, where petitioner does not claim any errors, which can be relied on.

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

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3643 In re Jared S., and Another,

Children Under the Age
of Eighteen Years, etc.,

Monet S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), Law Guardian.

_____

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 8, 2008, which, upon a fact-finding determination that respondent father neglected his children, inter alia, placed the subject children in the custody of the non-respondent mother under the supervision of the Administration for Children's Services (ACS) for twelve months, referred the father to parenting skills and batterers' programs, and directed him to cooperate with other ACS referrals, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence, including testimony that the father engaged in acts of domestic violence against the children's mother, and placed two knives under one child's chin at his throat, while

threatening to kill the child (*see Matter of Niyah E.*, 71 AD3d 532, 533 [2010]; *Matter of Enrique V.*, 68 AD3d 427 [2009]).

A single incident of domestic abuse is sufficient to support a finding of neglect where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm, as here (*see Matter of Kayla W.*, 47 AD3d 571, 572 [2008]).

There are no grounds for disturbing the court's credibility determinations, including the weight to be given to any inconsistencies in testimony, because the trial court was in the best position to observe and assess the demeanor of the witnesses (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]).

The court providently exercised its discretion in limiting testimony concerning the mother's past history of mental illness or "unusual behavior."

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3645 James O'Halloran, et al., Index 108759/04
Plaintiffs,

-against-

City of New York,
Defendant.
- - - - - -
City of New York,
Third-Party Plaintiff-Respondent,

-against-

The Halcyon Construction Corp.,
Third-Party Defendant-Appellant.

_____

Law Offices of Richard A. Fogel, P.C., Islip (Richard A. Fogel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 8, 2010, which denied third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Plaintiffs and their insurer, Greenwich Insurance Company, commenced the underlying action, alleging that the City, its agents and employees, were negligent in the repair of a sewer line, causing plaintiffs' property to be "inundated with sewage," and resulting in damages of $84,030.97. The City subsequently commenced the subject third party action for indemnification and contribution against Halcyon, alleging that it was negligent in

its repair of plaintiffs' property.

The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The evidence submitted by Halcyon, specifically, inspection reports, the affidavit of its supervisor, and the deposition testimony of its foreman and a City inspector, fails to affirmatively establish that it did not cause or contribute to the flooding and/or sewage inundation at plaintiffs' property, and thus, its motion was properly denied without consideration of the City's opposition. Even if Halcyon had established its prima facie case, the motion was nonetheless properly denied, as plaintiff's testimony that he personally witnessed the secondary collapse and heard water after the backhoe began "aggressively" and that he heard unnamed employees of Halcyon tell their supervisor, "All right, we broke his pipe," created triable

issues of fact. Contrary to Halcyon's contention, hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [2010]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

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

3646 In re Michelle Cunningham, Index 107447/07
Petitioner,

-against-

State of New York Higher Education
Services Corporation,
Respondent.

_____

Mirkin & Gordon, P.C., Great Neck (E. Lisa Forte of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

_____

Determination of respondent State of New York Higher Education Services Corporation, dated January 25, 2007, which, after a hearing, authorized garnishment of petitioner's wages to collect a defaulted guaranteed student loan, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Richard F. Braun, J.], entered June 16, 2008), dismissed, without costs.

Respondent's finding that petitioner defaulted in the repayment of her student loans is supported by substantial evidence (*see e.g. 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). Despite her claims that some of the underlying student loans were fraudulent, petitioner admitted that she signed an application and promissory note to consolidate the balance of the loans. Furthermore, petitioner

was given ample opportunities to present her claims at the hearing that was conducted by telephone at her request and her contention that she was prevented from presenting evidence on her behalf is belied by the hearing transcript.

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: NOVEMBER 18, 2010

CLERK

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

3647N Isaiah Rodriguez, etc., Index 22047/06
Plaintiff-Respondent,

-against-

New York City Health and Hospitals Corporation (Jacobi Medical Center),
Defendant-Appellant,

"John" Bernstein, M.D., et al.,
Defendants.

_____

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

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 8, 2008, which granted plaintiff's motion to serve a late notice of claim, unanimously reversed, on the facts, without costs, and the motion denied.

None of the factors that the motion court considered were demonstrated to be in plaintiff's favor (*see* General Municipal Law § 50-e[5]). Plaintiff failed to offer a reasonable excuse for the eight-year delay in moving for leave. The record shows that the delay is attributable to the fact that plaintiff's mother and guardian, while on notice of his condition, lacked an understanding of the legal basis for the claim. However, such ignorance of the law is not a reasonable excuse (*Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [2007]). Plaintiff failed to

demonstrate that defendant acquired actual notice of the facts of the claim from the medical record. He was born prematurely, and the complications he suffered were consistent with that condition. The record alone did not put defendant on notice of alleged malpractice that might years later give rise to another condition (*see Velazquez v City of NY Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441 [2010]). Defendant demonstrated that it has been prejudiced by the delay by showing that its former-employee witnesses have no recollection of this particular delivery, performed almost a decade ago (*see Matter of Banegas-Nobles v New York City Health & Hosps. Corp.*, 184 AD2d 379, 379-380 [1992]). Finally, plaintiff's infancy carries little weight, because there is no connection between the infancy and the delay (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537-538 [2006]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3648 The People of the State of New York, Ind. 4944/07
Respondent,

-against-

Leonel Cerda,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Britta Gilmore of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 15, 2008, convicting defendant, after a jury trial, of predatory sexual assault against a child (two counts) and attempted disseminating indecent material to minors in the first degree, and sentencing him to an aggregate term of 10 years to life, unanimously affirmed.

Defendant was not deprived of his constitutional right to disclosure of exculpatory or impeaching evidence when, after an in camera examination of the victim's medical records, the court redacted a handwritten notation that read as follows: "In year 2000, report of sexual abuse by father unfounded." Defendant concedes that this notation only would have been a starting point for investigation, but argues that, had it been disclosed, it could have led to admissible evidence that the victim made, or caused the making of, a false sexual abuse claim about her

father, and that this evidence might have cast doubt on the credibility of her allegations against defendant (*see generally People v Mandel*, 48 NY2d 952, 953 [1979], *cert denied* 446 US 949 [1980]). However, defendant's assertion that an investigation might have revealed evidence of exculpatory or impeachment value is entirely speculative. In any event, defendant has not shown any reasonable possibility that the outcome of the trial would have been different even if such an investigation had revealed that seven years before the incidents involving defendant, the victim, then four or five years old, falsely accused her father of sexual abuse. Furthermore, there was overwhelming evidence of defendant's guilt, including his detailed written and videotaped confessions, for which he gave an implausible explanation at trial.

The indictment originally included counts charging the class B felonies of rape in the first degree (Penal Law § 130.35[4]) and criminal sexual act in the first degree (Penal Law § 130.50[4]). Since those charges were based on the theory that defendant was 18 years old or more while the victim was less than 13 years old, they had the identical elements as the class A-II felony of predatory sexual assault against a child (Penal Law § 130.96). The court did not submit the rape and criminal sexual act counts to the jury. On appeal, defendant argues that the prosecutor was required to choose between these sets of counts

prior to trial, and that the presence of the additional counts suggested to the jury a higher level of culpability. Defendant also argues that there was a reasonable view of the evidence, under the theory discussed in *People v Discala* (45 NY2d 38, 43 [1978] [crimes with identical elements may differ as to "heinous quality," possibly presenting jury question]), that he was guilty of the class B sex crimes but not the class A-II felony, so that the former crimes should have been submitted as lesser included offenses. He alternatively argues that they should have been submitted as noninclusory concurrent counts. Since the arguments defendant makes on appeal are entirely different from those he made before and during the trial concerning the presence and submission of these sets of counts, he has not preserved any of his present claims and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Defendant has not shown that he was prejudiced by the timing of the court's dismissal of the rape and criminal sexual act counts, or that the court was obligated to submit them to the jury.

The challenged portions of the People's summation constituted permissible arguments for crediting the testimony of

the People's witnesses and discrediting that of defendant (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), and any errors were harmless in view of the overwhelming evidence.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3650 Joseph Delaney, et al., Index 108818/05
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

_____

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

Fabiani Cohen & Hall, LLP, New York (Joseph J. Rava of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 3, 2009, which granted defendant's motion for summary judgment dismissing plaintiff's causes of action under Labor Law §§ 200 and 241(6) and for common-law negligence, unanimously affirmed, without costs.

Plaintiff, an ironworker, alleges that while working on a bridge owned by defendant City, he was injured when he attempted to enter a lane of traffic on the bridge that had been closed to the public by his employer and was struck by a pickup truck owned and operated by his employer. Where, as here, the injuries were caused by a contractor's methods of performing a particular construction activity the owner cannot be held liable under section 200 or the common law unless it exercised supervisory control over the activity (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Plaintiff offered no evidence tending to show such

control. It does not avail plaintiff that defendant authorized plaintiff's employer's request for lane closures and hired engineers to ensure that the work being performed was in accordance with plans and specifications (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400, 401-402 [2004]).

We also reject plaintiff's argument that because the Jersey barrier over which he had to step to get to the roadway had no breaks to allow for safe passage and because there were no signs, traffic controls or flagmen to protect workers from oncoming traffic, the barrier was an inherently dangerous condition of the workplace itself for which defendant can be held liable even in the absence of supervisory control (*compare Dalanna v City of New York*, 308 AD2d 400, 400 [2003], *with Urban v No.5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]).

Nor can section 200 liability against defendant be based on alleged violations of the Occupational Safety and Health Act, which governs employee/employer relationships (*see Khan v Bangla Motor and Body Shop, Inc*, 27 AD3d 526, 528-529 [2006], *lv dismissed* 7 NY3d 864 [2006]), as defendant was not plaintiff's employer.

The Industrial Code provisions cited by plaintiff in support

of his cause of action under section 241(6) -- 12 NYCRR 23-1.29 (Public vehicular traffic) and 23-1.32 ("Imminent danger -- notice, warning and avoidance") -- are inapplicable to the alleged facts.

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

ENTERED: NOVEMBER 18, 2010

CLERK

CORRECTED ORDER - DECEMBER 8, 2010

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3651 In re Cain Keel L., and Another,

Children Under the Age
of Eighteen Years, etc.,

Derzerina L.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian.

_____

Order, Family Court, Bronx County (Allen Alpert, J.), entered on or about June 17, 2009, which denied appellant mother's motion to vacate two orders of disposition of the same court and Judge, entered on or about March 11, 2009, upon appellant's default, terminating her parental rights to her children on the ground of abandonment, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's motion to vacate the orders terminating her parental rights upon her default because her moving papers failed to demonstrate a reasonable excuse for her absence from the court's March 11, 2009 proceeding and a meritorious defense (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [2010], *lv*

dismissed 15 NY3d 766 [2010]; *Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402 [2010]). Given the fact that appellant failed to appear at two prior Family Court proceedings and that the court notified her attorney that should she fail to appear at the March 11, 2009 hearing, the court would proceed with an inquest, the court acted within its discretion to proceed notwithstanding her guardian ad litem's request for an adjournment (*see Matter of Jones*, 128 AD2d 403 [1987]). Moreover, counsel's bare assertion that as her attorney he would have had the opportunity to cross-examine the agency's witnesses and would have presented evidence countering the allegations of abandonment are insufficient to establish a meritorious defense (*see Matter of Gloria Marie S.*, 55 AD3d 320, 321 [2008] *lv dismissed* 11 NY3d 909 [2009]).

Lastly, appellant's argument that the Family Court lacked jurisdiction to issue a final order because the Cherokee Indian tribe was not given the opportunity to intervene pursuant to the Indian Child Welfare Act of 1978 (ICWA) is without merit. Appellant, as the party asserting the applicability of the ICWA, failed to meet her burden to provide sufficient information to at least put the court or Department on notice that the child may be

an "Indian child" within the meaning of the ICWA, and that further inquiry is necessary (*In re Trever I.*, 2009 ME 59,*P 21, 973 A2d 752, 758 [2009]).

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3653-
3654-
3655 425 Third Avenue Realty Co., Index 400841/08
Plaintiff-Respondent,

-against-

Scott Greenfield, et al.,
Defendants-Appellants.

_____

Steven Greenfield, Westhampton Dunes (Sheila F. Pepper of counsel), for appellants.

David A. Pravda, Scarsdale, for respondent.

_____

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered December 4, 2009, following a nonjury trial, awarding plaintiff the principal sum of $35,942.68, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered September 29 and October 23, 2009, which denied defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court properly concluded that defendants owed plaintiff use and occupancy for the period from April 2006 through October 2007. Even though the evidence adduced on the motions and at trial established that plaintiff's former managing agent had negligently failed to furnish defendants with a rent-stabilized lease, failed to bill defendants for rent over the first 18 months, and represented to the Division of Housing and

Community Renewal (DHCR) that the apartment was vacant, it also established that defendants agreed to pay the then-current regulated rent of $1,891.72 per month when they moved into the apartment, and that they resided in the apartment for over three years without paying any rent whatsoever. Defendants fail to establish that they had an understanding with plaintiff allowing them to live in the apartment without paying rent, and thus plaintiff is entitled to collect use and occupancy (*see Goldman v Segal*, 278 AD2d 74 [2000]).

There was sufficient evidence adduced at trial to support the court's award of damages. Plaintiff's managing partner testified that the last registered regulated rent for the apartment was $1,891.72 per month, which was the amount he collected from the former tenant before she vacated in 2004. This testimony is fully corroborated by the DHCR registration forms. Defendants did not offer any evidence suggesting that a lesser amount was correct. To the contrary, Greenfield himself testified that he was initially offered the apartment at $1,891.72 per month. Nor did defendants adduce any evidence of fraud on plaintiff's part in setting the regulated rents over the years so as to render the DHCR registration records inherently unreliable (*cf. Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29 [2009], *affd* __ NY3d __ [2010 NY Slip Op 7379] [2010]).

We also find no merit to the defense premised on General Business Law § 130(9) barring plaintiff -- an entity conducting business under an assumed name or partnership -- from bringing suit for failure to file a certificate in New York County setting forth the name/designation and address under which such business is conducted or transacted, and the full names of those conducting or transacting such business, as required by § 130(1)(a). Even though plaintiff owns buildings in New York County, it runs its business from Westchester County, where its offices are located. There is no dispute that plaintiff has filed the required certificate in Westchester County, and indeed, when its managing partner attempted to file a certificate in New York County, it was unable to do so because it does not maintain an office here.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3656 Arthur Kent, etc., Index 150198/08
Plaintiff-Appellant,

-against-

Don Martin, etc., et al.,
Defendants-Respondents,

Does 1 through 10 inclusive,
Defendants.

_____

Blakely Law Group, Hollywood, CA (Brent H. Blakely, of the California Bar, admitted pro hac vice, of counsel), for appellant.

Levine Sullivan Koch & Schulz, L.L.P., New York (David A. Schulz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 27, 2010, which granted respondents' motion to dismiss on the ground of forum non conveniens, unanimously affirmed, with costs.

This is a defamation action by a Canadian resident against a Canadian journalist and the publishers of two Canadian newspapers. All the corporate defendants are incorporated and have their principal places of business in Canada (*see Georgakis v Excel Mar. Carriers*, 72 AD3d 494 [2010]; *Adamowicz v Besnainou*, 58 AD3d 546 [2009]). Even if jurisdictionally sound, the action would be more appropriately adjudicated there (*see Rabinowitz v Devereux Connecticut Glenholme*, 69 AD3d 485 [2010]). And since there is an earlier commenced action for the same relief pending

in Canada, dismissal of the New York action would avoid the possibility of inconsistent findings (*see Nasser v Nasser*, 52 AD3d 306, 308 [2008]; *Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co.*, 49 AD3d 276 [2008], *lv denied* 10 NY3d 713 [2008]).

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

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3658 In re Tyrone T.,
Petitioner-Appellant,

-against-

Katherine M.,
Respondent-Respondent.

_____

John J. Marafino, Mount Vernon, for appellant.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about July 21, 2009, which dismissed petitioner's family offense petition seeking an order of protection against respondent on the ground that petitioner failed to sufficiently establish a family offense, unanimously affirmed, without costs.

Petitioner's claim that he was the boyfriend of respondent's sister, and a friend of respondent, was insufficient to establish an "intimate relationship" within the meaning of Family Court Act § 812(1)(e) so as to afford the Family Court jurisdiction over this matter (*see* Sponsor's Mem, Bill Jacket, L 2008 ch 326; *Matter of Seye v Lamar*, 72 AD3d 975 [2010]; *Matter of Mark W. v Damion W.*, 25 Misc 3d 1148 [Fam Ct, Kings County 2009]; *Matter of K.J. v K.K.*, 23 Misc 3d 754, 758–759 [Fam Ct, Orange County 2009]).

In any event, assuming the court had jurisdiction, petitioner failed to establish by a preponderance of the evidence that respondent committed the family offense of first degree

harassment against him because his alleged fear that respondent would harm him was not objectively reasonable (*see* Penal Law § 240.25; *People v Demisse*, 24 AD3d 118, 119 [2005], *lv denied* 6 NY3d 833 [2006]). Respondent's remark that "things would get ugly" if petitioner did not return her property could not be reasonably interpreted as a threat, especially given that they had been friends and that petitioner was dating respondent's sister. Further, petitioner never showed that respondent had ever threatened to shoot him with a gun, or that she would use her gun for purposes beyond the duties of her job as a corrections officer. That petitioner would socialize with respondent at her home even after he filed the petition further undermines any contention of fear.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3659 The People of the State of New York, Ind. 3581/06
Respondent,

-against-

Paul Ziegler,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; William A. Wetzel, J. at jury trial and sentence), rendered July 12, 2007, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second drug felony offender, to a term of 4½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to the police. Defendant's statement at the scene of his arrest was spontaneous and not the product of interrogation or its functional equivalent. The officer's innocuous general comments about the case made on the way to the police car were not reasonably likely to elicit an incriminating response (*see People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Lynes*, 49 NY2d 286, 294-295 [1980]). In any event, defendant's statement made to different officers at the precinct, approximately four hours

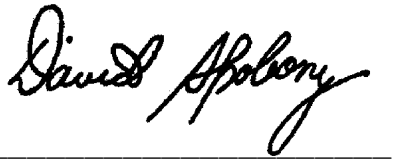
later and after receiving *Miranda* warnings, was sufficiently attenuated from the earlier statement (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US__, 129 S Ct 221 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]), and any error in receiving the pre-*Miranda* statement was harmless because it was merely cumulative to the post-*Miranda* statement (*see People v Sanders*, 56 NY2d 51, 66 [1982]).

Defendant has not established that two jury notes were substantive inquiries that required compliance with the procedures mandated by CPL 310.30 (*see People v O'Rama*, 78 NY2d 270 [1991]). Instead, these notes only necessitated the ministerial actions of sending certain exhibits into the jury room and informing the jury that an additional requested item was not in evidence (*see e.g. People v Johnson*, 46 AD3d 415, 416-17 [2007], *lv denied* 10 NY3d 812 [2008]). Neither note can be reasonably interpreted as calling for a readback of testimony, and there were no ambiguities requiring the court to make inquiries of the jury or take input from counsel.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 18, 2010



CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3661 RE Corp., Index 309938/09
Plaintiff-Appellant,

-against-

New York Energy Savings Corp.,
Defendant-Respondent.

_____

Richard Paul Stone, New York, for appellant.

McKenna Long & Aldridge LLP, New York (Charles E. Dorkey III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered on or about February 17, 2010, which, in an action seeking a declaration that the parties' contract was legally unenforceable, granted defendant's motion to stay proceedings and compel arbitration, unanimously modified, on the law, to the extent of declaring that the contract is legally enforceable, and otherwise affirmed, with costs.

Plaintiff claims that the contract it entered into with defendant to purchase gas and electric supplies at specified prices was an adhesion contract because it had unequal bargaining power with defendant who provided a form contract without entering into any negotiations. Inequality of bargaining power alone does not invalidate a contract as one of adhesion when the purchase can be made elsewhere (*see Brower v Gateway* 2000, 246 AD2d 246, 252 [1998]). The signature of plaintiff's agent appeared under a provision directing the signatory to review the

specific pricing and billing clauses in the contract and plaintiff was afforded three business days to cancel the contract, which was to run for five years.

Notably, plaintiff does not dispute its signature on the contract or that the energy was actually delivered. Because plaintiff received the energy, there is no merit to plaintiff's contention that there was no consideration. Accordingly, the contract is enforceable and pursuant to its arbitration provision, this dispute must be arbitrated.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3662 The People of the State of New York, Ind. 225/08
Respondent,

-against-

Gregory Huffman,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Carol Berkman, J.), rendered on or about January 14, 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: NOVEMBER 18, 2010

CLERK

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

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3665 Lindemberg Cevallos, Index 14664/07
Plaintiff-Appellant,

-against-

Morning Dun Realty, Corp.,
Defendant-Respondent.

_____

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Camacho Mauro & Mulholland, LLP, New York (Philip J. Odett of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about October 2, 2009, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted.

Defendant, the owner of a residential building, moved for summary judgment on the strength of the deposition testimony of its principal, who stated that he was an absentee owner who retained a managing agent to maintain the building, and of plaintiff. Plaintiff testified that he was employed as a handyman by the managing agent, who instructed him to repair a hole in the ceiling of an apartment and supplied all the materials and equipment for the repair job. The equipment

included an old, wobbly ladder lacking rubber material on its footing, which plaintiff had asked the managing agent to replace. Plaintiff testified that his injury occurred when the unsecured ladder collapsed and fell while he was attempting, without assistance, to install sheetrock into the ceiling with a drill while holding it in place with his head.

In light of plaintiff's undisputed testimony that defendant's managing agent failed to provide a suitable safety device and that the failure of the unsecured ladder proximately caused his injury, it was error to grant summary judgment in favor of defendant dismissing the Labor Law § 240(1) cause of action (*see Vargas v New York City Tr. Auth.*, 60 AD3d 438, 440 [2009]). Moreover, defendant's argument that plaintiff's method of installing the sheetrock was negligent was insufficient, as a matter of law, to defeat plaintiff's cross motion for partial summary judgment. Any negligence on plaintiff's part could not have been the sole proximate cause of his accident, since the accident was caused, at least in part, by defendant's failure to satisfy its statutory duty to provide an adequate safety device to protect plaintiff from the risk of falling (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Hart v Turner Constr. Co.*, 30 AD3d 213 [2006]; *Ben Gui Zhu v Great Riv. Holding, LLC*, 16 AD3d 185 [2005]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 175-176 [2004]). There was no evidence that plaintiff either

misused an adequate ladder or failed to use a readily available device that would have protected him from a fall (*see Gallagher*, 14 NY3d at 83; *compare Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292 [2003]). Defendant's contention that, as an absentee owner, he did not supervise or control plaintiff's work is irrelevant, since absolute liability follows upon proof that a defendant's breach of its statutory duty proximately caused the accident *(see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Nor do the arguments advanced by defendant establish its entitlement to summary judgment dismissing the Labor Law § 241(6) cause of action. In opposition to the motion, plaintiff alleged the violation of a sufficiently specific Industrial Code provision (12 NYCRR 23-1.21[b]) and raised an issue of fact whether the violation proximately caused his injury (*see Hart*, 30 AD3d at 214; *De Oliveira v Little John's Moving*, 289 AD2d 108 [2001]). Although plaintiff did not specifically plead a violation of that Industrial Code provision in his bill of particulars, defendant does not claim any prejudice resulting from the late invocation thereof (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560-561 [2010]).

The record also presents an issue of fact whether defendant had constructive notice that the ladder was defective, which precludes summary judgment dismissing the Labor Law § 200 and

common-law negligence causes of action (*see Chowdhury v Rodriguez*, 57 AD3d 121, 129-131 [2008]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223 [1999]). The managing agent's affidavit, which defendant submitted in reply, could not be considered to remedy defects in defendant's motion papers (*see Migdol v City of New York*, 291 AD2d 201 [2002]). Even if it were considered, it would not entitle defendant to summary judgment but would raise issues of fact precluding summary judgment for either party.

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

ENTERED: NOVEMBER 18, 2010

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3667N Pierre Maccagno, PhD, Index 601054/09
Plaintiff-Appellant,

-against-

John J. Prior, Jr., et al.,
Defendants-Respondents.

_____

Pierre Maccagno, appellant pro se.

Kasowitz, Benson, Torres & Friedman LLP, New York (Eric J. Wallach of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 18, 2009, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for a default judgment, unanimously affirmed, without costs.

There was no default because defendants had requested and received an extension of time to respond to the complaint (*see Grant v City of New York*, 17 AD3d 215, 217 [2005]), they timely served their motion to dismiss in full compliance with CPLR 2103(b)(2), and they complied with the court's instruction that they need not respond to interrogatories until the court directed otherwise.

In dismissing the complaint in its entirety, the court held that plaintiff inadequately pleaded a cause of action under the Whistleblowers Law, but in doing so, elected a remedy that effectively waived any other rights and remedies it had (Labor Law § 740[7]; *see Reddington v Staten Is. Univ. Hosp.*, 11 NY3d

80, 87 [2008]; *Bones v Prudential Fin., Inc.*, 54 AD3d 589 [2008]). Plaintiff's claim for retaliation did not fall within the ambit of § 740 because the conduct he sought to expose did not constitute the violation of a law, rule or regulation that presented "a substantial and specific danger to the public health or safety" (§ 740[2][a]); *see Lamagna v New York State Assn. for Help of Retarded Children*, 158 AD2d 588 [1990]).

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

ENTERED: NOVEMBER 18, 2010

CLERK