SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 10, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3546 Carol Rowe, etc., et al., Index 8213/00
Plaintiffs-Appellants,

-against-

Norma P. Fisher et al.,
Defendants,

-and-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

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Gorayeb & Associates, P.C., New York (Mark J. Elder of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for resopndent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered May 8, 2009, which, insofar as appealed from as limited by the briefs, granted defendant New York City Health and Hospitals Corporation's motion to preclude plaintiffs' expert from testifying that plaintiff Carol Rowe should have been provided chelation therapy during pregnancy and to dismiss that allegation, unanimously affirmed, without costs.

The motion court properly precluded plaintiffs' expert testimony on chelation because the expert's theories were

contrary to the medical literature on the subject and therefore "unreliable" (*Parker v Mobile Oil Corp.*, 7 NY3d 434, 447 [2006]).

Furthermore, the court properly precluded the testimony pursuant to *Frye v United States* (293 F 1013 [1923]). Although we find that plaintiffs' theory that chelating Carol at the start of her third trimester would have prevented or reduced the claimed injuries to the infant plaintiff was a novel theory subject to a *Frye* analysis, plaintiffs failed to rebut defendant's showing that this theory was not generally accepted within the relevant scientific community. Plaintiffs' position was based solely on their expert's own unsupported beliefs (*see Marso v Novak*, 42 AD3d 377, 378-379 [2007], *lv denied* 12 NY3d 704 [2009]).

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

ENTERED: MARCH 10, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

3576-
3576A Leonard Boyce, et al., Index. 21508/99
Plaintiffs-Respondents,

-against-

Gumley-Haft, Inc.,
Defendant,

-and-

Bernard Spitzer,
Defendant-Appellant.

- - - - -

And a Third-Party Action

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Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., New York (Jennifer B. Rubin of counsel), for appellant.

Ofodile & Associates, P.C., Brooklyn (Anthony C. Ofodile of counsel), for respondens.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 3, 2008, which, to the extent appealed from, denied defendant Bernard Spitzer's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs. Order, same court (Lucy Billings, J.), entered April 23, 2010, which, to the extent appealed from as limited by the briefs, denied Spitzer's motion to set aside the jury's verdict as to liability, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for a new trial.

The motion court correctly denied defendant's motion for summary judgment with respect to the claims under both the New

York City Human Rights Law and the Executive Law. The record shows that defendant was the 50% owner of the limited liability company that owned the subject building. The contract between the management company (Gumley-Haft) and the LLC provided that all employees hired by Gumley-Haft were in fact employees of the LLC owner. Defendant, as 50% owner of the limited liability company, and with the power to hire and fire employees, was "amenable to liability [under the Executive Law] upon proof that he became a party to [the] discriminatory termination . . . 'by encouraging, condoning or approving it'" (*Pepler v Coyne*, 33 AD3d 434, 435 [2006] [citations omitted]), and the record raised a triable issue of fact with respect to defendant's actions. Further, plaintiffs opposed the motion for summary judgment with proof that employee Senna exercised managerial or supervisory responsibility and that he discriminated against plaintiffs. Thus, defendant could be held liable for Senna's discriminatory conduct under the New York City Human Rights Law (Administrative Code of City of NY § 8-107[13][b][1]) provided that he encouraged, condoned or approved Senna's alleged discriminatory conduct.

However, defendant's posttrial motion to set aside the verdict was incorrectly denied. The trial court committed reversible error when it permitted plaintiff Haydenn to testify that he had overheard the superintendent of the building commenting to the

handyman that defendant "[didn't] want any niggers [working] in the building." This statement was inadmissible hearsay.

The statement does not fall within the exception to the hearsay rule for an agent's making of a statement as an activity within the scope of his authority (*see Loschiavo v Port Auth. of N.Y. & N.J.*, 58 NY2d 1040, 1041 [1983]). Nothing in the record even suggests that the superintendent, who occasionally was given some direction by defendant when the latter visited the premises, was authorized to speak on defendant's behalf with respect to the building's employment practices and hiring and firing of employees (*see Niesig v Team I*, 76 NY2d 363, 374 [1990]; *Silvers v State of New York*, 68 AD3d 668, 669 [2009], *lv denied* 15 NY3d 705 [2010]; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 221 [2007]). Nor is defendant estopped from challenging the admission of Haydenn's statement because the defense declined the court's offer to have the jury decide whether defendant had authorized the superintendent to speak on his behalf; "the question whether a given set of facts takes a declarant's statement outside [an] exception [to the hearsay rule] is one of law" (*People v Norton*, 79 NY2d 808, 809 n * [1991]).

Contrary to plaintiffs' contention that the admission of Haydenn's statement, even if error, was harmless, the particular

epithet used could have had no other effect than to prejudice the jury against defendant.

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

ENTERED: MARCH 10, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

3591 The People of the State of New York, Ind. 2697/07
Respondent,

-against-

Monzir Zohri,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 6, 2009, as amended February 4, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

On May 26, 2007, at 11:30 A.M., someone came up behind the 57-year old victim and placed his arm around her neck in a choke hold. The victim tried but was unable to grab the perpetrator's arm, because she had a cast and sling on her own arm. The perpetrator ripped off the victim's chain and pendant. After the attack, the victim was able to turn and look at the perpetrator's face for about three to five seconds. The victim described him as black, at least six feet tall, and appearing to be between 25 and 35 years old. He also had a shaved head, was "nice looking" and "clean cut." He was wearing a long sleeved, very dark green

"knitted-type of shirt." Initially, the victim stood at the corner "in a daze," but then she became angry and followed the perpetrator for 15 minutes for several blocks, keeping him almost continuously in view from across the street. She observed him showing what she believed was her chain to two men. She continued to follow him, losing sight of him only when he entered a phone store. However, she saw him exit very soon thereafter. He passed just inches away from her while she hid her face to avoid recognition. Within seconds of this encounter, the police arrived. After driving just two blocks with them, the victim pointed out defendant, whereupon the police stopped him and eventually arrested him. The gold necklace was never found.

The court properly exercised its discretion when it denied defendant's application to present expert testimony on eyewitness identification. "[E]xpert testimony proffered on the issue of the reliability of eyewitness identification is not admissible per se; rather, the decision whether to admit it rests in the sound discretion of the trial court, which should be guided by whether the proffered expert testimony would aid a lay jury in reaching a verdict" (*People v Abney*, 13 NY3d 251, 266 [2009] [internal citations and quotation marks omitted]). "[W]here the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial

court to exclude expert testimony on the reliability of eyewitness identifications" (*People v LeGrand*, 8 NY3d 449, 452 [2007]).

Here, the victim followed defendant for about 15 minutes after the crime, watching him from across a street as he made what appeared to be efforts to sell the gold chain he had just stolen from her. When the police arrived, she gave them a detailed and fairly accurate description of defendant, including his clothing and shaved head. She then rode with the officers for two blocks and pointed out defendant. Between the crime and defendant's apprehension, the victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely.

Given the circumstances under which defendant was observed and apprehended, expert testimony on identification would have been of little or no value to the jury (*see People v Austin*, 46 AD3d 195, 200-201 [2007], *lv denied* 9 NY3d 1031 [2008]). We need not decide whether factors that strongly enhance the reliability of an identification may obviate the need for expert testimony, because here there was "significant corroborating evidence," other than the victim's identification itself, that connected defendant with the crime (*see People v Chisolm,* 57 AD3d 223, 223-224 [2008], *lv denied* 12 NY3d 782 [2009]; *People v Austin*, 46 AD3d at 200-201). Police testimony placed defendant very close

to the scene of the crime within 15 minutes after it occurred, and established that he resembled the perpetrator the victim described, both in his clothing and in his physical appearance.

Although it was not required to give an expanded charge on eyewitness identification (*see People v Knight*, 87 NY2d 873 [1995]; *People v Whalen*, 59 NY2d 273, 279 [1983]), the court gave a thorough charge on that subject, and it was not required to add language requested by defendant regarding the lack of correlation between accuracy and confidence.

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

ENTERED: MARCH 10, 2011

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3831 Gustavo Perrotti, Index. 603496/08
Plaintiff-Appellant,

-against-

Becker, Glynn, Melamed & Muffly LLP, et al.,
Defendants-Respondents,

Fronteer Capital Holdings, Inc., et al.,
Defendants.

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Andrew B. Schultz, Jericho, for appellant.

Becker, Glynn, Melamed & Muffly LLP, New York (Jordan E. Stern of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 16, 2009, which granted defendants-respondents' motions to dismiss the complaint, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, with costs.

Plaintiff and defendants Garcia and Lobato jointly owned several investment advisory businesses incorporated in the Cayman Islands. In May, 2006, the parties entered into a Stock Buyout and Consulting Agreement (SBCA), in which Garcia and Lobato agreed to purchase plaintiff's shares in the entities for a total of $70,000. The agreement further provided that Linda Macarena (Macarena), a Panamanian company owned by plaintiff, would provide consulting services to two of the entities subject to the

stock sale as well as a third entity, and that those companies would pay Macarena $2,088,000 in the aggregate.

Contemporaneous with the execution of the SBCA, plaintiff, Macarena, Garcia, Lobato and defendant Becker, Glynn, Melamed and Muffly, LLP (BGMM), a law firm, executed a Stock Pledge and Escrow Agreement. Richard N. Chassin, a partner of BGMM, signed that agreement on behalf of the firm. Pursuant to that instrument, Garcia and Lobato agreed to deliver, and BGMM agreed, as escrow agent, to hold, "duly executed share transfer forms representing all of the shares" of the entities which plaintiff had agreed to sell to Garcia and Lobato.

Garcia and Lobato made all required payments for plaintiff's shares of stock. However, in January 2007, the entities which were required by the SBCA to make payments to Macarena for consulting services went into voluntary liquidation in the Cayman Islands, and stopped making the payments.

Plaintiff filed a complaint alleging that Garcia, Lobato, and the three entities which were subject to the consulting provisions of the SBCA, had breached the SBCA. He claimed that Garcia and Lobato had individually agreed to pay him (personally and as assignee of Macarena) $2,155,750 for his shares in the three advisory firms. He did not explain in the complaint how he reached this figure, where the SBCA clearly stated that the purchase price was only $70,000. The complaint also named two

additional entities which plaintiff alleged were successors in interest to two of the entities that were party to the SBCA. Plaintiff alleged that Garcia and Lobato "each personally used the five defendant corporations as an 'alter ego,' and dominated and controlled the corporations for their own benefit, so that the corporate 'veil' should be pierced."

The complaint also asserted a cause of action against BGMM and Chassin, both denominated as "escrow agent." Plaintiff alleged that those defendants violated the Stock Pledge and Escrow Agreement "by failing to maintain for plaintiff's security, the subject stock and/or indicia of stock ownership." He further claimed that the conduct of BGMM and Chassin "constituted 'bad faith' and 'gross negligence' on their part," and compelled judgment against them for the balance of amounts due plaintiff under the SBCA.

BGMM and Chassin moved pursuant to CPLR 3211(a)(7) to dismiss the complaint as against them. In support of the motion, Chassin submitted an affirmation in which he asserted that "BGMM, as escrow agent continues to retain each of the three pledged share transfer forms in escrow in accordance with the terms of the Stock Pledge and Escrow Agreement." Garcia and Lobato separately moved to dismiss. They argued that nothing in the Stock Buyout and Consulting Agreement required Garcia and Lobato to pay plaintiff anything more than $70,000 for his shares of

stock in the advisory firms, and that they were current on those payments.

Plaintiff cross-moved to amend his complaint. His proposed amended complaint contained several factual allegations which were absent from the original complaint. Specifically, plaintiff alleged that he originally entered into an oral agreement with Garcia and Lobato, pursuant to which he agreed to sell them his shares in the advisory firms for $2,125,000, and that an attorney representing Garcia and Lobato prepared a writing memorializing that arrangement. Plaintiff further asserted that, after he reviewed the document, but before it was executed, Garcia and Lobato proposed to him that the payment terms be restructured so that a substantial percentage of the stock purchase price would be characterized as consulting fees. This change, they allegedly assured plaintiff, was for tax planning purposes and would have no effect on plaintiff's ability to collect the agreed amount of $2,125,000. Plaintiff asserted that Garcia and Lobato further represented to him that additional changes, such as placing the obligation to pay the "consulting fees" on two of the advisory firms and a new, third entity, as well as designating an entity controlled by plaintiff, but not plaintiff himself, as the recipient of the "consulting fees," were for the "internal benefit" of Garcia and Lobato and would have no adverse impact on plaintiff. Indeed, plaintiff claimed that Garcia and Lobato's

internal accounting records demonstrated that they characterized all payments as being for the stock purchase, and that they made all payments to him in his individual capacity, not to Macarena.

The proposed pleading asserted a claim for fraudulent inducement against Garcia and Lobato, based on these new allegations. It contained the same cause of action against BGMM and Chassin as in the original complaint. Finally, the new pleading sought recovery from only one of the five entities named in the original complaint, Southport Capital Alternative Investments Ltd. Plaintiff alleged that Southport Capital was the successor-in-interest to Swiss Cayman Capital, one of the firms which was party to the SBCA. He further asserted that Southport Capital was liable to him because "Garcia and Lobato each personally dominated and controlled Swiss Cayman Capital, and caused Southport Capital to be its successor in interest." Plaintiff further relied on a provision of the SBCA which makes all its obligations binding on corporate successors.

The IAS court granted defendants' motions to dismiss and denied plaintiff's cross motion to amend. With respect to BGMM, the court observed that the Stock Pledge and Escrow Agreement was clear and unambiguous. As such, it stated that it was required to enforce it in accordance with its plain meaning. Since the agreement merely required BGMM to hold the "share transfer forms" for the stock in the three advisory firms, and not the shares

themselves, the court held that BGMM could not be held liable for retaining the former and not the latter. The court further held that the claim against Chassin had no merit, since he signed on behalf of BGMM and did not express any intent to be personally liable as an escrow agent. The court dismissed the breach of contract claim. It held that the SBCA placed no personal obligation on Garcia and Lobato to pay consulting fees to plaintiff, because any such obligation was reserved to the various entities. The court further found that plaintiff had not made sufficient factual allegations to pierce the corporate veil.

The IAS court also refused to grant plaintiff leave to amend the complaint. It held that the executed SBCA rendered unviable the fraud claim against Garcia and Lobato. This was because that agreement "meaningfully contradicted" the oral misrepresentations upon which plaintiff claimed to have relied. The court found lacking in merit the claim against Southport Capital, stating that plaintiff's attempt to pierce the corporate veil remained "completely unsubstantiated."

On this appeal, plaintiff focuses only on his proposed amended complaint. In doing so, he urges this Court to put aside any questions it may have regarding the merits of his proposed amended complaint, and give him leave to replead as required by CPLR 3025(b).

It is true that on a motion for leave to amend a pleading,

the movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [2010] [internal citations omitted]). However, plaintiff has failed to make such a showing.

Plaintiff's proposed fraudulent inducement claim is not supported by the factual allegations contained therein. For such a cause of action to be viable, it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged (*see Lama Holding Co. v Smith Barney,* 88 NY2d 413, 421 [1996]). Here, plaintiff alleges that Garcia and Lobato misrepresented to him their true intentions in redrafting the SBCA. However, under any interpretation of the proposed pleading, it is impossible to conclude that plaintiff, a sophisticated investor, reasonably relied on Garcia's and Lobato's alleged representations. He asserts that they told him that the changes to the agreement were "for their own internal benefit and tax advantage" and that the "rewording would benefit them without in any way prejudicing plaintiff." Even if it is true that Garcia and Lobato made such representations, plaintiff fails to explain how he acted reasonably when he executed a writing which, on its face,

contradicted those representations and was *highly* prejudicial to him as it relieved Garcia and Lobato of personal liability for all but a small percentage of the total amount due thereunder. This Court has repeatedly held that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party *(see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [2006], *lv dismissed* 7 NY3d 886 [2006]); *Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 14 [1998], *lv denied* 93 NY2d 803 [1999]; *A-Pix, Inc. v SGE Entertainment Corp.*, 222 AD2d 387, 389 [1995]).

The documentary evidence submitted by plaintiff on his cross motion is insufficient to support the proposed cause of action for fraudulent inducement. This evidence purportedly demonstrates that, after the SBCA was executed, Garcia and Lobato behaved in a fashion that suggests they were honoring the original oral agreement. However, Garcia and Lobato counter with ample documentary evidence, completely unrebutted by plaintiff, that negates the import of plaintiff's documents and demonstrates that the conduct pointed to by plaintiff was actually consistent with the SBCA. Accordingly, plaintiff's proposed cause of action for fraudulent inducement is "palpably insufficient [and] clearly devoid of merit" (*MBIA Ins. Corp.*, 74 AD3d at 500).

The IAS court properly dismissed the cause of action against BGMM and Chassin. The Stock Pledge and Escrow Agreement expressly required BGMM to maintain only "share transfer forms," and not share certificates or any other indicia of stock ownership. Thus, this case differs from *Corhill Corp. v S.D. Plants, Inc.* (9 NY2d 595 [1961]) and *Matter of Lipper Holdings v Trident Holdings* (1 AD3d 170 [2003]), the cases relied on by plaintiff. In those matters, the contract language in question was open to divergent interpretations. Here, the term "share transfer form" is specific, well-defined, and incapable of being interpreted in more than one way. Therefore, we reject plaintiff's allegation that BGMM breached a duty by failing to maintain actual share certificates or other indicia of stock ownership. Plaintiff's claim against Chassin, a Becker Glynn partner, fails for the additional reason that Chassin, although a signatory on behalf of his firm, was not a party to the Stock Pledge and Escrow Agreement. Plaintiff does not allege that Chassin was personally negligent and offers no other reason why Chassin should be held individually responsible for the alleged failure by his law firm.

Finally, plaintiff was properly denied leave to amend his complaint to assert a successor liability cause of action against

defendant Southport Capital Alternative Investments Ltd. Plaintiff was not in contractual privity with Southport's predecessor, only Macarena was. Accordingly, only Macarena would have standing to assert a claim against Southport.

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

ENTERED: MARCH 10, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3992 Robert Booth, Index. 110897/07
Plaintiff-Respondent,

-against-

Seven World Trade Company, L.P., et al.,
Defendants-Appellants,

Safety & Quality Plus, Inc.,
Defendant.

_____

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

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

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 11, 2010, which, to the extent appealed from, denied the motion of defendants Seven World Trade Company, L.P. and Seven World Trade Center, LLC for summary judgment dismissing the complaint against them, unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and that part of the Labor Law § 241(6) claim alleging a violation of Industrial Code (12 NYCRR) §23-1.7(e), and otherwise affirmed, without costs.

Plaintiff, a construction site superintendent employed by nonparty general contractor Tishman Construction Corporation, was injured on January 17, 2005 while completing a walk-through on

the 42nd floor of the building owned by defendants. Plaintiff arrived on site at approximately 6:00 a.m. and went directly to the superintendent's office located on the fourth floor of the building. After spending time with several other construction site superintendents, plaintiff left the office, by himself, at around 7:30 a.m. to begin his biweekly walk-through of the construction site. He took the elevator to the 42nd floor, the highest floor that had been completed at that point. The 42nd floor was open to the elements on the sides, but was enclosed overhead by a concrete floor. When plaintiff exited the elevator on the 42nd floor, at approximately 8:00 a.m., he observed two to three inches of snow.

Plaintiff saw two surveyors when he exited the elevator, but did not notice if any other workers were present. The record does not establish why the surveyors were present or who employed them. As plaintiff crossed the core of the building to speak with one of the surveyors, he tripped on an unknown object covered by snow and ice. He slid and injured his back when he struggled to keep himself upright. Plaintiff testified that he did not see the object, and that it "could have been anything from a bolt to a screw to a piece of rod." He also was unsure of what, if any, work had taken place on the 42nd floor prior to his accident.

Plaintiff commenced the instant action against defendants

alleging violations of Labor Law §§ 240, 241(6) and 200, as well as common-law negligence. Plaintiff alleged liability under Labor Law § 241(6) based on violations of Industrial Code (12 NYCRR) §§23-1.7(d) and (e). Defendants moved for summary judgment, and the lower court denied the motion in its entirety.

The motion court should have dismissed that part of the Labor Law § 241(6) claim premised upon a violation of 12 NYCRR 23-1.7(e) ("Tripping and other hazards"). This section is inapplicable because there is no evidence in the record to show that the object was debris, tools, or even a tripping hazard. Indeed, plaintiff stated in his deposition testimony that it "could have been anything from a bolt to a screw to a piece of rod" - a statement that does not rise above mere speculation (*Isola v JWP Forest Elec. Corp.*, 267 AD2d 157 [1999]). In *Isola*, this Court noted that the plaintiff's claim that the alleged tripping hazard may have been scattered materials was not enough to establish that a specific safety regulation had been violated (267 AD2d at 158). Similarly, in *Greenfield v New York Tel. Co.* (260 AD2d 303, 304 [1999], *lv denied* 94 NY2d 755 [1999]), this Court held that the plaintiff's inability to recall what caused him to trip required dismissal of the 12 NYCRR 23-1.7(e) claim.

The motion court properly declined to dismiss the Labor Law § 241(6) claim based on a violation of 12 NYCRR 23-1.7(d) ("Slipping hazards"). Here, the accident occurred on a floor,

platform or other working surface within the meaning of Industrial Code (12 NYCRR) §23-1.7(d). The evidence that plaintiff slipped on snow and ice raises a triable issue as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard" (*Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]; *Temes v Columbus Ctr. LLC*, 48 AD3d 281 [2008]). Plaintiff testified that he arrived on site two hours prior to his accident, and spent the first hour and a half in the trailer with the other superintendents. He further explained that Tishman workers typically arrived at the site and started work at 7:30 a.m. According to defendants' forensic meteorologist, it began snowing on the morning of the accident at 1:30 a.m. and continued snowing until approximately 8:00 a.m. Because plaintiff's accident occurred almost seven hours after the snow began and several hours after other workers were on the premises, there are triable issues as to whether someone within the chain of construction knew about the presence of snow and ice and acted negligently in failing to remove it, or at least rope off the dangerous areas, prior to the accident (*see id.*). It does not matter, as defendants contend, that no employees of the general contractor or subcontractors went to the 42nd floor prior to plaintiff's accident. It is enough that employees were on site for an

extended period before plaintiff's accident, and that it was snowing for a sufficient time to provide the required notice.

Nor is it relevant that it was snowing up until the time of plaintiff's accident. Although the storm in progress doctrine applies in common-law negligence cases, it does not apply to 12 NYCRR 23-1.7(d) because "[t]hat subdivision includes no exception for storms in progress" (*Rothschild v Faber Homes*, 247 AD2d 889, 890 [1998]). Moreover, plaintiff testified at his deposition that he did not know whether Tishman laborers were responsible for snow removal at the site. If plaintiff saw a dangerous condition, he would report it to the labor foreman, who would then direct the Tishman laborers accordingly. Even if snow removal fell within the scope of plaintiff's responsibilities, such would only be relevant in determining comparative fault, and would not require a grant of summary judgment in defendants' favor.

Plaintiff's Labor Law § 200 and common-law negligence claims

are dismissed, as plaintiff concedes that these claims are not viable as against defendants.

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4013 Riichiro Fujii, Index 602332/08
Plaintiff-Respondent,

-against-

K2 Advisors, L.L.C., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about January 12, 2010.

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 18, 2011,

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4319 1 Model Management, LLC, Index 108191/08
Plaintiff-Appellant,

-against-

Ali Kavoussi,
Defendant-Respondent.

_____

McCue, Sussmane & Zapfel, P.C., New York (Kenneth Sussmane of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Brian S. Kaplan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 13, 2009, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissal of the breach of contract and unfair competition causes of action and denied plaintiff's motions for partial summary judgment and for leave to amend its complaint, unanimously modified, on the law, to reinstate the breach of contract claim insofar as it relates to the 90 day notice provision and the restrictive covenant, and otherwise affirmed, without costs.

Plaintiff 1 Model Management (1MM), a model agency, seeks damages and injunctive relief against Ali Kavoussi, a former 1MM model agent employed pursuant to a May 2004 contract. In May 2008, Kavoussi terminated the contract, left 1MM, and began working for another model agency, Men Women N.Y. Model Management

Inc. d/b/a Women Management (Men Women). During the next eight months, three models whom 1MM had been representing when Kavoussi terminated the contract also left 1MM for Men Women.

Kavoussi failed to comply with a contract provision requiring him to provide 90 days advance notice before terminating. He contends that a letter from 1MM to Kavoussi expressly waived the requirement, but the letter only stated that 1MM was "willing" to waive it and asked Kavoussi to execute an acknowledgment that he would comply with various provisions in the contract. Since Kavoussi did not sign the acknowledgment, a triable issue of fact exists whether notice actually was waived or was conditioned upon the acknowledgment.

The contract also provided that, for the one-year period after his termination, which has now passed, Kavoussi could not "be employed by . . . any entity which . . . represents . . . any model managed by 1MM at the time of Employee's termination or at any time during the 90-day period preceding such termination." Such a restrictive covenant is enforceable only to the extent, among other things, that it is reasonable and necessary to protect the employer's legitimate interest and does not impose undue hardship on the employee (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]).

An employer's legitimate interest can include preventing an employee from misappropriating trade secrets or confidential

customer lists or keeping an employee with unique or extraordinary skills from joining a competitor to the employer's detriment (*see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 308 [1976]; *BDO Seidman*, 93 NY2d at 389). Here, 1MM failed to establish that its customer lists and model contact information are confidential, since it has not shown that the information is not readily available to others in the modeling industry (*see Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972]). But 1MM has raised a viable issue of fact as to whether Kavoussi's services were "special, unique or extraordinary," given that he had cultivated personal relationships with 1MM's models while working for 1MM and using its resources (*see Henson Group, Inc. v Stacy*, 66 AD3d 611 [2009]; *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263 [2004]).

Kavoussi argues that enforcing the restrictive covenant as written would prevent him from working in the modeling industry, but a triable issue has been raised concerning whether the restriction against working for agencies representing former 1MM models was unreasonably burdensome.

Since 1MM failed to establish that Kavoussi misappropriated or exploited confidential records or proprietary information, the cause of action for unfair competition was properly dismissed (*see Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [1998]).

Finally, leave to further amend the complaint to include

claims for tortious interference with contract and tortious interference with prospective economic relations against Kavoussi and as against Men Women as an additional party was properly denied in the absence of a sufficient evidentiary showing that the proposed claims were viable (*see Weksler v Kane Kessler, P.C.*, 63 AD3d 529 [2009]).

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: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4482-
4482A

Amelie Trahant
Plaintiff-Respondent,

-against-

82 Horatio Owners, Ltd., et al.,
Defendant-Appellants.

Index 108765/07

Law Offices of Safranek, Cohen & Krolian, White Plains (James G. Kelly of counsel), for 82 Horatio Owners, Ltd. and Siren Management Corp., appellants.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for P&G Equities, LLC and F1 LLC, appellants.

Seeger Weiss LLP, New York (Marc S. Albert of counsel), for respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered October 28, 2009, and October 29, 2009, which denied defendants' motions for summary judgment to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court properly denied defendants' summary judgment motions to dismiss this personal injury action where triable issues of material fact remain as to which defendants owed a duty of care, and, as to whether plaintiff provided prior notice of

the dangerous condition that resulted in the underlying accident and injury (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4483 The People of the State of New York, Ind. 66/09
M-517 Respondent,

-against-

Terry Pearson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 (Maxwell Wiley, J.), rendered on or about March 3, 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.

M-517 - Motion to file pro se supplemental brief denied.

ENTERED: MARCH 10, 2011

CLERK

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

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4485 Orlando Toro, Index 101189/08
Plaintiff-Respondent,

-against-

Plaza Construction Corp., et al.,
Defendants-Appellants,
- - - - -
Plaza Construction Corp.,
Third Party Plaintiff,

-against-

Rite-Way Internal Removal, Inc.
Third Party Defendant-Appellant.

_____

Mauro Goldberg & Lilling LLP, Great Neck (Matthew M. Naparty of counsel), for appellants.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 5, 2010, which, to the extent appealed from, denied defendants' and third-party defendant's motions for summary judgment dismissing the Labor Law § 241(6) cause of action to the extent said cause of action is based on a violation of Industrial Code 12 NYCRR 23-1.8(a), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Plaintiff, a truck driver employed by third-party defendant Rite-Way Internal Removal, Inc. (Rite Way), suffered injuries to

his face and right eye when, while performing construction debris removal at a building under renovation, a piece of debris shattered as it was being compacted in the garbage truck and struck him in the face.

Dismissal of the Labor Law § 241(6) claim was warranted since defendants and Rite Way established that plaintiff was not a worker protected under the Labor Law. Liability under Labor Law § 241(6) is limited to accidents where the work performed involves "construction, excavation or demolition" (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]; *Maes v 408 W. 39 LLC*, 24 AD3d 298, 300-301 [2005], *lv denied* 7 NY3d 716 [2006]). Here, there is no evidence that plaintiff was performing such work as his activities did not include anything other than driving a garbage truck and picking up debris. He had never been inside the building under renovation, and his contact with the site was limited to pulling up to the loading dock. The debris pick-up was but one of a number of pick-ups plaintiff needed to perform that day.

While the contract between the general contractor defendant Plaza Construction Corp. and Rite-Way called for demolition, as well as rubbish removal, plaintiff was not a member of the demolition team (*cf. Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *Rivera v Squibb Corp.*, 184 AD2d 239 [1992]). Furthermore, Rite-Way was not at the site that day to perform

demolition, and it had not been there in the nearly three weeks since the phase-one demolition had concluded. Since plaintiff was not performing tasks ongoing and contemporaneous with the greater project, and the work he was performing was a separate activity easily distinguishable from the construction project, he was not intended to be protected by the statute (*see Martinez v City of New York*, 93 NY2d 322 [1999]).

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4486 In re A.J. McNulty & Company, Inc., Index 260499/09
Petitioner-Appellant,

-against-

Sharon Greenberger, etc., et al.,
Respondents-Respondents.

_____

Eric H. Sussman, Chicago IL, of the Bar of the State of Illinois, admitted pro hace vice, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered August 26, 2010, which, to the extent appealed from, denied the petition seeking to annul respondent New York City School of Construction Authority's determination to remove petitioner from a list of prequalified responsible bidders, and declare Public Authorities Law § 1734(3)(b) and 21 NYCRR 9600.3(d)(2)(i) invalid, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, to declare that there is a rational basis for the Authority's determination, and otherwise affirmed, without costs.

The Authority issued its determination after learning about the execution of search warrants at petitioner's offices in furtherance of an ongoing criminal investigation into work performed for the Metropolitan Transportation Authority. Pursuant to 21 NYCRR 9600.3(d)(2)(i), the Authority may preclude

an applicant "from working for [it] until there is a favorable resolution of . . . [a] pending criminal investigation." Accordingly, the Authority's determination was not arbitrary and capricious (*see Matter of N.J.D. Elecs. v New York City Health & Hosps. Corp.*, 205 AD2d 323, 324 [1994]).

Public Authorities Law § 1734(3)(b), which allows the Authority to consider factors "it deems appropriate" in determining whether a prospective bidder qualifies for inclusion on a list of prequalified bidders, is a valid delegation of legislative power. Indeed, the Legislature may "delegat[e] power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature" (*Matter of Levine v Whalen*, 39 NY2d 510, 515 [1976]). The statute at issue here provides a guideline of factors to consider in determining the qualifications of prospective bidders, and thus does not, as petitioner asserts, give the Authority "unfettered authority."

Lastly, the Authority did not exceed its authority by enacting 21 NYCRR 9600.3(d)(2)(i). This regulation has not been shown to be "so lacking in reason for its promulgation that it is

essentially arbitrary" (*Festa v Leshen*, 145 AD2d 49, 55 [1989] [internal quotation marks and citation omitted]).

The court should have declared in the Authority's favor upon finding that petitioner was not entitled to the declaration it sought.

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4488 New York City Housing Authority, Index 406023/07
Plaintiff-Respondent,

-against-

Tower Insurance Company of New York, etc.,
Defendant-Appellant.

_____

Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for appellant.

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

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 13, 2010, which granted plaintiff's motion for summary judgment declaring that defendant has a duty to defend and indemnify it in an underlying personal injury action and denied defendant's cross motion for summary judgment declaring that it has no such duty, unanimously reversed, on the law, without costs, plaintiff's motion denied, the cross motion granted, and it is declared that defendant has no duty to defend or indemnify plaintiff in the underlying action.

The record demonstrates that upon receiving an untimely notice of the claim from plaintiff, defendant issued a formal disclaimer that was timely under the circumstances. Defendant's delay in issuing the disclaimer was justified, as the timeliness of the disclaimer is measured from the time that the insurer first learns of the grounds for disclaimer (*see A.J. McNulty &*

Co. v Lloyds of London, 306 AD2d 211, 212 [2003]). "An insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer; in fact, a 'reasonable investigation is preferable to piecemeal disclaimers'" (*DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 [2004], *lv denied* 3 NY3d 608 [2004], quoting *2540 Assoc. v Assicurazioni Generali*, 271 AD2d 282, 284 [2000]). Accordingly, before issuing its disclaimer, it was reasonable for defendant to investigate whether plaintiff had contemporaneous knowledge of the incident, and whether plaintiff was actually insured via a written contract with its contractors, which was not apparent from the face of the notice of claim or the letter transmitted by plaintiff.

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4489 The People of the State of New York, Respondent, Ind. 5733/06

-against-

Gary Kelly, Defendant-Appellant

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered August 1, 2007, as amended August 24, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose a prior felony conviction was a violent felony, to a term of 6½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police properly seized evidence under the plain view doctrine (*see People v Diaz*, 81 NY2d 106, 110 [1993]; *Horton v California*, 496 US 128, 136-137 [1990]; *Arizona v Hicks*, 480 US 321, 324-329 [1987]). The police arrested defendant and the codefendant in a car minutes after they sold drugs to an undercover officer. An officer saw a clear lip balm container on the floor of the car, and noticed that it held what appeared to be yellow ziplock bags of crack cocaine. The incriminating nature of this evidence was immediately apparent to the trained and experienced officer (*see*

e.g. People v Batista, 261 AD2d 218 [1999], *lv denied* 94 NY2d 819 [1999]). The officer immediately recognized that the container was of a type commonly used to hold narcotics, and saw "yellow zips" inside the clear container, which he recognized as packaging for cocaine. The record fails to support defendant's assertion that the officer did not detect the presence of contraband until after he seized the evidence.

The lip balm container of drugs was also admissible under the automobile exception to the warrant requirement *(see People v Blasich*, 73 NY2d 673 [1989]; *People v Ellis*, 62 NY2d 393, 398 [1984]). Defendant and the codefendant got into a car immediately after completing an undercover sale, and the arresting officer immediately recognized the lip balm container as a common device for carrying drugs. Accordingly, it was reasonable to infer that the car would contain drugs.

Defendant also argues that the lip balm container and its contents should have been excluded at trial as inadmissible as evidence of an uncharged crime. Since defendant objected to this evidence on different grounds from those raised on appeal, his present claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. This evidence linked defendant to the crime because

the container matched a container used in making the undercover sale, and it was not unduly prejudicial.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4493 Laura Gordon, Index 308215/07
Plaintiff-Respondent,

-against-

Daniel Gordon,
Defendant-Appellant.

_____

Akerman Senterfitt LLP, New York (Donald N. David of counsel), for appellant.

Elayne Kesselman, New York, for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered July 19, 2010, which denied defendant's motion for a downward modification of his maintenance and child support obligations, unanimously affirmed, without costs.

Defendant demonstrated neither extreme hardship to warrant a downward modification of his maintenance obligations (*see Shelia C. v Donald C.*, 5 AD3d 123 [2004]; Domestic Relations Law § 236[B][9][b][1]), nor a substantial, unanticipated and unreasonable change in his circumstances necessitating a reduction in child support (*see* Domestic Relations Law § 236[B][9][b][2][i]; *Matter of Boden v Boden*, 42 NY2d 210, 212-213 [1977]). The motion court's skepticism of defendant's statements reflect the gaps in his evidence, rather than any bias against him. Furthermore, contrary to defendant's contention, a hearing on the motion was not required in light of his inability to raise

a genuine question of fact (*see Young v Young*, 223 AD2d 358 [1996]).

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4494 The People of the State of New York, Ind. 4536/05
Respondent,

-against-

Paul Tillman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about August 18, 2009.

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

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

ENTERED: MARCH 10, 2011

CLERK

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

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4495 In re Bryant M., A Person Alleged to be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rodgers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about December 9, 2009, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge, with the condition that he participate in a sex offender treatment program. When nearly 16 years old, appellant engaged in sexual conduct with a 10-year-old girl. In light of the seriousness of the underlying incident and the very short duration of any supervision that an ACD might have provided, the court adopted the least restrictive dispositional

alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4496-
4497-
4498

Christine Maldonado, etc.,
Plaintiff-Appellant,

-and-

Amanda Marie Rodriguez, an infant by her mother and natural guardian Christine Maldonado,
Plaintiff,

-against-

Hunts Point Cooperative Market, Inc., et al.,
Defendants-Respondents,

New York City Department of Small Business Services, et al.,
Defendants.

Index 15112/06

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Steven DiSiervi of counsel), for Hunts Point Terminal Produce Cooperative Association, Inc., I/S/H/A Hunts Point Cooperative Market, Inc., New York City Terminal Produce Co-oprative Market, Hunts Point Terminal Market and Hunts Point Department of Public Safety, respondents.

Venable LLP, New York (Edward A. Smith of counsel), for Affiliated Building Services, Inc. and TCTJB V, Inc., respondents.

Paul, Hastings, Janofsky & Walker LLP, New York (William A. Novomisle of counsel), for Global Innovation Partners, LLC, The Line Group LLC, Linc Faculty Services LLC, Linc Services LLC, Linc Mechanical LLC, and Linc Network LLC, respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.),

entered on or about June 25, 2010, which granted the motion by

defendants Hunts Point Cooperative Market, Inc. and Hunts Point Terminal Produce Cooperative Association, Inc. (collectively, Hunts Point) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered November 4, 2009, which, upon renewal, granted the motion by Global Innovation Partners, LLC, and The Linc Group, LLC, The Linc Group, Inc., Linc Facilities Services, LLC, Linc Services, LLC, Linc Mechanical, LLC, and Linc Network, LLC (collectively, Linc) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about July 1, 2009, which granted defendant Affiliated Building Services, Inc.'s (ABS) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Christine Maldonado was shot and injured by her boyfriend, Jose Machado, during a domestic dispute in their home. Machado used a revolver he had surreptitiously removed from Hunts Point Produce Market, where he worked as a security guard, and concealed before leaving work. After shooting Maldonado, Machado shot and killed himself.

None of ABS, Global, Linc or Hunts Point, in their different capacities, breached a duty to Maldonado that, if carried out, could have prevented her injuries. ABS was Machado's former

employer but had no control over him in 2005, and it owed Maldonado no independent duty to protect her from Machado. Global and Linc, as successor corporations to ABS, stand in ABS's shoes, assuming their assumption of liabilities. Hunts Point, which apparently employed Machado and supplied him with a firearm for security purposes at its premises, had a degree of control over Machado's actions, but not to the extent of responsibility for his concealed removal of the revolver from the premises and use of it at his place of residence during a domestic dispute. Contrary to plaintiff's contention, the record evidence fails to raise a triable issue of fact whether Hunts Point was negligent in entrusting Machado with a weapon.

Even assuming that any or all of these defendants breached a duty of care owed to Maldonado, including a breach arising from the entrustment of a firearm to Machado, any such breach was not the proximate cause of Maldonado's injuries. Machado was not acting within the scope of his employment when he shot Maldonado, and his "independent intervening acts" arising out of their personal relationship severed any nexus between defendants' alleged negligence and her injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980] ["the question of legal cause may be decided as a matter of law ... [where] independent intervening acts ... operate upon but do not flow from the original negligence"]; *see e.g. Hoffman v City of New York*, 301

AD2d 573 [2003], *lv denied* 100 NY2d 501 [2003]).

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: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4499 In re Hector Gonzalez, Index 400384/10
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Hector Gonzalez, appellant pro se.

Sonya M. Kaloyanides, General Counsel, New York (Andrew M. Lupin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 21, 2010, which denied the petition seeking, inter alia, monetary damages on the basis that the actions of neighbors in petitioner's public housing development caused him mental anguish and granted respondent's cross motion to dismiss this purported CPLR article 78 proceeding, unanimously affirmed, without costs.

To the extent that petitioner claims that respondent was responsible for certain disturbances caused by his neighbors, petitioner did not file any grievance and respondent rendered no determination relating to those claims. Accordingly, Supreme Court properly dismissed the proceeding for petitioner's failure to exhaust his administrative remedies (*see* CPLR 7801).

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: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4500 Jacqlene C. Hall, an Infant under the age of 14 years, by her mother and natural guardian, Sabrina C. Tolbert, et al., Plaintiff-Appellant, Index 111791/01

-against-

New York City Board of Education, Defendant-Respondent.

_____

Alexander J. Wulwick, New York, for appellants.

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

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 15, 2009, which, in an action alleging that infant plaintiff suffered psychological injuries as a result of a schoolyard incident with another classmate while they were in the first grade, denied plaintiff's motion to set aside the jury's verdict in favor of defendant, unanimously affirmed, without costs.

The verdict was based upon a fair interpretation of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The jury was presented with conflicting expert testimony and issues respecting infant plaintiff's credibility and its resolution of such issues is entitled to deference (*id.* at 206-207). Furthermore, the record presents ample evidence from which the jury could fairly infer that infant plaintiff did

not sustain any psychological injuries as a result of the incident (*see Rivera v City of New York*, 40 AD3d 334, 343-344 [2007].

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

ENTERED: MARCH 10, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4502 Pearl Williams-Smith, Index 402906/08
Plaintiff-Appellant,

-against-

MTA New York City Transit,
Defendant-Respondent.

_____

Michael R. Scolnick, Airmont, for appellant.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 24, 2009, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Generally, on a motion to dismiss made pursuant to CPLR 3211, the court must accept as true the facts alleged in the complaint and accord the plaintiff the benefit of "every possible favorable inference" (*Leon v Martinez, 84 NY2d 83, 87* [1994]). However, the court is not required to accept factual allegations that are negated by documentary evidence (*see Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). Here, the documentary evidence conclusively establishes that the notice of claim was mailed 91 days after the accident, thus missing by one day the 90-day notice of claim requirement set forth in General Municipal Law § 50-e(1)(a).

Accordingly, the motion court properly determined that the notice of claim was untimely.

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

ENTERED: MARCH 10, 2011

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3841 In re Sojitz Corporation, Index 602511/09
Petitioner-Respondent,

-against-

Prithvi Information Solutions Ltd.,
Respondent-Appellant.

_____

DLA Piper LLP (US), New York (James P. Duffy IV of counsel), for appellant.

Hogan Lovells LLP, New York (Andrew Mark Behrman of counsel), for respondent.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered October 5, 2009, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. McGuire
Dianne T. Renwick
Roslyn H. Richter, JJ.

3841
Index 602511/09

_____x

In re Sojitz Corporation,
Petitioner-Respondent,

-against-

Prithvi Information Solutions Ltd.,
Respondent-Appellant.
_____x

Respondent appeals from the order of the Supreme Court, New York County (James A. Yates, J.), entered October 5, 2009, which, insofar as appealed from, granted petitioner a pre-award attachment in aid of arbitration and reduced the amount of bond that petitioner was required to post pursuant to an order entered August 13, 2009.

DLA Piper LLP (US), New York (James P. Duffy IV, Claudia T. Salomon and Sonal Patel of counsel), for appellant.

Hogan Lovells LLP, New York (Andrew Mark Behrman, Joseph P. Cyr and Matthew J. Galvin of counsel), for respondent.

RENWICK, J.

In this proceeding, we are asked to determine an issue apparently of first impression in this State, that is, whether a creditor can attach assets in New York, for security purposes, in anticipation of an award that will be rendered in an arbitration proceeding in a foreign country, where there is no connection to New York by way of subject matter or personal jurisdiction. We answer in the affirmative, holding that, pursuant to CPLR 7502(c), a pre-award attachment in international arbitration is proper; that is, debt owed by an entity domiciled within this state to the party against whom the award is sought may be attached.

Petitioner is a Japanese company with its principal place of business in Tokyo. Respondent is a company organized under the laws of India and has its principal place of business in Hyderabad, India. There is no claim that either party regularly engages in business, or has transacted business in connection with the present case, in New York State.

In November 2007, the parties entered into a contract in Delhi, India, whereby petitioner agreed to provide telecommunications equipment produced in China to respondent in India. In return, respondent would make payments into an escrow account located at the Punjab National Bank in India, from which

petitioner was to withdraw the funds and deposit them into its account in Japan. The contract also contains choice of law and arbitration clauses that provide that the contract is governed by the laws of England and that any disputes arising "out of or in connection with or in relation to" the contract will be settled by arbitration in Singapore.

Pursuant to the contract, petitioner shipped and delivered equipment to respondent over a five-month period, from January to June 2008. Upon each shipment of goods, petitioner issued invoices along with bills of exchange to respondent. Respondent accepted delivery of all goods without complaint. The total price of the goods invoiced by petitioner was $47,483,106.93. On March 15, 2009, the final payment from respondent became due under the contract.

Petitioner claims that it only received approximately $5.6 million from respondent and that payments intended for the escrow account were diverted by respondent. Allegedly, respondent admitted to petitioner that it wanted to use the money for "other things" because it had "cash flow problems." In addition, petitioner alleges that respondent owes "unbundled" and "delay" interest under the contract that amounts to approximately $1.345 million, as of July 2009. Accordingly, respondent allegedly owes petitioner approximately $48.4 million.

In August 2009, petitioner moved ex parte for an order of attachment against respondent for $40 million. Petitioner alleged that it intended to commence an arbitration in Singapore within 30 days of the order of attachment, but that it would take time to constitute the arbitral tribunal, and respondent might dissipate assets in the meantime. Supreme Court granted an order of attachment to secure the amount of $40 million and ordered petitioner to post a $2 million bond.

Respondent moved to vacate the order of attachment. In support of its motion, it submitted an affidavit from Satish Vuppalapati, its managing director, stating that it did not maintain any offices in New York, was not licensed to do business in New York, and had no property, bank accounts, or employees in New York. Respondent acknowledged soliciting business in New York, but only occasionally. Vuppalapati said that, as of September 4, 2009, respondent had only three or four customers in New York, which together contributed only about 1.4% of respondent's total annual revenue. He said that respondent did not undertake any business activities in New York in connection with the contract at issue. One of respondent's New York customers, COMSYS, owed $18,480. Petitioner attached that $18,480, which was located in New York.

In September 2009, Supreme Court issued the order appealed

herein, which vacated the $40 million attachment, confirmed the $18,480 attachment, reduced the $2 million bond to $900, or 5% of any amount attached, whichever is greater, and permitted petitioner to move to attach additional specific assets if it found any in New York. Relying on CPLR 7502(c), the court rejected respondent's argument that the court had to have personal jurisdiction over it to issue such an attachment.

In February 2010, in an order denying respondent's motion for a stay of the order pending appeal, the court mandated that the order from which respondent appealed would automatically dissolve 90 days from March 8, 2010, unless certain events occurred, and on June 6, 2010, the order appealed from dissolved in accordance therewith. Petitioner then moved to release its bond because no property of respondent was attached. In August 2010, the court discharged the bond. Respondent now appeals from the order to the extent it granted petitioner the pre-award attachment and reduced the $2 million bond to $900.

As a threshold matter, we reject petitioner's argument that the appeal is moot because the order appealed from has been dissolved and the bond has been discharged. Respondent has the right to recover any damages sustained by reason of an improperly granted attachment (*Albany Sav. Bank v All Advantages Limousine Serv.*, 154 AD2d 759, 761 [1989]). Therefore, this appeal is not

moot (*Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988], *cert denied* 488 US 966 [1988]).

Despite New York's status as a global commercial and financial center, the authority of New York courts to issue the provisional remedy of attachment in aid of arbitration is a relatively recent phenomenon. In 1982, the Court of Appeals held that New York courts did not have the authority to issue an order of attachment in a case that was subject to arbitration (*Cooper v Ateliers de la Motobecane,* 57 NY2d 408 [1982]). The dispute in *Cooper* concerned a contract between Cooper and others, and a French corporation that provided for disputes to be resolved by arbitration in Switzerland. The plaintiff obtained ex parte an order of attachment of a debt owed by a New York corporation to the defendant. The Court noted that "[t]he provisional remedy of attachment is, in part, a device to secure payment of a money judgment" and that, pursuant to CPLR 6201, "[i]t is available only in an action for damages" (57 NY2d at 413). Accordingly, "attachment would not be available in a proceeding to compel arbitration (*see* CPLR 7503, subd [a]), as that is not an action seeking a money judgment" (*id.*). The Court also found that the remedy of attachment should not have been granted because it was inconsistent with the United Nations Convention on the

Recognition and Enforcement of Foreign Arbitral Awards (the U.N. Convention), which applied because one of the parties was a French corporation, and which "precludes the courts from acting in any capacity except to order arbitration" (*id. at 144*).

In 1985, the New York Legislature amended article 75 of the CPLR to overrule *Cooper*. Specifically, it added a new subsection -- "(c) Provisional Remedies" -- to CPLR 7502. Under this new subsection, courts were granted the authority to entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, provided "that the award to which the applicant may be entitled would otherwise be rendered ineffectual without such provisional relief." However, CPLR 7502(c), as interpreted, did not provide the courts with the authority to entertain applications for the provisional remedies of preliminary injunctions and orders of attachment where the situs of the arbitration is outside of New York or in actions governed by the U.N. Convention (*see e.g. Koob v IDS Fin. Servs.*, 213 AD2d 26, 34 [1995]*; Drexel Burnham Lambert Inc. v Ruebsamen*, 139 AD2d 323, 329 [1988], *lv denied* 73 NY2d 703 [1988]; *Shah v Eastern Silk Indus.*, 112 AD2d 870, 871 [1985], affd 67 NY2d 918 [1986]; *Faberge Int'l v Di Pino*, 109 AD2d 235, 238-239 [1985]). That authority was granted in October 2005, when the Legislature amended CPLR 7502(c) again, and in doing so

granted the courts of New York authority to issue preliminary injunctions and attachments in aid of all arbitrations including those involving foreign parties or in which the arbitration is conducted outside of New York.[1]

In the instant case, respondent does not argue that petitioner failed to demonstrate, as required by CPLR 7502(c), that the arbitration award would otherwise be rendered ineffectual without the provisional relief of attachment, based upon the documentary evidence suggesting that respondent diverted funds from the escrow account without an explanation. Nor does respondent contest that the account seized is a debt owed by a New York domiciliary to petitioner. In addition, the situs of the debt for attachment purposes is "the location of the party of whom performance is required by the terms of the contract" (*ABKCO Indust. v Apple Films*, 39 NY2d 670, 675 [1976]). Nevertheless, respondent argues that the court improperly ordered attachment of its property because the court did not have personal jurisdiction over it. We find, to the contrary, that the attachment --

[1] As amended, CPLR 7502(c) reads in relevant part as follows: "The supreme court . . . may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards."

strictly for security purposes -- was proper.

An analysis of the issue must begin with *Shaffer v Heitner* (433 US 186 [1977]), which subjects in rem and quasi in rem jurisdiction to the same standard of constitutional scrutiny that has been applied to in personam jurisdiction since *International Shoe Co. v Washington* (326 US 310 [1945]). In *International Shoe* the Supreme Court rejected the rigid territorialism of *Pennoyer v Neff* (95 US 714 [1877]) and announced that a state court's exercise of in personam jurisdiction would satisfy the Due Process Clause if the defendant had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (326 US at 316 [internal quotation marks and citation omitted]).

International Shoe addressed in personam jurisdiction only. For some 30 years thereafter, quasi in rem jurisdiction could still be predicated entirely on the "presence" of the intangible property in the forum state, in keeping with *Pennoyer*. *Shaffer*, however, abandoned that notion. In *Shaffer*, the plaintiff filed a shareholder's derivative action in Delaware against, inter alia, present and former officers of the corporation (nonresidents of Delaware) and attached shares of stock owned by them, giving the Delaware court quasi in rem jurisdiction over the defendants. Recognizing that an assertion of "jurisdiction

over a thing" is in fact "jurisdiction over the interests of persons in a thing," *Shaffer* held that, although the location of property could be evaluated as a contact for *International Shoe* purposes, the ultimate question was whether there was jurisdiction over the party against whom the plaintiff asserted liability (*id.* at 207 [internal quotation marks and citations omitted] & n 22; *id.* at 212).

In his analysis for the majority in *Shaffer*, Justice Marshall distinguished two types of quasi in rem actions, as well as the true in rem action (433 US at 199, n 17). In both the true in rem action and one type of quasi in rem action, the plaintiff's claim is directly related to the property that is the subject of the seizure. Justice Marshall noted that where that was the case, "it would be unusual for the state where the property is located not to have jurisdiction" (*id.* at 207). But in the second type of quasi in rem action, where the property is unrelated to the cause of action, jurisdiction depends on defendant having other contacts with the forum that satisfy the standards of *International Shoe* (*Shaffer* at 208-209, 212-213).

The *Shaffer* case, of course, involved an assertion of quasi in rem jurisdiction for purposes of obtaining jurisdiction over the defendant to adjudicate the merits of the case, and not merely for the purpose of securing satisfaction of a future

judgment. However, the Court held out the possibility of a "security" exception to the requirement of minimum contacts in quasi in rem jurisdiction, remarking in a dictum that a plaintiff might be entitled, without demonstrating minimum contacts of any kind, to attach property located in one state "as security for a judgment being sought in [another] forum where the litigation can be maintained consistently with *International Shoe*" (433 US at 210).

In reliance on this language, some courts have asserted jurisdiction for prejudgment attachment purposes based on nothing more than the presence within the jurisdiction of the assets to be attached. For example, in *Barclays Bank, S.A. v Tsakos* (543 A2d 802 [DC 1988]), Barclays sought to attach an apartment in Washington, D.C., pending resolution of court proceedings in France and Switzerland over a defaulted $1.4 million loan. Relying on the "security" exception described in *Shaffer*, the D.C. Court of Appeals held that the trial court could issue an attachment of the defendants' property even though it had no personal jurisdiction over the defendant. The D.C. Court was following *Carolina Power & Light Co. v Uranex* (451 F Supp 1044, 1048 [ND Cal. 1977]), in which the district court held:

> "Where the facts show that the presence of defendant's property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient

> arena for defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible."

We are similarly persuaded that New York's attachment statute does not run afoul of *Shaffer* when it is used for purposes of security rather than to confer in personam jurisdiction. As the *Shaffer* Court recognized, attachment for security pending litigation in a proper out-of-state forum does not raise the same due process concerns as are implicated by attachment for jurisdictional purposes. In seeking attachment pursuant to CPLR 7502(c), a petitioner is in no way seeking to compel a respondent to litigate in an improper forum to save her property; the petitioner merely seeks to have the property attached for future execution in the event a recovery is ordered by the out-of-state forum.

To the extent that security attachments raise the concerns of the *Shaffer* Court, we see nothing fundamentally unfair about an attachment for security pending arbitration in a proper forum. In fact, CPLR 7502(c) provides several substantive and procedural safeguards intended to permit attachment consistent with due process. For instance, as noted above, to demonstrate entitlement to a provisional remedy in aid of arbitration, the petitioner must show that any award issued by the arbitrator

would otherwise be rendered ineffectual if the relief was not granted *(see e.g. Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270 [1996]). In addition, the statute provides that if the arbitration is not commenced within 30 days after the attachment is granted, the order "shall expire and be null and void." Since *Shaffer* was intended to prevent attachment where attachment would violate due process, it should not hamper attachments that are issued consistent with due process.

Significantly, the Supreme Court has approved attachments used to execute foreign judgments against judgment debtors who have no contacts with the forum other than ownership of property there that can be used to satisfy the foreign judgments *(see North Georgia Finishing, Inc. v Di-Chem, Inc.*, 419 US 601 [1975]; *Mitchell v W.T. Grant Co.*, 416 US 600 [1974]; *Fuentes v Shevin*, 407 US 67 [1972]). If that is so, we perceive no reason why local assets belonging to a party should not also be attached prejudgment to secure payment of an eventual judgment against that party, provided that party seeking the attachment demonstrates its entitlement to the provisional relief.

Accordingly, the order of Supreme Court, New York County (James A. Yates, J.), entered October 5, 2009, which, insofar as

appealed from, granted petitioner a pre-award attachment in aid of arbitration and reduced the amount of the bond that petitioner was required to post pursuant to an order entered August 13, 2009, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 10, 2011

CLERK