SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 23, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5685 The People of the State of New York, Respondent, Ind. 523/09

-against-

Michael Boone,
Defendant-Appellant.

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

Michael Boone, appellant pro se.

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

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Appeal from the judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Charles H. Solomon, J. at suppression decision and dismissal motion; Maxwell Wiley, J. at plea and sentencing), rendered January 6, 2010, convicting defendant of criminal possession of a weapon in the third degree and resisting arrest, and sentencing him to an aggregate term of 1 year, held in abeyance, and the matter remitted to the Supreme Court for a new suppression hearing.

Upon reconsideration, we find that at the time defendant

first waived his right to counsel before the suppression hearing, the court did not conduct the requisite "searching inquiry" as to whether he was aware of the dangers and disadvantages of proceeding pro se, nor did the court apprise defendant of the "singular importance of the lawyer in the adversarial system of adjudication" (*People v Wingate*, 17 NY3d 469, 482 [2011]; *see also People v Providence*, 2 NY3d 579 [2004]).

The Decision and Order of this Court entered herein on October 13, 2011 is hereby recalled and vacated (*see* M-5397 decided simultaneously herewith).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5794 Jose Montas, Index 27241/99
Plaintiff-Appellant,

-against-

JJC Construction Corporation, et al.,
Defendants-Respondents.

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

Mitchell Silberberg & Knupp LLP, New York (Lauren J. Wachtler of counsel), for JJC Construction Corporation, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Omar Nasar of counsel), for municipal respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about April 12, 2010, which granted defendants' motions to dismiss the complaint at the close of the evidence, affirmed, without costs.

Plaintiff alleges that he sustained personal injuries when he stepped over a piece of wood and slipped on "sand and construction debris" as he was crossing the street with his cousin. Approximately three or more feet to plaintiff's right, separated by a six-ton concrete barrier and chain link fence, was the City and JJC Construction's work site for a project to remove the existing Grand Concourse bridge over East Tremont Avenue and erect a new one, which, among other things, required removing and

carting away the old concrete and replacing it with new concrete. Approximately 5 to 10 feet in front of plaintiff was a sidewalk bridge adjacent to a building that, according to JJC's president, was undergoing brick pointing work.

After the close of evidence, the trial court granted defendants' motions for a directed verdict, finding that the testimony of plaintiff and his cousin that the sand on which plaintiff slipped was generated from the cutting and chopping of concrete for the roadway project was "more suggestion than proof," and was insufficient in light of the defense testimony that the roadway project used brown mason sand and that the white sand on which plaintiff slipped was blown over from the pointing project.

Contrary to the dissent's view, the trial court did not improperly make credibility determinations or decide factual issues when it granted defendants' motions. Rather, it correctly determined that plaintiff's self-serving testimony that JJC's concrete-chopping activities were the source of the greyish-white sand in the street on which he slipped was too speculative to raise an issue of fact.

It was plaintiff's initial burden to show that "defendant['s] negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51

NY2d 308, 315 [1980]). "'Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury'" (*Lynn v Lynn*, 216 AD2d 194, 195 [1995], quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). "Even when there is no requirement for the plaintiff to exclude every other possible cause other than a defendant's breach of duty, 'the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation'" (*McNally v Sabban*, 32 AD3d 340, 341 [2006], quoting *Lynn*, 216 AD2d at 195-196).

Plaintiff testified that he knew he slipped on sand because he felt it underneath his foot when he fell down. However, he did not introduce into evidence a sample of the sand on which he slipped. While plaintiff testified that the sand was the result of the chopping of concrete on the roadway project, he conceded that he never worked with concrete or did road work. Plaintiff and his cousin also conceded that they never did any pointing work and that they were not familiar with the dross it created.

Plaintiff's cousin admitted on cross examination that he did not know if the sand residue came from inside or outside the fence surrounding the roadway project. While he speculated that it "could be" that it came from inside the fence, he conceded that he did not know what material plaintiff slipped on. The City's project engineer, called by plaintiff as part of his direct case, testified that there was another project in the vicinity, that he could not identify the substance on which plaintiff slipped, and that he had not received any complaints about debris on the street that came from JJC's work site. JJC's president testified that the whitish material on which plaintiff slipped was created by the pointing work. While plaintiff and his cousin both testified that they did not see any work being done on the building adjacent to the sidewalk bridge, plaintiff testified that for the most part he and his friends would gather in the area after 5:00 P.M. or 6:00 P.M. His cousin testified that he was not in the area between 9:30 A.M. and 5:00 P.M.

Thus, the facts show that it is just as likely that the accident was caused by debris from the pointing project as by debris from the roadway project, and any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation (*see Siegel v City of New York*, 86 AD3d 452, 455 [2011] ["[p]laintiff's unsupported assertion that it could

have been defendants' conduit rather than that of Consolidated Edison or the water main break that caused the purported defect is mere conjecture and fails to raise a triable issue of fact]; *Kimball-Malone v City of New York*, 7 AD3d 675, 675-676 [2004] [where plaintiff slipped and fell on gravel and sand while ascending flight of stairs in building undergoing renovations, appellant was entitled to summary judgment because "plaintiffs' contention that the appellant, or a contractor it supervised, created the dangerous condition was too speculative to raise an issue of fact"]).

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

TOM, J.P. (dissenting)

Because there is evidence from which the jury could have found that defendants were negligent in permitting construction debris to accumulate on a pedestrian walkway and that such negligence was a proximate cause of plaintiff's injuries, it was error for the trial court to direct a verdict dismissing the complaint for failure to establish a prima facie case. Furthermore, the resolution of factual issues by the court deprived plaintiff of his right to a jury trial.

In September 1999, defendant JJC Construction Corp., under contract with the City, was engaged in demolishing and reconstructing the Grand Concourse overpass and bridge over Tremont Avenue in the Bronx. This work entailed, inter alia, cutting and chopping out the existing concrete roadway, hauling the broken concrete and debris away in dump trucks, and replacing the roadway. The construction area was separated from the street by a six-ton concrete barrier, approximately three feet tall and topped by a wire fence. Plaintiff contends that he sustained injury slipping on sandy debris generated by JJC's demolition of the concrete overpass.

The dispositive issue in this matter is whether the sandy or gritty substance on which plaintiff slipped was the byproduct of the concrete-cutting and concrete-removal operations undertaken

by the City's contractor, defendant JJC, as plaintiff alleges, or the cleaning and pointing of brickwork being performed by another, unidentified, contractor at a nearby building, as JJC maintains. The jury heard testimony in support of each theory.

On September 11, 1999, plaintiff and his cousin, Sergio Sanchez, were walking by the construction site when plaintiff noticed a large piece of "two by six" wood approximately five feet long lying on the ground next to the concrete barrier. As plaintiff stepped over the wood, his foot came down on "sand" or "sand and construction debris," causing him to slip and tear the anterior cruciate ligament and meniscus of his right knee. Both plaintiff and his cousin testified that there was a whitish or greyish material, as depicted in plaintiff's photographs, scattered about the ground in the vicinity of the barrier. Plaintiff frequently visited the neighborhood and was familiar with the area. He was aware of the construction project and had observed workers using "big machines" to cut and break up concrete slabs. Plaintiff testified that the sand and construction debris at the site of the accident had been generated by the cutting and chopping of the concrete and that the sand and debris from the demolition work went past the concrete barrier and onto the street where he fell. Plaintiff described the substance as sand and debris generated from the

cutting and breaking of concrete.

Sergio Sanchez testified that he was familiar with the subject area since he walked past the site of the accident every morning on his way to work. He saw big "breaking machines" used to demolish the concrete slabs and stated that this work generated "a lot" of "dust." Sanchez saw plaintiff slip and fall over the sandy debris, the presence of which he had noticed at the location many times before the accident.

Plaintiff denied that the sandy substance on which he slipped was from brick pointing work at a nearby building, as urged by JJC, or from any source other than the construction site behind the concrete barrier. Sanchez, who waited at the construction site every day to be picked up and transported to his workplace, stated that he saw no work being performed on the nearby building either during the time he arrived at the pick up point at about 10:00 each morning or at the time he was dropped off at about 5:00 in the evening. For his part, plaintiff testified that he "never saw anyone work on that building. Absolutely no one."

Ohene Duodo, a project engineer, supervised the reconstruction project for the Department of Transportation, and oversaw the contractors. He testified that, as part of the reconstruction project, JJC was required to cut the concrete with

a saw and then use a jackhammer or an excavator to break and remove the large chunks of concrete, which would then be hauled away in dump trucks. JJC was obligated to keep the work site clean and free of debris, even if it did not create that debris. JJC's duties included the removal of rubbish, debris, waste material, and wood as they accumulated. At a pretrial deposition, Duodo testified that materials used in the reconstruction project, including sand, were often deposited onto the roadway directly from delivery vehicles. He added that it was his practice to require the contractor to remove any sand or other debris from the roadway "whether he was responsible or not responsible because of our project." Duodo stated that he could not identify the material depicted in plaintiff's photographs. He stated that some of the material depicted in the photos could be seen "hanging on the wire mesh" above the concrete barrier. He concluded that the material depicted could be "many things" including "debris" and that "pure sand" "doesn't look like that." Duodo added that the sand used in city roadway construction projects is not white, like the substance depicted in plaintiff's photo. He further noted that during the time of plaintiff's fall, there was an ongoing pointing project on a nearby building, which was unrelated to the City's and JJC's work.

After plaintiff rested, defendants moved to dismiss the

complaint. The court reserved decision, and the defense called Donald Zanfardino, the president of JJC Construction for the duration of the overpass reconstruction project. He testified that the sand used by JJC was yellow in color and that the company's responsibility for cleaning up the work site was limited to the area enclosed by the concrete barrier and adjoining fence and did not extend to the walkway beyond the barrier. This testimony was inconsistent with testimony given by Duodo.

From logs he maintained of the project's progress, Zanfardino recounted the work that was undertaken each day during the week preceding plaintiff's injury, which was sustained on a Saturday evening. On Friday, a concrete curb and rock had been removed from an area where a fire hydrant was to be installed. On the day of the accident, Zanfardino had recorded a log entry that read, "clean up concrete rock," which he explained referred to the remains of the concrete curb. Contrary to the testimony given by plaintiff and his cousin, Zanfardino stated that he had indeed observed work being performed at the nearby building, asserting that "they were re-pointing the brick work around the entire building." He described the mortar and cement mix being used as "a greyish material." Zanfardino asserted that the whitish material depicted in plaintiff's photographs was old

mortar from the brick repointing project. Samples of materials employed in the City's reconstruction project were introduced into evidence to show the color of the sand that was being used.

After the conclusion of Zanfardino's testimony, the defense rested, and the court granted the dismissal motion on the record; the ruling was later reduced to the written decision and order from which plaintiff appeals. With respect to the cause of plaintiff's fall, the court found that Zanfardino "differentiated the grit on the ground from any sand or crushed concrete that was used in the JJC/City project." The court noted that "[t]he only evidence as to the source of the sand came from JJC's witness who testified that its white collar [*sic*] made it different from any material used in the renovation project, which was light brown or dark brown."

Assessing the relative strength of the evidence, the court continued, "Plaintiff's evidence was much more suggestion than proof regarding the source of the sand. This evidence was met by physical evidence, in the form of samples of the type of sand used in the project, as well as the testimony of JJC's witness, who placed another project at the site of the accident, and in describing the dross from the project, matched it to the cause of Plaintiff's fall." The court concluded that "there is insufficient evidence of causation to put this dispute before a

jury." This was error.

A directed verdict pursuant to CPLR 4401 may be granted only "where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The evidence must be assessed in a light most favorable to the responding party and the benefit of every factual inference that may properly be drawn must be accorded him (*id.*, citing *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Where, as here, a matter is tried to a jury, the court lacks the power to make findings of fact and, thus, may not resolve any factual issue in deciding whether to direct a verdict (*see Cohen*, 45 NY2d at 498, citing *Middleton v Whitridge*, 213 NY 499, 506-508 [1915] [the power of a court to make factual findings is foreclosed by the constitutional right to trial by jury]). Thus, Supreme Court erred in resolving the central factual contention in this case.

As an initial matter, the samples of sand, introduced into evidence by JJC apparently with the intent to demonstrate that it was not the substance on which plaintiff slipped, is immaterial. As noted at the outset, the central issue in this case is whether the gritty debris alleged to have caused plaintiff to slip and fall was the result of the cutting and breaking of concrete by

JJC or, alternatively, the removal of mortar from the adjacent building by some unidentified third party. The mason's sand that was used to mix new cement for use in the City's project was never implicated as the cause of plaintiff's injury, and its color and other characteristics have no bearing on this case.

The divergent testimony given by the different witnesses during trial merely serves to establish the existence of credibility issues that the trier of fact was required to resolve in making its findings. Plaintiff owned an "environmental construction company," which performed, among other things, interior demolition and renovation work. He testified that he observed "big machines" cutting and breaking up concrete slabs which generated "a lot of dust" and sandy debris that spilled from the site past the concrete barrier and onto the adjacent street where he slipped and fell. Likewise, Sanchez observed the accumulation of dust and sandy debris at that location on many occasions before plaintiff's fall. Plaintiff and Sanchez both testified that they had viewed the whitish dust and debris generated by JJC's concrete-cutting-and-breaking activities, and that the debris was on both sides of the concrete barrier next to the site of the accident. Indeed, Duodo testified that some of the whitish material depicted in plaintiff's photographs could be seen on the wire mesh above the concrete barrier.

In contrast, defendants point to the testimony of Zanfardino and Duodo that there was a brick-pointing project on the building behind the scaffolding visible in plaintiff's photos, and that this repointing project, not JJC's reconstruction work, was the source of the sandy material upon which plaintiff slipped. Zanfardino was the only witness to maintain that repointing work was actively being performed at the nearby building, and his testimony was explicitly contradicted by the testimony of plaintiff and Sanchez. Zanfardino went to the site of the accident after plaintiff's fall and confirmed that there was debris there. However, he made no attempt to clean it because he determined that the debris was not from his project but was from the brick repointing work. Once again, his account was inconsistent with the testimony of Duodo, who stated that JJC would be directed to clean the debris on the roadway even though it was outside of the work site and regardless of whether it had been generated by JJC.

The trial court deprived plaintiff of his right to have this case decided by a jury (*Middleton v Whitridge*, 213 NY at 506-508) by usurping the jury's function and purporting to resolve, as issues of law (*see* CPLR 4401; *Cohen v Hallmark Cards*, 45 NY2d at 498), questions of credibility and issues of fact (*see Colozzo v LoVece*, 144 AD2d 617, 618 [1988]). The court further erred in

drawing favorable inferences from the facts in favor of defendant, rather than in favor of plaintiff (*Cohen*, 45 NY2d at 499).

Although the trial court did not reach JJC's alternative argument that it was an independent contractor that had no duty to third parties, the testimony of plaintiff and his cousin, if credited, serves to establish liability on the ground that it was JJC that created the hazardous condition (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1984], *affd for reasons stated* 64 NY2d 670 [1984]).

The majority's analysis of this case is flawed. In concluding that defendant's action should be dismissed, the majority relies on this Court's ruling in *Lynn v Lynn* (216 AD2d 194 [1995]) to conclude that plaintiff's injury could just as likely have been caused by debris from the repointing work. The facts in *Lynn* are distinguishable, and its holding has no application to the present appeal. There, an 81-year-old plaintiff fell down a flight of stairs and commenced an action against the property owner. She contended that the stairway was defective and that there was inadequate lighting. As a result of the fall, the plaintiff suffered amnesia and was unable to testify as to the circumstances of the accident or the cause of her fall. Thus, she failed to meet her burden to establish prima

facie that the owner's negligence was a proximate cause of the events that produced her injuries, and the owner was entitled to summary judgment in his favor. In stark contrast, plaintiff herein suffers from no amnesia, and based on the testimony and evidence adduced at trial, has made out a prima facie case that his injuries were caused by defendant's negligent maintenance of the construction site. In making a factual finding that plaintiff's injury could just as likely have been caused by another source, the majority improperly condones the trial court's improvident intrusion into the jury's exclusive province to decide factual issues (*cf. Siegel v City of New York*, 86 AD3d 452 [2011] [summary judgment]; *McNally v Sabban*, 32 AD3d 340 [2006] [same]; *Kimball-Malone v City of New York*, 7 AD3d 675 [2004] [same]).

Viewing the evidence in the light most favorable to plaintiff, a finder of fact could rationally have found that the sandy debris upon which he claims to have slipped and fallen was generated by JJC's activities (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 349 [2008], *appeal dismissed* 12 NY3d 832 [2009]). The jurors could reasonably have credited the testimony of plaintiff and his cousin, based on their direct observations, that JJC's concrete-cutting activities were the source of the sandy debris.

The testimony of defendants' witnesses that a nearby brick-repointing project was the source of the sandy debris merely raised a credibility issue for the jurors, who were free to reject that testimony (*see Matter of Nowakowski*, 2 NY2d 618, 622 [1957]; *Perez v Andrews Plaza Hous. Assoc., L.P.*, 68 AD3d 512 [2009]). The majority agrees with the trial court that plaintiff's testimony was self-serving. But if plaintiff's testimony concerning the cause of his injury can be considered self-serving, so too can Zanfardino's testimony denying liability. Once again, assessment of the credibility of witnesses is within the sole prerogative of the jury.

Finally, as a matter of procedure, the court improvidently decided the motion without first submitting the case to the jury. It has been noted by this Court that the better practice is to entertain motions for judgment as a matter of law only after the jury has returned a verdict, so that if an appellate court disagrees with the ruling, the verdict may be reinstated rather than remanding the matter for a new trial (*see Jacino v Sugerman*, 10 AD3d 593, 594-595 [2004]; *Vera v Knolls Ambulance Serv.*, 160 AD2d 494, 496 [1990]; *Matter of Austin v Consilvio*, 295 AD2d 244, 246 [2002]). As this Court pointed out in *Rosario v City of New York* (157 AD2d 467, 472 [1990], citing *Greenberg v Bar Steel Constr. Corp.*, 37 AD2d 162, 163 [1971]), "Unless it appears that

the defendant's case will consume an inordinate amount of the trial court's time, the better practice is to submit the case to the jury which, in some instances, may obviate defendant's CPLR 4401 motion by returning a defendant's verdict." Here, the jury heard all the evidence, and the court reserved decision on the motion until both sides had rested. It would hardly have been an imposition on the court's time to take the obvious next step of obtaining a jury verdict to avoid the potential waste of the time expended on the trial.

Accordingly, the order should be reversed and the matter remanded for a new trial.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Saxe, Sweeny, Richter, Manzanet-Daniels, JJ.

6124 How Shim Yu, Index 117206/04
Plaintiff-Appellant,

-against-

General Security Insurance Co., etc.,
Defendant-Respondent.

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Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 21, 2010, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously reversed, on the law, with costs, the motion denied, and the cross motion granted in the principal amount of $501,055, plus interest. The Clerk is directed to enter judgment accordingly.

This is an action pursuant to Insurance Law § 3420(a)(2) by an injured person (plaintiff) against the insurer (defendant) of a tortfeasor (nonparty Lep Keng Corp.), which has not satisfied a judgment against it in plaintiff's favor. It is undisputed that Lep Keng's notice to defendant was late. However, "[a]n insurer's failure to provide notice as soon as is reasonably

possible precludes effective disclaimer, even where the policyholder's own notice of the incident to its insurer is untimely" (*Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006] [internal quotation marks and citation omitted]).

Defendant learned by August 27, 2004, at the latest, that plaintiff served the summons and complaint in the underlying personal injury action on the Secretary of State on December 31, 2001, that the Secretary of State had sent the documents to the address on file for Lep Keng, and that the documents had been returned unclaimed. Thus, defendant was aware by that date "of the grounds for disclaimer of liability or denial of coverage" (*id.* [internal quotation marks and citation omitted]). Nevertheless, it did not disclaim until July 18, 2007, almost three years later, a delay that is unreasonable as a matter of law (*see e.g. First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]). Defendant's contention that it had to wait until the motion court in the underlying action confirmed the Special Referee's finding that Lep Keng had deliberately left mail

unclaimed, is unavailing (*see Republic Franklin Ins. Co. v Pistilli*, 16 AD3d 477, 479 [2005]).

In light of the above disposition, we do not reach the parties' remaining arguments.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Saxe, J.P., DeGrasse, Freedman, Román, JJ.

6181-
6182-
6183-
6184-
6185 Index 603697/08

Citibank, N.A.,
Plaintiff-Respondent,

-against-

Sheldon H. Solow,
Defendant-Appellant.

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Lowenstein Sandler PC, New York (Donald A. Corbett of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Marc A. Weinstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered March 24, 2011, awarding plaintiff the principal amount of $98,854,072.27, unanimously affirmed, with costs. Orders, same court and Justice, entered March 29, 2010, which granted plaintiff's motion for summary judgment as to liability and directed a reference as to damages; June 28, 2010, which granted defendant's motion to renew and adhered to the March 29, 2010 determination; January 5, 2011, which denied defendant's second motion to renew and January 11, 2001, which granted plaintiff's motion to confirm the report of the Special Referee and denied defendant's cross motion to reject said report, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

The court properly relied on the affidavit of plaintiff's executive who was personally involved in enforcing defendant's obligations. The affidavit was not hearsay, because it was not submitted to show that the value of defendant's collateral had fallen below the required amount, but, rather, that the method employed in determining the shortfall was reasonable, as required by the governing documents. Defendant did not support his claim that the value of the collateral was determined in bad faith (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 388-389 [1995]). It did not evince bad faith for plaintiff to refuse to accept additional collateral to cure defendant's default based on a shortfall, despite having accepted additional collateral in the past, since extension of the cure period and acceptance of the proposed non-liquid interest in realty as collateral, rather than the required cash and securities, would have been inconsistent with express terms of the governing agreements (*see id.*).

The sale of defendant's municipal bond collateral through regular market channels immunized the method of sale from attack on the ground of commercial unreasonableness (*see Bankers Trust Co. v Dowler & Co.*, 47 NY2d 128, 135 [1979]). With regard to other aspects of commercial reasonableness, the timing was

commercially reasonable because plaintiff was not bound to wait and undertake the risk of a declining market (*see Sumner v Extebank*, 88 AD2d 887, 888 [1982], *mod on other grounds* 58 NY2d 1087 [1983]), and the sale price was not significantly lower than the market value (*see DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 [2004]; *Weinstein v Fleet Factors Corp.*, 210 AD2d 74 [1994]). In light of the motion court finding that the sale of collateral was commercially reasonable, testimony that the price obtained when plaintiff purchased a portion of the collateral was properly precluded (*see* UCC § 9-615[f]). Contrary to defendant's contention, while the statute refers to "calculation," it addresses the commercial reasonableness of the sale price.

We have considered defendant's other contentions, including those involving the calculation of the deficiency judgment and his claimed need for discovery, and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6245-
6246 Index 600643/10

Continental Guest Services Corporation,
Plaintiff-Appellant,

-against-

International Bus Services, Inc., etc., et al.,
Defendants-Respondents,

Battery Park Hotel Management, LLC, et al.,
Defendants.

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Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for appellant.

Paul Hastings LLP, New York (Michael P.A. Cohen of counsel), for respondents.

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Judgment, Supreme Court, New York County (Charles Edward Ramos, J.), entered October 15, 2010, insofar as appealed from as limited by the briefs, dismissing the Donnelly Act (General Business Law § 340 *et seq.*) claims against defendants International Bus Services, Inc. (IBS), City Sights Twin, LLC (City Sights), and Twin America, LLC (Twin America), unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 14, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Until the spring of 2009, defendant IBS and defendant City

Sights operated competing double-decker sightseeing tour buses in New York City. However, they subsequently formed Twin America, which controls 90% of the double-decker sightseeing tour bus market in New York City;[1] the only competitor was nonparty Big Taxi Tours. According to the complaint, plaintiff is the largest operator of hotel concierge desks in New York City and the largest single source of ticket sales for double-decker sightseeing bus tours in the City.

Prior to commencement of this litigation, plaintiff had operated concierge desks at 43 New York City hotels, pursuant to written agreements with these hotels. The hotel concierge desks provide a range of services including flowers, car rentals, and, as relevant to this appeal, tickets to sightseeing tours including double-decker bus tours. Specifically, plaintiff sells vouchers for defendants' double-decker bus tours, and customers submit the vouchers to defendants in exchange for a ticket to board the bus. Plaintiff subsequently remits the voucher payments to defendants within a specified number of days, minus an agreed upon commission percentage.

After the formation of Twin America, defendants reduced

[1] On February 8, 2011, the United States Surface Transportation Board (STB) denied approval of the Twin America joint venture. On March 8, 2011, the STB stayed its February 8 decision pending defendants' petition for reconsideration.

plaintiff's commission and the amount of time plaintiff had to remit payment. Plaintiff alleges that when it refused to sell a 49% interest in its company to defendants, defendants advised plaintiff that they would "force [p]laintiff out" so defendants could control the hotel concierge desks.[2]

Plaintiff's complaint alleges monopolization, and attempted monopolization, of both the Tour Bus Market and the Ticket Sales Market. Plaintiff defines the Tour Bus Market as the market for hop-on, hop-off double-decker sightseeing bus tours in New York City, and the Ticket Sales Market as the "hotel concierge desk distribution channel for the sale of tickets to passengers for the double-decker sightseeing tours in New York City." Plaintiff contends that IBS and City Sights conspired to form Twin America, with the intent to control, dominate and curtail competition in the Tour Bus Market. Plaintiff also alleges that defendants conspired to monopolize the Ticket Sales Market by vertically controlling distribution of their tickets, "taking over" hotel concierge desks previously operated by plaintiff, and reducing plaintiff's commission percentage and time to remit payment.

The motion court properly dismissed the antitrust claims for

[2] Although 11 hotels initially terminated their contracts with plaintiff and gave business to defendants, four of these hotels subsequently reinstated plaintiff as the hotel concierge desk operator.

failure to state a cause of action.[3] Although the motion court found that plaintiff had standing as to the Tour Bus Market claims, that aspect of the ruling is incorrect. Plaintiff is neither a consumer nor a competitor in the Tour Bus Market because it does not operate bus tours. Plaintiff's allegations that defendants increased their ticket price and that the quality of the tours has decreased are injuries that can be vindicated by tour bus passengers and/or the Attorney General. This consideration "diminishes the justification for allowing a more remote party such as [plaintiff] to perform the office of a private attorney general" (*see Associated Gen. Contractors of Cal., Inc. v Carpenters*, 459 US 519, 542 [1983]).

Plaintiff's claims with respect to the Ticket Sales Market were correctly dismissed because plaintiff failed to define a relevant product market. A relevant product market includes all products that are "reasonably interchangeable," and the alleged market must be plausible (*Theatre Party Assoc., Inc. v Shubert Org.*, 695 F Supp 150, 154 [SD NY 1988]). The general rule when

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[3] The motion court also determined that defendants were one entity after the creation of Twin America and therefore plaintiff had failed to allege a conspiracy between two or more legal or economic entities. However, it does not matter, for purposes of this decision, whether or not the motion court erred in finding that defendants had become a single entity because plaintiff's claims fail on other grounds.

determining a relevant product market is that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it" (*FTC v Staples, Inc.*, 970 F Supp 1066, 1074 [DDC 1997] [internal quotation marks omitted]). Interchangeability and cross-elasticity of demand look to the availability of substitute commodities, meaning, "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other" (*id.* [internal quotation marks omitted]). If there are other products available to consumers that are similar in character or use to the products in question, then the products are said to be functionally interchangeable and form the outer boundaries of a relevant product market for antitrust purposes.

Here, according to plaintiff, the market for ticket sales for double-decker bus tours through hotel concierge desks is distinct from the market for ticket sales for the same double-decker bus tours that are available through other vendors and distribution channels. Although plaintiff contends it is the "major distribution channel" of defendants' tickets, it is not the only distribution channel because consumers can purchase tickets from street vendors, the Internet, and visitor centers

operated by defendants. Thus, there is functional interchangeability between the hotel concierge desk distribution channel and other distribution channels and vendors. Plaintiff's isolation of a supposed separate market via hotel concierge desks from the other vendors is too narrow a definition to constitute a plausible market (*Belfiore v New York Times Co.*, 826 F2d 177, 180 [2d Cir 1987], *cert denied* 484 US 1067 [1988]).

Furthermore, the hotel concierge desk distribution channel does not constitute a submarket within the larger double-decker tour bus ticket sales market. Courts recognize that submarkets can exist within larger product markets, thereby providing potential plaintiffs with another avenue of establishing a relevant product market for an antitrust claim. The United States Supreme Court in *Brown Shoe Co. v United States* (370 US 294, 325 [1962]) provided a series of factors for determining whether a submarket exists, including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, . . . [and] distinct prices." In this case, the tickets sold by plaintiff do not have any peculiar characteristics, but rather provide the consumer with the same product and experience as a ticket purchased through any of the other distribution channels. Moreover, plaintiff does not allege that either the hotel concierge

industry or the double-decker tour bus industry recognizes plaintiff's defined submarket as a separate economic entity. Indeed, plaintiff does not set the price for the double-decker tour bus tickets; it is solely a distributor of vouchers for defendants' product.

Even if the Ticket Sales Market were a relevant product market or submarket, plaintiff failed to allege an antitrust injury in that market. An antitrust injury is an injury "attributable to an anti-competitive aspect of the practice under scrutiny" (*Atlantic Richfield Co. v USA Petroleum Co.*, 495 US 328, 334 [1990]). Here, plaintiff complains that defendants have replaced it as the concierge at 11 of the 43 hotels where it used to operate the concierge desk, that defendants plan to take over the hotel concierge industry, and in so doing, defendants have decreased plaintiff's commission and the amount of time plaintiff has to remit payment. However, in the hotel concierge industry, plaintiff and defendants are now competitors, and the antitrust laws were enacted to protect competition, not competitors (*see Theatre Party*, 695 F Supp at 155). Plaintiff does not allege that defendants have prevented it from selling vouchers at concierge desks it continues to operate.

Furthermore, the antitrust laws do not require defendants to pay plaintiff a particular commission or give it a certain number

of days to pay (*see Belfiore v New York Times Co.*, 654 F Supp 842, 847 [D Conn 1986], *affd* 826 F2d 177 [2d Cir 1987], *cert denied* 484 US 1067 [1988], *supra*). In fact, defendants may decline to deal with plaintiff altogether (*see Theatre Party*, 695 F Supp at 155; *see also E & L Consulting, Ltd. v Doman Indus. Ltd.*, 472 F3d 23, 29 [2d Cir 2006], *cert denied* 552 US 816 [2007]).

Indeed, a manufacturer's vertical control of the distribution of its own product is presumptively legal and not a violation of the antitrust laws (*E & L Consulting*, 472 F3d at 30). The gravamen of plaintiff's argument is that defendants are distributing their double-decker tour tickets themselves, instead of using plaintiff's services. However, "[i]t is not a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . " (*id.* at 29 [internal quotation marks omitted]). Notably, defendants' vertical control of their product does not provide any monopolistic benefit that defendants do not already enjoy.

The motion court properly dismissed plaintiff's attempted monopolization claims. Although the motion court found that plaintiff could not bring a private right of action for attempted

monopolization, that portion of the ruling is incorrect.[4] Plaintiff's claims of attempted monopolization fail because plaintiff does not have standing in the Tour Bus Market, and plaintiff has not alleged anticompetitive conduct by defendants or a "dangerous probability" that the attempted monopolization will succeed in the Ticket Sales Market (*Intl. Distrib. Centers, Inc., v Walsh Trucking Co., Inc.*, 812 F2d 786, 791 [2d Cir 1987], *cert denied* 482 US 915 [1987]). The complaint alleges that defendants have taken over some of plaintiff's hotel concierge desks. However, the seven hotels that terminated plaintiff's contract were able to do so without alleging cause and were free to hire any replacement company to operate the concierge desks. Just because defendants are now in competition with plaintiff in the hotel concierge desk industry does not mean that they engaged in anticompetitive conduct.

To establish a "dangerous probability" of success we must examine whether a defendant "possesses a significant market share when it undertakes the challenged anti-competitive conduct" (*Intl. Distrib.*, 812 F2d at 791). Here, the minimal economic

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[4] In *Two Queens v Scoza* (296 AD2d 302 [2002]), this Court reinstated the defendant's counterclaims, which included an allegation of attempted monopolization. It is a fair inference that the *Two Queens* Court found that the Donnelly Act provided for a private right of action for attempted monopolization.

power defendants may have in the hotel concierge industry does not warrant the conclusion that they possessed a significant market share at the time plaintiff alleges they engaged in the anticompetitive actions. Defendants now operate seven hotel concierge desks in New York City, however, according to the complaint, plaintiff remains the "largest operator of hotel concierge desks in New York City." Further, plaintiff's conclusory allegations that defendants will eventually "take over each and every hotel concierge desk in New York City" and thereby put plaintiff out of business is legally insufficient to make out a violation of the Donnelly Act (*Sands v Ticketmaster-N.Y., Inc.*, 207 AD2d 687, 688 [1994], *lv denied* 85 NY2d 904 [1995]).

The motion court properly declined to permit plaintiff to replead its antitrust claims because no amount of repleading will change the nature of its injuries (*see Chapman v New York State Div. for Youth*, 546 F3d 230, 239 n 3 [2d Cir 2008], *cert denied* __ US __, 130 S Ct 552 [2009]).

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

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6872-
6873 Ind. 989/08

The People of the State of New York,
Respondent,

-against-

Derek Moore,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered January 14, 2009, as amended March 5, 2009, convicting defendant, after a jury trial, of kidnapping in the second degree (two counts), coercion in the first degree (five counts), criminal possession of a weapon in the third degree (three counts), reckless endangerment in the first degree (two counts), intimidating a witness in the third degree, assault in the second degree and unlawful imprisonment in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 years, unanimously affirmed.

Defendant challenges the sufficiency of the evidence as to several of his convictions. However, defendant did not alert the trial court to the specific arguments he makes on appeal.

Accordingly, these claims are unpreserved (*see People v Gray*, 86 NY2d 10, 20-22 [1995]), and we decline to review them in the interest of justice. As an alternative holding, we reject defendant's sufficiency claims on the merits. We further find that the verdict was not against the weight of the evidence in any respect (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The evidence satisfied the abduction element of kidnapping. The jury could have reasonably inferred that when defendant tied up and gagged the victim, defendant restrained her "with intent to prevent [her] liberation by . . . using or threatening to use deadly physical force" (Penal Law § 135.00[2][b]). The manner in which defendant gagged the victim was readily capable of causing death by asphyxiation. The evidence supported an inference that when defendant gagged the victim, he intended, among other things, to prevent her from calling for help. The evidence also supported the physical injury element of the assault conviction and the grave risk of death element of the reckless endangerment convictions.

The prosecutor's summation remark that the victim had told the jury "what exactly had happened" did not constitute improper vouching, when viewed in context. Instead, it was a permissible response to the defense summation, which attacked the victim's

credibility (*see People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]). The prosecutor's attacks on the credibility of defendant's sister's testimony were likewise permissible (*id.* at 143-144). Defendant did not preserve any of his remaining challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court provided the jury with sufficient instructions on evaluating the credibility of witnesses. The court was not required to marshal specific evidence relating to credibility (*see People v Saunders*, 64 NY2d 665, 667 [1984]).

The court responded meaningfully to a jury note (*see People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). The court properly exercised its discretion when it provided some very limited and nonprejudicial clarifying information, even if that information went slightly beyond the jury's request (*see e.g. People v DeGannes*, 76 AD3d 935 [2010], *lv denied* 15 NY3d 919 [2010]).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6874 Gary Don, et al., Index 105584/06
Plaintiffs-Respondents,

-against-

Baruch Singer, et al.,
Defendants-Appellants,

Mark Junger, et al.,
Defendants,

855 Realty Owners, LLC, et al.,
Intervenors-Defendants.

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Law Office of Mark R. Kook, New York (Mark R. Kook of counsel), for appellants.

Neil J. Saltzman, Forest Hills, and L. Marc Zell, Jerusalem, Israel, of the bars of the District of Columbia, State of Maryland and State of Virginia, admitted pro hac vice, for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 18, 2011, which denied defendants Baruch Singer and Herald Square Development LLC's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

An issue of fact exists whether defendant Singer's conduct manifested an intention to be bound as a joint venturer with plaintiffs (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 297-298 [2003]). This conduct included remaining silent when provided with each of the subject agreements and when

repeatedly introduced as plaintiffs' partner (*see Russell v Raynes Assoc. Ltd. Partnership*, 166 AD2d 6, 15 [1991]). Contrary to defendants' contention, plaintiffs' claim that Singer's conduct created his obligations under the joint venture does not contradict their deposition testimony that he did not sign the agreement (*see e.g. Castro v New York City Tr. Auth.*, 52 AD3d 213, 214 [2008]). There was no requirement that the joint venture agreement contain a provision that losses be shared since, under the circumstances, there was no reasonable expectation of losses (*see Cobblah v Katende*, 275 AD2d 637, 639 [2000]). Even if there were an expectation of losses, there is a question of whether an agreement to share such losses could be implied from the facts of record (*Richbell*, 309 AD2d at 298).

Issues of fact exist on the question of whether the material that plaintiffs provided Singer was confidential (*see Ashland Mgt., Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [2008], *mod on other grounds* 14 NY3d 774 [2010]) and whether Singer used the material that plaintiffs provided.

The claim for lost profits is not unduly speculative in light of plaintiffs' expert affidavit (*see Blinds to Go [U.S.], Inc. v Times Plaza Dev., L.P.*, 88 AD3d 838, 840 [2011]) and their detailed profit projections.

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

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6876 In re Sandra C.,
Petitioner-Appellant,

-against-

Enrique M.,
Respondent-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Louise Belulovich, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Elana Roffman of counsel), attorney for the child.

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 25, 2011, which, upon respondent's motion to modify an order of visitation, same court and Judge, entered on or about May 24, 2010, suspended petitioner's visitation "until such time as she can provide evidence of individual counseling to address her inability to communicate with [respondent] without hostility," unanimously reversed, on the law, without costs, and the matter remitted for further proceedings consistent herewith before a different Judge.

Family Court erred in modifying the May 24, 2010 order of visitation without first conducting a full evidentiary hearing to determine whether there had been a subsequent change in circumstances and whether modification was in the child's best

interests (*see Matter of Santiago v Halbal*, 88 AD3d 616 [2011]; FCA § 467[b][ii]). Moreover, the court lacked the authority to condition the mother's continued visitation upon her undergoing therapy (*Schneider v Schneider*, 127 AD2d 491, 495 [1987], *affd on other grounds* 70 NY2d 739 [1987]; *Matter of Smith v Dawn F.B.*, 88 AD3d 729, 730 [2011], *lv dismissed* 2011 NY Slip Op 93103 [2011]; *Matter of Saggese v Steinmetz*, 83 AD3d 1144, 1145 [2011], *lv denied* 17 NY3d 708 [2011]; *Matter of Vieira v Huff*, 83 AD3d 1520, 1522 [2011]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6877 Beatrice E. Wein, et al., Index 117223/09
Plaintiffs-Appellants,

-against-

Rickie A. Robinson,
Defendant-Respondent.

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Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellants.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered July 15, 2011, which denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff pedestrian alleges that she was injured when, while crossing the street within the crosswalk, she was struck by defendant's SUV. Plaintiff also cites to the police report noting defendant's statement that he struck plaintiff "while in the crosswalk." In contrast, defendant driver, at his deposition, denied making that statement to the responding officer, and testified that he did not see anyone in the crosswalk or on the sidewalk approaching the crosswalk prior to the accident. Moreover, he testified how the left front of his vehicle came into contact with plaintiff, with the left rear tire

still in the crosswalk, and that he saw plaintiff lying on the ground, with her feet roughly where the door was and her head toward the front of his 14-foot-long vehicle. These conflicting accounts raise triable issues of fact as to whether plaintiff was in the crosswalk at the time of the accident and had the right-of-way, and whether plaintiff pedestrian or defendant driver failed to exercise due care to avoid the accident or was negligent in any manner (*see Calcano v Rodriguez*, __ AD3d __, 2012 NY Slip Op 00110 [2012]*; Villaverde v Santiago-Aponte*, 84 AD3d 506 [2011]; *Lopez v Garcia*, 67 AD3d 558 [2009]).

While plaintiffs may use defendant's admission in the police report, the relative weight to be accorded to the admission in light of defendant's subsequent explanation at his deposition, is to be determined by a jury (*see Fravezzi v Koritz*, 295 AD2d 290 [2002]).

We have reviewed plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6878 Morse, Zelnick, Rose & Lander, LLP, Plaintiff-Respondent, Index 106421/09

-against-

Ronnybrook Farm Dairy, Inc., Defendant-Appellant.

Feldman & Associates, PLLC, New York (Stephanie R. Feldman of counsel), for appellant.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Judith Gische, J.), entered April 19, 2011, which granted plaintiff's motion for summary judgment, deemed an appeal from the judgment, same court and Justice, entered May 3, 2011, in favor of plaintiff in the amount of $115,885.42, and, so considered, said judgment unanimously reversed, on the law, with costs, and the judgment vacated.

There is a triable issue of fact as to whether the preconditions to the payment of plaintiff's note have been satisfied. The May 25, 2000 promissory note, which is the basis for this action, and the May 25, 2000 letter agreement must be read together (*see e.g. BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 852 [1985]). The letter agreement provides

that "the repayment of the note held by [plaintiff] shall be subordinate and subject to the repayment of the notes . . . or the payment of any Liquidation Preference on the Series A Preferred Shares." Unlike the note, the letter agreement does not merely contain a subordination clause. Rather, it also contains conditions precedent to the payment of plaintiff's note. The letter agreement further provides that "[a]fter the notes have been repaid in full or after [nonparty] Sofisco and [nonparty] Osofsky have received the entire Liquidation Preference with respect to the Series A Preferred Shares that they hold, [defendant] shall repay the note held by [plaintiff]." Thus, one of the conditions precedent to repayment on the note is payment in full of the Sofisco and Osofsky notes.

Defendant submitted the affidavit of its president, stating that the Osofsky note has not been satisfied. It was error for the motion court to assume that conversion of the Sofisco and Osofsky notes into Series A Preferred Shares is the same as repayment of the notes. Were that the case, there would not be any need for the letter agreement to provide a choice of two conditions precedent, namely, repayment of the notes *or* payment of the entire Liquidation Preference on the Series A Preferred Shares. "A reading of the contract should not render any portion meaningless . . ." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324

[2007]). Thus, since it is unclear whether the conditions precedent have been met, plaintiff is not entitled to summary judgment (*see Citicorp Intl. Trading Co. v Western Oil & Refining Co.*, 790 F Supp 428, 434 [SD NY 1992]).

In light of the above disposition, it is unnecessary to reach defendant's arguments that plaintiff's summary judgment motion should have been denied because heightened standards apply to transactions between attorneys and their clients, and plaintiff may have violated the Code of Professional Responsibility. In any event, these arguments are unpreserved and may not be raised for the first time on appeal (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [2000]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6879 The People of the State of New York, Ind. 1832/06
Respondent,

-against-

Gerald Gordon,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 27, 2009, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

Defendant claims he was improperly convicted of first-degree robbery under Penal Law § 160.15(4) (displaying what appeared to be a firearm) because the police recovered an operable but unloaded pistol that the victim identified as having been displayed during the robbery. Defendant did not preserve this claim, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence.

Defendant now asserts that the weapon must have been unloaded at the time of the robbery, so that the affirmative

defense set forth in Penal Law § 160.15(4) was established. However, at trial, defendant testified and denied any involvement in the robbery, and his defense was based entirely on issues of identification and credibility. Although the court offered to charge the affirmative defense, defense counsel expressly declined that offer. Since the court's charge governs our assessment of both the sufficiency (*People v Ford*, 11 NY3d 875, 878 [2008]) and the weight (*People v Danielson*, 9 NY3d 342, 349 [2007]) of the evidence, we generally have no occasion to consider a defense raised for the first time on appeal (*see e.g. People v Williams*, 15 AD3d 244, 246 [2005], *lv denied* 5 NY3d 771 [2005]).

We note that the trial evidence permits an inference that defendant had an opportunity to separately discard the pistol and its ammunition. Accordingly, "[t]he evidence was consistent with the pistol having been loaded at the time of the crime, but unloaded at the time it was recovered" (*id.*).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategic reasons for declining to pursue the affirmative defense (*see People v. Love*, 57 NY2d 998 [1982]). According to defendant, the record reveals that counsel's waiver of the defense was not based on strategy but on

a misunderstanding of the law. However, the sparse record is inconclusive as to counsel's reasoning.

To the extent the trial record permits review, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714, [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for the conduct challenged on appeal (*People v Rivera*, 71 NY2d 705, 709 [1988]). Under all the circumstances, it was a plausible strategy to focus exclusively on the issue of misidentification, that is, whether defendant committed the robbery at all (*see People v Lane*, 60 NY2d 748, 750 [1983]; *People v Williams*, 15 AD3d at 245-246). In any event, defendant has not shown a reasonable probability that assertion of the affirmative defense would have resulted in a more favorable verdict.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6881 In re Stephanie G. Devins, Index 402427/09
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Stephanie G. Devins, appellant pro se.

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

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Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered October 21, 2010, which denied the CPLR article 78 petition to annul a determination of respondent, dated June 3, 2009, terminating petitioner's tenancy, after a hearing, upon grounds of chronic rent delinquency and harassment of a former co-tenant, and dismissed the proceeding, unanimously affirmed, without costs.

Respondent's determination that petitioner was chronically delinquent in payment of rent was supported by substantial evidence (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]), including a Housing Court Stipulation dated January 28, 2008, in which petitioner agreed to pay $3,506.55 in arrears; testimony from her housing development's assistant manager,

expressly credited by the hearing officer (*see Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [2007]), that petitioner had not paid rent since August 2007 and, by April 2009, owed over $11,000 in rent arrears; and petitioner's admission that she had not paid rent in nearly two years. Respondent's determination that petitioner had harassed her co-tenant was likewise supported by substantial evidence, including the co-tenant's testimony to that effect, which the hearing officer expressly credited.

The penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Morman v New York City Dept. of Hous. Preserv. & Dev.*, 81 AD3d 528 [2011]).

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: FEBRUARY 23, 2012

CLERK

Catterson, J.P., Renwick, Abdus-Salaam, Román, JJ.

6882 Fownes Brothers & Company, Inc., et al., Plaintiffs-Appellants, Index 603012/09

-against-

JPMorgan Chase & Co., et al., Defendants-Respondents,

Fictitious Defendants A, et al., Defendants.

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Kayser & Redfern, LLP, New York (Leo Kayser, III of counsel), and Haskell Slaughter Young & Rediker, LLC, Birmingham, AL (Anil A. Mujumdar of the bar of the State of Alabama, admitted pro hac vice, of counsel), for appellants.

Andrew R. Kosloff, New York, for JPMorgan Chase & Co., respondent.

Morrison & Foerster LLP, New York (Grant J. Esposito of counsel), for Grant Thornton LLP, respondent.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 1, 2010, granting the motions of defendants JPMorgan Chase & Co. and Grant Thornton LLP to dismiss the complaint, unanimously affirmed, without costs.

Defendants' motions to dismiss were fully briefed, oral argument was held, and plaintiffs were afforded the opportunity of a surreply. Plaintiffs' decision to amend the complaint two business days before the court issued its order made it impossible for defendants to respond in any substantive manner.

Plaintiffs' amended complaint did not moot the motions to dismiss, and the court properly directed the motions toward the original complaint (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35 [1998] [an amended pleading does not "automatically abate[] a motion to dismiss that was addressed to the original pleading"], *DiPasquale v Security Mut. Life Ins. Co. of N.Y.*, 293 AD2d 394, 395 [2002] [directing the motion to dismiss toward the amended complaint because plaintiff sought the amendment rather than "attempt[ing] to defend" the complaint]).

Additionally, the court properly dismissed, as time-barred, plaintiffs' professional negligence and accounting malpractice claims for back taxes and penalties (*see Chemical Bank v Sternbach & Co.*, 91 AD2d 518 [1982], *appeal and cross appeal dismissed* 58 NY2d 1113 [1983]), as plaintiffs failed to allege any facts showing continuous representation by either defendant (*Zaref v Berk & Michaels*, 192 AD2d 346, 347-348 [1993]).

The motion court also properly dismissed plaintiffs' fraud, negligent misrepresentation, unjust enrichment and breach of fiduciary duty claims. Plaintiffs failed to allege any compensable damages. Plaintiffs' tax liability did not flow naturally from the alleged misrepresentations by defendants, but rather from the taxable event created when plaintiffs switched

from one employee benefit plan to another (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 422-423 [1996]). The fact that plaintiffs may have performed the transfer pursuant to advice from defendants does not convert plaintiffs' tax liability into consequential damages (*see Gaslow v KPMG LLP*, 19 AD3d 264, 265 [2005], *lv dismissed* 5 NY3d 849 [2005]).

Finally, the New York General Business Law (GBL) § 349 claim was appropriately dismissed as time-barred (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001] [GBL governed by three-year statute of limitations]), and because plaintiffs failed to allege that the transfer complained of was "consumer oriented" (*see Denenberg v Rosen*, 71 AD3d 187, 194 [2010], *lv dismissed* 14 NY3d 910 [2010]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6885 In re Angel M.,
Petitioner-Appellant,

-against-

Nereida M.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Yisroel Schulman, New York Legal Assistant Group, New York, (Christina Brandt-Young of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Sena Kim-Reuter of counsel), attorney for the child.

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Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about September 17, 2009, which, after a hearing, granted a final order of custody to respondent mother, with visitation to petitioner father, unanimously affirmed, without costs.

The court's determination that it was in the best interests of the child to grant custody to the mother has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The record shows that the father attempted and intended to thwart any relationship between the mother and the child, while the mother was willing to ensure that the father had frequent contact with the child; the mother served as the child's primary caregiver before the father gained de facto custody by

refusing to return the child after a weekend visit; the father failed to attend to the child's educational needs and was not involved in the child's upbringing; and the father had abused the mother, sometimes in the presence of the child (*see Nimkoff v Nimkoff*, 74 AD3d 408, 409 [2010]; *Matter of Shayna R.*, 57 AD3d 262, 263 [2008]). There is no basis to disturb the court's credibility determinations, which are entitled to deference (*Eschbach*, 56 NY2d at 173).

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

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6886 Issac Ainetchi, et al., Index 118597/02
Plaintiffs-Respondents,

-against-

500 West End LLC,
Defendant-Appellant.

_____

Franklin R. Kaiman, New York, for appellant.

Cuddy & Feder LLP, White Plains (Joshua E. Kimerling of counsel), and Connors and Sullivan, P.C., Brooklyn (Edward R. Dorney of counsel), for respondents.

_____

Supplemental judgment, Supreme Court, New York County (Debra A. James, J.), entered March 9, 2011, after a nonjury trial, awarding plaintiffs possession of a mechanical room situated between two residential condominiums at 500 West End Avenue in Manhattan, unanimously reversed, on the facts, with costs, the judgment vacated, and possession of the mechanical room awarded to the owner of Penthouse East. The Clerk is directed to enter judgment accordingly.

The weight of the evidence did not support the trial court's fact-finding determination that the mechanical room at issue belonged to Penthouse West, the unit purchased by plaintiffs (*see Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 571 [2010]). Pursuant to the Offering Plan Floor Plans and the Tax Lot Floor Plans, the mechanical room at issue was contained

within Penthouse East. Although the plans drafted by defendant's architect (the BKS Plans) labeled the mechanical room "W212," this information conflicted with the Door and Finish Schedule also included within the BKS Plans, thereby rendering this document ambiguous (*see Ainetchi v 500 W. End LLC*, 51 AD3d 513 [2008]). Since the BKS Plans are ambiguous, the parties were required to go outside the documents to establish the ownership of the mechanical room (*see NAB Constr. Corp. v City of New York*, 276 AD2d 388, 390 [2000]).

Taking defendant's testimony with the relevant documents, i.e., the Offering Plan, the Tax Lot Plan, and the discrepancies within the BKS Plans (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 57 [2005]; *Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78 [2008]), the evidence supports a fact-finding determination that the mechanical room was initially contemplated within the space attributed to Penthouse East, that the designation of the mechanical room as "W212" was a typographical error, that the mechanical room was, in fact, part of Penthouse

East, and that the mechanical room was connected to Penthouse West because it was easier to do so while the parties settled their dispute as to ownership of this room.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6887 The People of the State of New York, Ind. 656/08
Respondent,

-against-

Mamerto Gonzalez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about January 20, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6888 Angel L. Santiago, Index 13711/06
Plaintiff-Appellant,

-against-

Rusciano & Son, Inc., et al.,
Defendants-Respondents.

_____

David P. Kownacki, P.C., New York (David P. Kownacki of counsel), for appellant.

The Law Offices of Edward M. Eustace, White Plains (Heath A. Bender of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about January 21, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and granted defendants' cross motion (collectively, Owners) for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny the cross motion as to the §§ 240(1) and 241(6) causes of action, and to grant plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff was injured when, while boarding up windows to make the subject premises uninhabitable and to protect it from vandalism in anticipation of demolition, he fell several feet from a ladder. Plaintiff's accident fell within the purview of

section 240(1), since the ladder supplied to plaintiff slipped out from underneath him and did not offer proper protection (*see Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1998]; *see also Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [2004]). Moreover, plaintiff was "altering" the premises within the meaning of Labor Law § 240(1). He was engaged in activities designed to prepare and secure the premises' windows for demolition, thereby "making a *significant* physical change to the configuration or composition of the building" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see Belding v Verizon N.Y., Inc.*, 14 NY3d 751, 752 [2010]).

The Labor Law § 241(6) cause of action was improperly dismissed. Plaintiff was performing work on the premises as it was being prepared for demolition.

Plaintiff's Labor Law § 200 claim was properly dismissed. The accident did not arise from a dangerous condition of the

premises and the Owners did not direct or control plaintiff's work (*see Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268, 269 [2008]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6889 The People of the State of New York, Respondent, Ind. 1772/06

-against-

Reyes Rodriguez, Defendant-Appellant.

_____

Arnold J. Levine, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 19, 2007, convicting defendant, after a jury trial, of robbery in the first degree and conspiracy in the second and fourth degrees, and sentencing him to concurrent terms of 12 years, 6 to 18 years, and 1⅓ to 4 years, respectively, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's credibility determinations.

There was sufficient nonaccomplice testimony to satisfy the accomplice corroboration requirement (*see* CPL 60.22[1]; *People v Morales*, 86 AD3d 147, 162 [2011], *lv denied* 17 NY3d 902 [2011]). Nonaccomplice witnesses provided many corroborating details

including, but not limited to, the description of a vehicle that matched the description of defendant's vehicle.

Defendant did not preserve his claim that a portion of a nontestifying, jointly tried codefendant's remark, made to one of the accomplice witnesses, implicated defendant and thereby violated his right of confrontation. Under the circumstances, merely requesting certain remedies associated with *Bruton v United States* (391 US 123 [1968]) did not suffice to preserve a Confrontation Clause claim, particularly because the court was not alerted to the issue of whether the remark in question was testimonial. We decline to review this claim in the interest of justice.

As an alternative holding, we find no Confrontation Clause violation. The codefendant's remark to the accomplice witness cannot be viewed as testimonial (*see People v Rodriguez*, 47 AD3d 406, 407-408 [2008], *lv denied* 10 NY3d 770 [2008]). Accordingly, the remark was beyond the reach of the Confrontation Clause (*see e.g. United States v Figueroa-Cartagena*, 612 F3d 69, 85 [1st Cir 2010]). Furthermore, the remark in question was not received for its truth, and it did not facially implicate defendant.

Defendant objected, under *Crawford v Washington* (541 US 36 [2004]), to an officer's testimony about how he learned defendant's nickname. However, this testimony did not violate

Crawford, because the officer did not directly place before the jury any testimonial statement by a nontestifying declarant, and this portion of the officer's testimony was not offered for its truth. In any event, were we to find any error, we would find it to be harmless.

Defendant's Confrontation Clause argument concerning the testimony of an expert witness is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, and also find any error to be harmless in any event.

We have considered and rejected defendant's remaining claims.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6890 In re Nora Chierchia, Petitioner, Index 111971/10

-against-

New York City Housing Authority, Respondent.

_____

Vishnick McGovern Milizio LLP, Lake Success (Avrohom Gefen of counsel), for petitioner.

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

_____

Determination of respondent New York City Housing Authority (NYCHA), dated May 12, 2010, terminating petitioner's Section 8 subsidy on the ground that she vacated her subsidized apartment without prior approval from NYCHA, unanimously modified, on the law, to vacate the penalty of termination, and to 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 Supreme Court, New York County [Anil J. Singh, J.], entered January 28, 2011), otherwise disposed of by confirming the remainder of the determination, without costs.

The penalty of termination of petitioner's Section 8 subsidy is disproportionate to the offense under the circumstances (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Although petitioner does not challenge the finding that she had

vacated her subsidized apartment without prior approval from NYCHA, petitioner did not act in bad faith, or with the intent to defraud NYCHA.

The evidence shows that petitioner temporarily relocated from her apartment (Unit 3I) to another unit (Unit 2I), while the landlord performed repairs to her apartment. The two apartments are identical but for the location on different floors. The work was done about one or two weeks later. At that point, petitioner asked to remain in Unit 2I because it was more convenient for her, given her medical conditions. Approximately three weeks following the move, petitioner voluntarily went to the NYCHA office to explain her situation and to ask if she could remain in Unit 2I, believing it would not be a problem since the apartment was in the same building and was identical. While NYCHA argues that petitioner could have cured the violation by returning to the subsidized apartment, there is nothing in the record showing that petitioner was so advised.

Moreover, the record shows that petitioner, whose sole source of income was social security disability, had received a subsidy for 15 years, had lived in the subject apartment for four

years, and had never breached any rules before this violation (*see e.g. Matter of Williams v Donovan*, 60 AD3d 594 [2009]; *Matter of Gray v Donovan*, 58 AD3d 488 [2009]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6892 The People of the State of New York, Ind. 770/08
Respondent,

-against-

Michael Allick,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Chadbourne & Parke LLP, New York (Nicolas A. Stebinger of counsel),for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 12, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of minor inconsistencies in testimony. The testimony of the two principal witnesses was consistent as to

the material facts.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6893 In re Timothy Quinn, Index 111048/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered April 26, 2010, denying and dismissing the CPLR article 78 petition seeking to annul the determination of respondents, dated April 8, 2009, which denied petitioner accidental disability retirement benefits, unanimously affirmed, without costs.

The Medical Board ruled out stress as the cause of petitioner's cardiomyopathy, and concluded that there was no known association between exposure to toxins at the World Trade Center disaster recovery and clean up sites and the development of viral myocarditis. The Board of Trustees were entitled to rely on this finding to overcome the presumption of General Municipal Law § 207-k (*see Matter of Lo Pinto v Ward*, 124 AD2d 497 [1986]; *Matter of Goldman v McGuire*, 101 AD2d 768, 770

[1984], *affd* 64 NY2d 1041 [1985]). Petitioner acknowledges that cardiomyopathy is not a qualifying condition under Administrative Code § 13-252.1[1][a] and Retirement and Social Security Law § 2[36][c], related to illness incurred in connection with World Trade Center recovery and clean up operations.

We have reviewed petitioner's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6895 In re Zion F.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 10, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and second degrees, criminal sexual act in the first degree and sexual misconduct, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request to convert the proceeding to a person in need of supervision proceeding, and instead adjudicated him a juvenile delinquent and placed him on probation. An 18-month period of probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for

protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of the underlying offenses, appellant's lack of remorse and denial of responsibility, and the recommendations by the Probation Department and a psychologist that he be placed on probation.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6896 Jeffrey Santos, Claims No. 109907
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

_____

Andrew F. Plasse, New York, for appellant.

Eric T. Schneiderman, Attorney General, New York (Frank K. Walsh of counsel), for respondent.

_____

Order, Court of Claims, New York County (Alan C. Marin, J.), entered on or about July 28, 2010, which dismissed plaintiff's claim against the State for unjust conviction and imprisonment on the grounds that the claim was not verified in accordance with Court of Claims Act § 8(b)(4), unanimously affirmed, without costs.

The Court of Claims correctly determined that where an individual has failed to personally verify his claim brought pursuant to the Unjust Conviction and Imprisonment Act, that claim must be dismissed (*Long v State of New York*, 7 NY3d 269, 276 [2006]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6897 Herzfeld & Rubin, P.C., Index 104005/09
Plaintiff-Respondent,

-against-

Kshel Realty Corp.,
Defendant-Appellant.

_____

Howard R. Birnbach, Great Neck, for appellant.

Herzfeld & Rubin, P.C., New York (Herbert Rubin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered March 18, 2011, awarding plaintiff the principal amount of $92,507.20, unanimously affirmed, without costs.

Supreme Court, having determined that plaintiff overbilled for its legal services, properly awarded an appropriate fee based on the services rendered. Such award is not a matter of quantum meruit but is based on the parties' retainer agreement.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6898 Barbara Banks, Index 100890/05
Plaintiff-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Margaret G. King of counsel), for appellants.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered March 3, 2010, upon a jury verdict in plaintiff's favor, unanimously affirmed, without costs.

The court properly charged the jury with determining whether, at the time of the accident, defendant police officer was "involved in an emergency operation" of an authorized emergency vehicle, pursuant to Vehicle and Traffic Law § 1104. The officer's operation of his vehicle while investigating a person who, from a truck, made a hand motion and may have waved to the police is not one of the vehicular operations specifically listed in Vehicle and Traffic Law § 114-b as an "emergency operation." Plaintiff on the other hand denied seeing the truck. Thus, whether it was an emergency operation was an issue of fact

(*see e.g. Jordan v County of Suffolk*, 70 AD3d 779 [2010]; *see also Rodriguez v Incorporated Vil. of Freeport*, 21 AD3d 1024 [2005]; *compare Criscione v City of New York*, 97 NY2d 152, 155-158 [2001] [officer undisputedly operating patrol vehicle while responding to police dispatch to investigate 911 call was involved in "emergency operation" as matter of law]).

The court properly allowed plaintiff's economist to testify about future damages, since there was no evidence of a willful or intentional failure to disclose or of prejudice to defendants (*see* CPLR 3101[d]; *St. Hilaire v White*, 305 AD2d 209, 210 [2003]; *McDermott v Alvey, Inc.*, 198 AD2d 95 [1993]). While plaintiff exchanged her expert economist's report only about two weeks before the scheduled start of the trial, the exchange was made only three days after the report was issued. Given that the bill of particulars pleaded continuing lost earnings, defendants cannot be said to have been surprised by the expert exchange. In any event, they cannot now complain of prejudice, having failed to move to exclude the testimony until after the trial began (*see Freeman v Kirkland*, 184 AD2d 331 [1992]). The economist's assumption that plaintiff was unable to work was "fairly inferable from the record" (*Williams v Turner Constr.*, 2 AD3d 217 [2003]).

The court also properly allowed plaintiff's treating

orthopedic surgeon to testify as to the possible need for future knee replacement surgery, despite plaintiff's noncompliance with 22 NYCRR 202.17(g) (*see* 22 NYCRR 202.17[h]; *McDougald v Garber*, 135 AD2d 80, 94-95 [1988], *mod on other grounds* 73 NY2d 246 [1989]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6899 The People of the State of New York, Respondent,

Ind. 16248C/05

-against-

Francisco Martinez,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered October 21, 2008, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 17 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning the credibility and reliability of witnesses, and its rejection of defendant's third-party-culpability defense.

The court properly exercised its discretion in receiving rebuttal evidence concerning the type of baseball bat used during the incident by the person claimed by defendant to be the actual

perpetrator (*see e.g. People v Harrington*, 262 AD2d 220 [1999], *lv denied*, 94 NY2d 823 [1999]). Under the circumstances, the nature of the instrument was material to the case.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6901 Kingdom Associates, Inc., Index 105059/10
Plaintiff-Appellant,

-against-

T.H.I. Properties, Ltd.,
Defendant-Respondent,

John Doe No. "1," et al.,
Defendants.

_____

Agovino & Asselta, LLP, Mineola (Robert C. Buff of counsel), for appellant.

Silverman Sclar Shin & Byrne PLLC, New York (Thomas Hunter Herndon, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 17, 2011, which granted defendant T.H.I. Properties, Ltd.'s (defendant) motion to stay this action, pursuant to CPLR 2201, pending the outcome of an earlier filed action, unanimously affirmed, without costs.

The motion court applied the proper standard for a stay (*see Buzzell v Mills*, 32 AD2d 897 [1969]). The instant parties are both parties to the prior action, and defendant's cross claims

against plaintiff in that action allege that plaintiff was negligent in performing the construction services for which it seeks payment in this action.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6902 H Eighth Avenue Associates, LLC, Plaintiff-Respondent-Appellant, Index 103296/10

-against-

Stessa Corp., Defendant-Appellant-Respondent.

_____

Akin Gump Strauss Hauer & Feld LLP, New York (Sean E. O'Donnell of counsel), for appellant-respondent.

Herrick, Feinstein LLP, New York (Ross L. Hirsch of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered November 7, 2011, which, insofar as appealed from, granted plaintiff's motion for summary judgment dismissing defendant's counterclaim for specific performance, denied defendant's cross motion for summary judgment on the counterclaim and denied plaintiff's motion for sanctions, unanimously affirmed, with costs.

Plaintiff seller could not have cured the notice of pendency problem by the latest of the closing dates selected through no fault of its own, and properly demanded that defendant purchaser elect its remedies pursuant to the limitation of remedies

provision in their contract of sale (*see Mehlman v 592-600 Union Ave. Corp.*, 46 AD3d 338, 342-343 [2007]; *Meisels v 1295 Union Equities Corp.*, 306 AD2d 144, 145 [2003]). The seller properly terminated the contract in light of the purchaser's failure to make the election and demonstrate its financial ability to close (*see Gindi v Intertrade Internationale Ltd.*, 50 AD3d 575 [2008]). In view of the purchaser's counsel's actual knowledge of certain pending litigation, the seller's inaccurate representation that no litigation was pending could not benefit the purchaser (*see Sisler v Security Pac. Bus. Credit*, 201 AD2d 216, 221-224 [1994], *lv dismissed* 84 NY2d 978 [1994]).

We have considered the parties' other contentions and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6904 Waterfall Victoria Master Fund, Ltd,
Plaintiff-Respondent,

-against-

Edward G. Dingilian, etc.,
Defendant-Appellant,

Peggy I. Dingillian, etc., et al.,
Defendants.

Index 113367/08

_____

F. Todd McLoughlin, New York, for appellant.

Jaspan Schlesinger, LLP, Garden City (Antonia M. Donohue of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 18, 2011, which to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff established prima facie its right to foreclosure and to a deficiency judgment against defendant Edward G. Dingilian by producing the mortgage documents underlying the transaction and evidence of nonpayment, which default defendant failed to rebut, as well as the personal guaranty signed by defendant as additional collateral for the mortgage. Defendant

failed to raise an issue of fact as to any defense (*see Hypo Holdings v Chalasani*, 280 AD2d 386 [2001], *lv denied* 96 NY2d 717 [2001]). Defendant's argument that an affidavit in support of the motion was based entirely upon inadmissible hearsay and incorrect information is unpreserved, and in any event, it is unavailing. Further, the court properly permitted plaintiff to discontinue the action against the decedent, who had conveyed the mortgaged property prior to his death (*see DLJ Mtge. Capital Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857 [2008]).

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6905 Olga Romero Nunez, et al., Plaintiffs-Respondents-Appellants, Index 14097/06

-against-

New York Organ Donor Network, Inc., Defendant-Appellant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellant-respondent.

Denise Luparello, P.C., Rockville Centre (Denise Luparello of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 13, 2011, which granted so much of defendant's motion for summary judgment as sought to dismiss the claims of battery, conversion and the loss of the right of sepulcher, and denied so much of the motion as sought to dismiss the claims brought under Public Health Law articles 43 and 43-A, unanimously modified, on the law, to grant the motion as to the Public Health Law claims, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Article 43 of the Public Health Law provides that "[a] person who acts in good faith in accord with the terms of this article or with the anatomical gift laws of another state is not

liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act" (§ 4306[3]). This good faith immunity provision is incorporated into Public Health Law § 4351(10), which provides that "any person or organization acting pursuant to this section, shall be legally responsible for any negligent or intentional act or omission committed by such entity or its employees or agents" (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 56 [2006]). The evidence here presents no issue of fact whether defendant failed to act in good faith in connection with its efforts to obtain the necessary statutory consent for the subject organ donation. Accordingly, all plaintiffs' claims, including those alleging a violation of Public Health Law articles 43 and 43-A, should be dismissed.

Plaintiffs are not entitled to any affirmative relief on their purported cross appeal, because the supplemental record they filed does not contain a notice of cross appeal from the

order (*see Gassab v R.T.R.L.L.C.*, 69 AD3d 511 [2010]; *see also Copp v Ramirez*, 62 AD3d 23, 27-28 [2009], *lv denied* 12 NY3d 711 [2009]). In any event, as indicated, the court correctly dismissed their common-law causes of action.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6907 Michael Coleman, Index 252484/09
Plaintiff-Appellant,

-against-

Richard Joel Korn, Esq.,
Defendant-Respondent.

_____

Michael Coleman, appellant pro se.

Matthew A. Kaufman, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 16, 2010, which, to the extent appealed from, granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

Plaintiff was required to commence this legal malpractice action within three years of defendant's withdrawal as his counsel, but failed to do so (*see* CPLR 214[6]; *cf.* Gonzalez v Ellenberg, 300 AD2d 173, 174 [2002]). Plaintiff's fraud and Judiciary Law § 487 claims were raised for the first time in a surreply, which Supreme Court properly refused to consider (*see* CPLR 2214[b],[c]; *Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [2009]).

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

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6908 The People of the State of New York, Respondent, Ind. 4968/08

-against-

Abdul-Malik Muhammad, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about October 6, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6909N New York Rowing Association, Index 652243/11
Petitioner-Respondent,

-against-

The Peter Jay Sharp Boathouse, Inc., et al.,
Respondents-Appellants.

_____

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Gary J. Hacker of counsel), for appellants.

Proskauer Rose LLP, New York (Brian D. Burton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 1, 2011, which granted New York Rowing Association's (NYRA) motion for injunctive relief pending arbitration, unanimously affirmed, with costs.

The parties' agreement, whereby NYRA would manage operations at appellants' boathouse for ten years, beginning in 2003, expressly provided that NYRA could seek arbitration of default disputes arising from NYRA's intentional breach of any provision in the parties' management agreement (*cf. Bowmer v Bowmer*, 50 NY2d 288 [1980]). Here, the appellants, in July 2011, served NYRA with a notice terminating its management services for NYRA's alleged failure to pay them an annual Asset Management Fee, from 2009 through 2011, in accordance with the agreement's terms.

NYRA filed for arbitration and, in support of its instant motion, submitted evidence that demonstrated its intentional breach of the obligation to pay the annual Asset Management Fee. The evidence showed that, from 2007 through 2008, appellants' executive director had stated that the fee was "waived" and, thereafter, appellants themselves allegedly "breached" the parties' management agreement when they unilaterally terminated it in June 2009, effective "immediately," relying on grounds that did not constitute a material default under the terms of the agreement. Moreover, NYRA asserts that it had no obligation to pay the annual Asset Management Fee from 2009 through 2011 because appellants not only terminated the parties' agreement, but, as in the past years, appellants never provided any "advisory services" to earn the right to an annual fee, as per the terms of the management agreement.

Such disputes are covered under the parties' arbitration clause. Furthermore, language in the agreement that expressly

authorizes recourse to injunctive relief to maintain the status quo pending an arbitration award is enforceable (*see e.g. Matter of Slepian v Beanstalk Rests.*, 75 AD2d 749 [1980]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6910N Antonio Rodriguez, Index 303467/10
Plaintiff-Appellant,

-against-

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

_____

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 30, 2010, which granted defendants' motion to change venue from Bronx County to New York County, unanimously reversed, on the law, without costs, and the motion denied.

Bronx County was a proper venue for this action alleging false arrest, false imprisonment, malicious prosecution, assault, battery and civil rights violations. It is uncontested that plaintiff was arrested in Bronx County, and the alleged assault and battery, and related alleged civil rights violations, arose in Bronx County (CPLR 504[3]; *see Garces v City of New York*, 60 AD3d 551 [2009]). Moreover defendants did not make a demand for a change of venue as required by CPLR 511(a). Defendants have

made no showing that the convenience of witnesses required a change of venue to New York County, nor have they persuasively argued that the ends of justice favor such a change (CPLR 510[3]).

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

ENTERED: FEBRUARY 23, 2012

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6301-
6302

Patrick Naughton, Jr.,
Plaintiff-Appellant-Respondent,

Index 104026/05
591166/06

-against-

The City of New York,
Defendant,

Petrocelli Construction, Inc.,
Defendant-Respondent-Appellant.

- - - - -

Petrocelli Construction, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

W & W Glass Systems, Inc.
Third-Party Defendant-Respondent-Respondent,

Metal Sales Co., Inc.,
Third-Party Defendant-Respondent-Appellant.

_____

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

Malapero & Prisco, LLP, New York (Andrew L. Klauber of counsel), for Petrocelli Construction, Inc., respondent-appellant.

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for Metal Sales Co., Inc., respondent-appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent-respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered on or about December 2, 2010, modified, on the law, to reinstate plaintiff's Labor Law §§ 240(1) and 241(6) claims, grant plaintiff summary judgment as to liability on his § 240(1) claim against Petrocelli, reinstate Petrocelli's claim for contractual indemnification against W & W Glass, and otherwise

affirmed, without costs. Appeal from order, same court and Justice, entered April 12, 2011, dismissed, without costs, as academic.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, JJ.

6301-6302
Index 104026/05
591166/06

_____x

Patrick Naughton, Jr.,
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant,

Petrocelli Construction, Inc.,
Defendant-Respondent-Appellant.

- - - - -

Petrocelli Construction, Inc.,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

W & W Glass Systems, Inc.
Third-Party Defendant-
Respondent-Respondent,

Metal Sales Co., Inc.,
Third-Party Defendant-
Respondent-Appellant.

_____x

Appeals from the order of the Supreme Court, New York County (Martin Shulman, J.), entered on or about December 2, 2010, which, insofar as appealed from as limited by the briefs, denied

plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, granted the cross motions of defendant Petrocelli Construction, Inc. and third-party defendants W & W Glass Systems, Inc. and Metal Sales Co., Inc. for summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims, denied Petrocelli's cross motion for summary judgment on its common-law and contractual indemnification claims against W & W Glass Systems, and for contractual indemnification against Metal Sales, granted W & W Glass's cross motion for summary judgment dismissing Petrocelli's claims for common law and contractual indemnification against it, granted Metal Sales's cross motion for summary judgment dismissing Petrocelli's claim for contractual indemnification against it, and granted W & W Glass's cross motion for contractual indemnification against Metal Sales as to liability, and from the order of the same court and Justice, entered April 12, 2011, which granted plaintiff's motion to reargue, and, upon reargument, adhered to the prior order.

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

Malapero & Prisco, LLP, New York (Andrew L. Klauber and Frank L. Lombardo of counsel), for Petrocelli Construction, Inc., respondent-appellant.

Litchfield Cavo LLP, New York (Joseph E. Boury and Beth A. Saydak of counsel), for Metal Sales Co., Inc., respondent-appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent-respondent.

RICHTER, J.

In this Labor Law action, plaintiff alleges that he was injured when he fell approximately 15 feet to the ground while unloading bundles of curtain wall panels off a flatbed truck. The panels were part of a renovation project of the Family Court building in Lower Manhattan, and were to be used for the building's facade. Defendant Petrocelli Construction, Inc. was the general construction contractor for the job. Petrocelli retained third-party defendant W & W Glass Systems, Inc. to perform all curtain wall, glass and stone work. W & W Glass, in turn, subcontracted the unloading and installation of the curtain wall panels to third-party defendant Metal Sales Co., Inc., plaintiff's employer.

On the day of the accident, six bundles of curtain wall panels arrived at the work site on a flatbed truck. Each bundle was approximately 10 feet long, 4 feet wide and 10 feet tall. Plaintiff was instructed by his supervisor to climb on top of the bundles, attach each bundle to a crane and make sure the bundles stayed apart while they were hoisted to a sidewalk bridge above. When plaintiff asked his supervisor for a ladder, he was told that a ladder was not needed, and that instead he should climb up the side of the bundles. Plaintiff explained to his supervisor that he did not like being on top of the bundles without a ladder

because there was no way to "get out of there." Despite his protestations, plaintiff was not provided with a ladder.

Plaintiff then climbed to the top of one of the bundles, which was 10-11 feet above the flatbed surface and 15-16 feet above the ground. Plaintiff explained that it was necessary to work on top of the bundles so that he could attach the chokers to the corners and ensure that the bundles did not interfere with each other while being hoisted. Two of plaintiff's coworkers were standing on the street below holding tag lines attached to the bottom of the bundles to control their movement. While standing on an adjacent bundle, plaintiff rigged one of the bundles, and the crane operator began to lift the load. After the load had been lifted several feet, one of the tag lines "got slack," and the bundle began to swing toward plaintiff. According to plaintiff, he retreated as far as he could looking for an escape route, but the bundle hit him and knocked him down 15 feet to the street below.

Plaintiff brought this action alleging violations of, inter alia, Labor Law § 240(1) and § 241(6). Petrocelli commenced a third-party action against W & W Glass and Metal Sales seeking contractual and common-law indemnification, and W & W Glass asserted a cross claim against Metal Sales for contractual indemnification. The parties then filed various motions seeking

summary judgment. By a decision entered on or about December 2, 2010, the motion court dismissed plaintiff's § 240(1) claim, concluding that Petrocelli was not a general contractor or agent under the Labor Law. The court also dismissed the § 241(6) claim finding that the Industrial Code provision relied upon by plaintiff was not specific enough. As for the indemnification claims, the court dismissed Petrocelli's claims for common-law and contractual indemnification against W & W Glass and for contractual indemnification against Metal Sales, and granted W & W Glass's cross motion for contractual indemnification against Metal Sales. These appeals followed.

The motion court should have granted summary judgment to plaintiff on his Labor Law § 240(1) claim. Under that section, owners, general contractors and their agents have "a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). To establish liability on a Labor Law § 240(1) cause of action, a plaintiff is required to show that the statute was violated and that the violation was a proximate cause of his injuries (*Harris v City of New York*, 83 AD3d 104, 108 [2011]).

Here, plaintiff asked his supervisor for a ladder but was told that one was not needed. He specifically explained to the

supervisor that he did not like being on top of the bundles without a ladder because there was no way to get down. Plaintiff testified that when the bundle started swinging toward him, he retreated. Since there was no ladder, he had no way to get off the bundles. Thus, plaintiff has established that the absence of a ladder was a proximate cause of the accident. Since Petrocelli and third-party defendants (defendants) point to no evidence challenging or contradicting plaintiff's assertions, plaintiff should have been granted summary judgment on his § 240(1) claim (*see e.g. Roman v Hudson Tel Assoc.*, 11 AD3d 346 [2004]).

Aside from Petrocelli's liability for failing to provide a ladder to prevent plaintiff's fall, Petrocelli is independently liable under § 240(1) for failing to provide a secure method of hoisting the bundles. In addition to "falling worker" cases, Labor Law § 240(1) applies where a plaintiff is struck by a falling object that was improperly hoisted or inadequately secured (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604). Thus, § 240(1) "was designed to prevent those types of accidents in which the . . . hoist . . . proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object" (*id.* [internal quotation marks omitted]).

Here, the harm plaintiff suffered was the direct consequence

of the application of the force of gravity to the bundle that was being hoisted (*see Runner at 604; Harris* at 109-110; *Ray v City of New York*, 62 AD3d 591 [2009]). The undisputed testimony in the record establishes that after the bundle began its ascent, one of the tag lines "got slack," causing the load to swing toward plaintiff. Thus, plaintiff has shown that the hoist proved inadequate to shield him from harm, and defendants point to no evidence in opposition that would create an issue of fact. Accordingly, plaintiff was entitled to summary judgment on his § 240(1) claim.

There is no merit to defendants' contention that plaintiff's accident is outside the scope of § 240(1) because it resulted from a usual and ordinary danger of a construction site. Plaintiff's fall from a height of 15-16 feet above the ground constitutes precisely the type of elevation-related risk envisioned by the statute (*see Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321 [2009] [the plaintiff's fall while unloading 10-foot high bundles of insulation from a flatbed trailer constitutes an elevation-related risk greater than merely falling from the bed of the trailer]; *Ford v HRH Constr. Corp.*, 41 AD3d 639 [2007] [fall from the top of a stack of curtain wall panels on a flatbed truck within the scope of § 240(1)]; *see also Ortiz v Varsity Holdings, LLC*, __ NY3d __, 2011 NY Slip Op 9161 [2011]

[declining to dismiss § 240(1) claim where the plaintiff fell six feet off the edge of a dumpster]).

There is no plausible view of the evidence that plaintiff's own acts or omissions were the sole proximate cause of the accident (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 [2005]). Defendants argue, pointing to an accident report in the record, that plaintiff was solely to blame because he jumped onto the truck bed and then onto the street. Whether plaintiff was hit by the swinging bundle or jumped to get out of its way, it cannot be said that plaintiff was the sole proximate cause of his injuries (*see e.g. Sherman v Piotrowski Bldrs.*, 229 AD2d 959 [1996]; *Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1995]; *Lockwood v National Valve Mfg. Co.*, 143 AD2d 509 [1988]).

The court erred in dismissing plaintiff's claim under Labor Law § 241(6). 12 NYCRR 23-6.1(h) provides that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines." This Industrial Code provision "sets forth a specific standard of conduct and not simply a recitation of common-law safety principles" (*St. Louis v. Town of N. Elba*, 16 NY3d 411, 414 [2011]). We recognize that other Courts have concluded that the regulation is not sufficiently specific to establish a § 241(6) violation (*see Morrison v City of New York*, 5 AD3d 642, 643 [2d Dept 2004]; *Smith v Homart Dev. Co.*, 237 AD2d

77, 80 [3d Dept 1997]). However, we have previously found that analogous regulations (*see* 12 NYCRR 23-8.2[c][3] ["A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard"]) can give rise to liability under § 241(6) (*see McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 309 [2007]; *Cammon v City of New York*, 21 AD3d 196, 201 [2005]). Although tag lines were used here, there is sufficient evidence that the tag lines did not properly control the movement of the load as it was lifted. Thus, a jury should be permitted to determine whether plaintiff may recover under § 241(6).

Defendants unpersuasively argue that Petrocelli was not a general contractor for purposes of liability under Labor Law § 240(1) and § 241(6). The record shows that Petrocelli was delegated plenary authority over the construction work at the site, which included the authority to supervise and control the work performed by its subcontractors, and was therefore a statutory agent of the owner or general contractor of the work site liable under the Labor Law (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Moreover, Petrocelli demonstrated this authority by subcontracting all curtain wall, glass, stone & metal work to W & W Glass, which engaged plaintiff's employer, Metal Sales, to unload, distribute and erect the curtain wall

panels at the site (*see Weber v Baccarat, Inc.*, 70 AD3d 487 [2010]; *Williams v Dover Home Improvement*, 276 AD2d 626 [2000]). Whether Petrocelli actually supervised plaintiff is irrelevant (*see Burke v Hilton Resorts Corp.*, 85 AD3d 419, 420 [2011]).

The motion court properly dismissed Petrocelli's claim for common-law indemnification against W & W Glass. To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d at 377-378; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]).

Petrocelli has met the first prong of the test. There is no showing that Petrocelli was negligent, and Petrocelli's liability is purely vicarious. However, there is no evidence in the record that W & W Glass was either negligent or actually supervised or controlled plaintiff's work. It is undisputed that W & W Glass did not perform the installation of the curtain wall panels; that work was subcontracted out to Metal Sales, plaintiff's employer. On the day of the accident, the unloading of the panels from the truck was supervised and directed by a Metal Sales foreman. Although W & W Glass's foreman was on the work site that day,

Petrocelli points to no evidence showing that he was present when plaintiff's accident occurred. More importantly, there is no proof that he, or any other W & W Glass employee, actually supervised or controlled plaintiff's work. Indeed, W & W Glass's president testified that its foreman was only responsible for coordinating the delivery of the panels, and was not required to remain during the unloading.

Petrocelli argues that common-law indemnification is warranted because W & W Glass was contractually required to supervise plaintiff's work. However, in *McCarthy*, the Court of Appeals made clear that "a party's . . . [contractual] authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification" (17 NY3d at 378). Rather, liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work (*id.* at 376, 378). Since there is no view of the evidence that W & W Glass actually supervised or controlled plaintiff's work, or was otherwise negligent, Petrocelli's common-law indemnification claim was correctly dismissed.

However, the motion court should not have dismissed Petrocelli's claim for contractual indemnification against W & W Glass. The contract between the parties requires W & W Glass to

indemnify Petrocelli for claims arising out the performance of W & W Glass's work, but only to the extent caused by the negligent acts or omissions of W & W Glass, its sub-subcontractors (*i.e.*, Metal Sales), or anyone directly or indirectly employed by them. Thus, the indemnification provision is triggered if the accident was caused by the negligence of *either* W & W Glass or Metal Sales, or their employees. Although the record is devoid of proof of W & W's negligence, there is evidence that the accident may have been caused by the negligence of the Metal Sales's employees who did not properly control the tag lines. Thus, the contractual indemnification claim against W & W Glass should not have been dismissed.

There is no merit to Petrocelli's contention that it is entitled to summary judgment on this claim. First, Petrocelli argues that the record establishes Metal Sales's negligence as a matter of law based on the theory of res ipsa loquitur. In response, W & W Glass maintains that res ipsa is not applicable to the facts of this case. Res ipsa loquitur is a form of circumstantial evidence that creates a permissible inference of negligence that may be accepted or rejected by the factfinder (*Tora v GVP AG*, 31 AD3d 341 [2006]). The only instance when res ipsa can be established as a matter of law is "when the plaintiff's circumstantial proof is so convincing and the

defendant's response so weak that the inference of [the] defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). We need not decide whether res ipsa loquitur applies here because even if it did, it cannot be said that the inference of Metal Sales's negligence is inescapable.

Next, Petrocelli contends that W & W Glass, during motion practice below, made a judicial admission that Metal Sales was negligent. Specifically, Petrocelli maintains that W & W Glass's argument before the motion court that plaintiff was the sole proximate cause of the accident constitutes a judicial admission of plaintiff's negligence. Thus, according to Petrocelli, W & W Glass has admitted Metal Sales's negligence under a respondeat superior theory. However, in order to constitute a judicial admission, the statement must be one of fact (*People v Brown*, 98 NY2d 226, 232 n 2 [2002]; *GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 624 [2011]; *Rahman v Smith*, 40 AD3d 613, 615 [2007]). Here, the legal arguments made by W & W Glass's counsel in its motion papers below do not constitute judicial admissions (*see Mesler v Podd, LLC*, 89 AD3d 1533, 1536 [2011]; *Rahman* at 615).

The motion court properly granted W & W Glass's motion for summary judgment on its contractual indemnification claim against

Metal Sales. Metal Sales and W & W Glass entered into a purchase order for the unloading and erection of the curtain wall panels. The indemnity provision in that order provides that Metal Sales agrees to indemnify W & W Glass for claims "arising directly or indirectly out of this order," and requires no showing of negligence by Metal Sales. Since there is no question that plaintiff's accident arose out of the purchase order, W & W Glass is entitled to be indemnified (*see Velez v Tishman Foley Partners*, 245 AD2d 155 [1997]). Because we have found that W & W Glass was not negligent, enforcement of the contractual indemnification provision does not run afoul of General Obligations Law § 5-322.1 (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 224 [2003], *lv denied* 100 NY2d 508 [2003]; *Velez*, 245 AD2d at 157).

Metal Sales's motion for summary judgment dismissing Petrocelli's claim for contractual indemnification was properly granted. Petrocelli and Metal Sales were not in contractual privity with each other, and the purchase order between W & W Glass and Metal Sales does not make Petrocelli a third-party beneficiary thereof, nor does it incorporate by reference the terms of the subcontract between Petrocelli and W & W Glass (*see Vargas v New York City Tr. Auth.*, 60 AD3d 438, 440 [2009]).

Accordingly, the order of the Supreme Court, New York County (Martin Shulman, J.), entered or on about December 2, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, granted the cross motions of defendant Petrocelli Construction, Inc. and third-party defendants W & W Glass Systems, Inc. and Metal Sales Co., Inc. for summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims, denied Petrocelli's cross motion for summary judgment on its common-law and contractual indemnification claims against W & W Glass Systems, Inc. and for contractual indemnification against Metal Sales, granted W & W Glass' cross motion for summary judgment dismissing Petrocelli's claims for common law and contractual indemnification against it, granted Metal Sales' cross motion for summary judgment dismissing Petrocelli's claim for contractual indemnification against it, and granted W & W Glass' cross motion for contractual indemnification against Metal Sales as to liability, should be modified, on the law, to reinstate plaintiff's Labor Law §§ 240(1) and 241(6) claims, grant plaintiff's motion for summary judgment as to liability on his § 240(1) claim against Petrocelli, reinstate Petrocelli's claim for contractual indemnification against W & W Glass, and otherwise affirmed, without costs. The appeal from the order of

the same court and Justice, entered April 12, 2011, which granted plaintiff's motion to reargue, and, upon reargument, adhered to the prior order, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: FEBRUARY 23, 2012

CLERK

Andrias, J.P., Saxe, Acosta, Freedman, Richter, JJ.

6861 In re New York Skyline, Inc., et al., Petitioners-Appellants, Index 106840/11

-against-

City of New York, et al., Respondents-Respondents.

_____

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

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

_____

Judgment, Supreme Court, New York County (Donna Mills, J.), entered October 17, 2011, reversed, on the law, without costs, the judgment vacated, and the petition granted to the extent of annulling and vacating respondents' determinations as to the applicability of Administrative Code of the City of New York § 20-452 and § 20-453 to the sale of tickets to Skyride, and declaring that New York Skyline's ticket agents' sales of admission tickets to Skyride on the public sidewalks do not qualify them as "general vendor[s]," as defined by Administrative Code § 20-452(b), and that New York Skyline's ticket agents do not require a general vendor license to sell Skyride tickets under Administrative Code § 20-453. The Clerk is directed to enter judgment accordingly.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Rolando T. Acosta
Helen E. Freedman
Rosalyn H. Richter, JJ.

6861
Index 106840/11

_____x

In re New York Skyline, Inc.,
et al.,
Petitioners-Appellants,

-against-

City of New York, et al.,
Respondents-Respondents.

_____x

Petitioners appeal from a judgment of the Supreme Court, New York County (Donna Mills, J.), entered October 17, 2011, which denied the petition and dismissed the proceeding.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro, Jennifer H. Rearden, Akiva Shapiro, Seema Gupta and Matthew W. Knox of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman, Francis F. Caputo, Mark Muschenheim and Melanie V, Sadok of counsel), for respondents.

RICHTER, J.

In this appeal, we are asked to decide whether the sale on public sidewalks of admission tickets to New York Skyride, a simulated helicopter trip around New York City, requires a general vendor license under § 20-452 and § 20-453 of the Administrative Code of the City of New York. We hold that because neither the Skyride experience nor the admission tickets constitutes goods or services, a general vendor license is not required.

Petitioner New York Skyline, Inc. (Skyline) is an entertainment company that created and manages the New York Skyride, a simulated helicopter experience. The Skyride experience, which takes place on the second floor of the Empire State Building, includes a brief lecture about the Empire State Building followed by a 15-minute film narrated by actor Kevin Bacon. The film, which features music and special effects, takes visitors on a virtual helicopter ride over New York City and its landmarks.

Skyline has been operating Skyride since 1994, and currently employs 110 people, including 40 ticket agents; the company also independently contracts with another 27 ticket agents. Since 2003, these agents have marketed and sold tickets to Skyride on public sidewalks near the Empire State Building. The agents

process the sales using small handheld devices that charge the customers' credit cards and print the tickets. Approximately 60% of Skyline's ticket sales comes from selling tickets on the sidewalks.

In April 2011, respondent New York City Police Department (NYPD) started issuing summonses to Skyline's agents for selling tickets on the public sidewalks without a general vendor license, purportedly in violation of § 20-453 of the Administrative Code. General vendor licenses are administered by the New York City Department of Consumer Affairs (DCA). According to the DCA website, the maximum number of licenses issued to non-veterans is limited to 853, and the waiting list is currently closed.[1] Thus, if the statute is enforced against the ticket agents, Skyline would be unable to obtain a vending license. Skyline maintains that if it is required to permanently suspend street sales, it will be forced out of business.

At first, NYPD issued summonses that were returnable at the offices of respondent New York City Environmental Control Board (ECB), the agency that adjudicates violations of the general vending laws. In June 2011, NYPD escalated its enforcement

[1] There is no waiting list for veterans and their surviving spouses or domestic partners, who are currently eligible to apply for a license.

strategy, and began arresting alleged violators, requiring them to appear in criminal court. Skyline alleges that 14 notices of violations or summonses have been issued and six ticket agents, including petitioner Calaif Parks, have been arrested for selling tickets without a general vendor license.

Petitioners commenced an article 78 proceeding against respondents City of New York, NYPD, ECB and various City officials seeking to enjoin them from enforcing the general vending statutes against Skyline's ticket agents. Petitioners asserted causes of action alleging that: (1) Administrative Code § 20-452 and § 20-453, which require a "general vendor" to be licensed, do not apply to Skyline's ticket agents because they are not selling "goods or services"; (2) the enforcement of the general vending statutes against the ticket agents constitutes an impermissible limitation on protected expressive activity and thus violates the free speech protections of the State and Federal Constitutions; and (3) the City's and NYPD's enforcement activity is the result of improper influence by Skyline's landlord, and thus constitutes an abuse of discretion.[2] The petition seeks, inter alia, a judgment declaring that: (1) the

[2] Specifically, petitioners allege that the recent crackdown is the result of influence by its landlord, who is alleged to be pursuing a campaign to force Skyline out of the building to make way for a more upscale tenant.

ticket agents' sales of admission tickets to Skyride on the public sidewalks do not qualify them as general vendors under Administrative Code § 20-452(b); and (2) the ticket agents do not require a general vendor license under Administrative Code § 20-453.

In a judgment entered October 17, 2011, Supreme Court denied the petition and dismissed the proceeding. The court found that respondents' determination that Skyline's agents require a general vendor license was rational, and that the sale of tickets to Skyride is the type of conduct that could be regulated by the general vending laws. The court also rejected petitioners' constitutional and improper influence claims. We now reverse and conclude that the sale of admission tickets to Skyride on a public sidewalk does not require a general vendor license under the Administrative Code.

Administrative Code § 20-453 provides, in relevant part, that "[i]t shall be unlawful for any individual to act as a general vendor without having first obtained a license."[3] A "general vendor" is defined as "[a] person who hawks, peddles, sells, leases or offers to sell or lease, at retail, *goods or*

[3] A person violating § 20-453 is guilty of a misdemeanor and is subject to a fine of between $250 and $1,000, possible imprisonment of up to three months, or both (Administrative Code § 20-472).

services . . . in a public space" (Administrative Code § 20-452[b] [emphasis added]). Thus, the statute makes clear that a vendor does not need a license unless the products being sold are either "goods" or "services."

Respondents do not argue that the Skyline admission tickets themselves constitute "goods" that come within reach of the statute. Indeed, any such argument would be unavailing. An admission ticket to an entertainment event is not a commodity in its own right, but is merely a license to enter the event (*see Aaron v Ward*, 203 NY 351, 355 [1911] [ticket for admission to a place of public amusement is a license]; *Impastato v Hellman Enters.*, 147 AD2d 788, 789 [1989] [same]; *People ex rel. Zvirin v Roxy Theater, Inc.*, 8 NYS2d 92, 98 [Magistrates' Ct 1938] [admission tickets to a theater are not merchandise]).

Instead, respondents argue that Skyline's agents are selling a "service," namely the entertainment provided by the Skyride experience. Thus, the critical inquiry here is whether the Skyride experience is a "service." When interpreting a statute, it is fundamental that a court "should attempt to effectuate the intent of the Legislature" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [internal quotation marks omitted]). Since "the clearest indicator of legislative intent is the statutory text, the starting point in any case of

interpretation must always be the language itself, giving effect to the plain meaning thereof" (*id.; see Bluebird Partners v First Fid. Bank*, 97 NY2d 456, 460 [2002] ["in all cases requiring statutory construction, we begin with an examination of the statute's plain meaning"]).

Because the statute does not define the term "service," it should be construed in accordance with its common, everyday meaning (*see Matter of Manhattan Cable TV Servs., Div. of Sterling Info. Servs. v Freyberg*, 49 NY2d 868, 869 [1980]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 94, § 232). As a matter of common parlance, one would not say that the Skyride experience is a "service" *(see Roxy Theater*, 8 NYS2d at 98 ["A theater does not . . . render service"]). For instance, a sports fan does not refer to a ball game as being a "service." Similarly, music lovers do not talk about the "service" they received when listening to a concert. Nor do theatergoers refer to getting a "service" when they attend a play or musical.

In arguing that Skyline provides a "service," respondents present a strained and unnatural construction of that term. When one thinks of a "service," as that word is ordinarily used, things like haircuts, home repair, house cleaning and car washes come to mind. Skyride is more appropriately characterized as a form of entertainment. "Entertainment" is defined as, inter

alia, "a public performance designed to divert or amuse" (Webster's Third New International Dictionary, Unabridged [2002]). That is precisely what Skyride is — visitors are treated to a film featuring music, special effects and a simulated helicopter ride over the city.

Had the City Council intended to include "entertainment" within the reach of the general vending laws, it would have explicitly included that term in the statute. In fact, other state and local statutes show that lawmakers have made a distinction between the terms "service" and "entertainment." For example, Administrative Code § 28-502.1 defines "Outdoor Advertising Business" as the business of selling space on signs for advertising purposes, "whether such advertising directs attention to a business, profession, commodity, service *or* entertainment . . ." (emphasis added). Likewise, "Contribution" is defined in Executive Law § 171-a as "[t]he promise or grant of any money or property . . ., whether or not in combination with the sale of goods, services, entertainment or any other thing of value." Thus, the terms "service" and "entertainment" are enumerated as two separate concepts (*see also* 19 RCNY 14-08[a][1] and [3] [separately referring to "providing goods or services," and "[o]perating a theater or other entertainment business"]; 53 RCNY 1-16[b][5] [defining "gift" as "money, service . . .

entertainment"]).

In urging this Court to interpret the statute as encompassing Skyline's ticket sales, respondents point to certain statements of legislative intent in which the City Council identified street congestion as one of the justifications for enacting the laws (*see e.g.* Local Law No. 50 [1979] of City of NY § 1). Street congestion is not the sole reason these laws were passed; the City Council also pointed to unlicensed vendors' failing to pay taxes, selling defective or counterfeit merchandise, and siphoning off business from tax-paying commercial establishments (*see e.g.* Local Law No. 40 [1988] of City of NY § 1). There is no evidence in the record, nor do respondents argue, that any of these considerations is applicable to Skyline's ticket sales.

The issue on this appeal is not whether preventing the sale of Skyride tickets might help in reducing sidewalk congestion.[4] The question is whether Skyline's agents are selling "goods or services." The expressed legislative intent does little to aid in that inquiry. Merely because one of the legislative purposes was to control street crowding does not mean that the City

[4] We note that the parties point to conflicting evidence as to whether Skyline's ticket agents are causing significant street crowding.

Council intended to include the sale of tickets to an entertainment event within the ambit of the statute if that sales process impacted the flow of pedestrian traffic on the sidewalk. We emphasize, however, that our holding is limited to the issue of whether Skyline ticket agents are general vendors under Administrative Code § 20-452 and § 20-453, and does not preclude respondents from enforcing any other statutes that might be applicable to Skyline's ticket sales, if the agents are, in fact, obstructing sidewalk traffic.

Finally, in construing this statute, respondents urge us to defer to NYPD's interpretation of the statute that the sale of Skyride tickets requires a general vendor license. However, no deference is due because where, as here, "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285 [2009] [internal quotation marks omitted]). Since no fair reading of the statute leads to the conclusion that the Skyride experience, or the tickets themselves, constitute "goods or services," Administrative Code § 20-452 and § 20-453 do not apply. In light of this determination, petitioners' alternative bases for relief need not be addressed.

Accordingly, the judgment of the Supreme Court, New York County (Donna Mills, J.), entered October 17, 2011, denying the petition and dismissing the proceeding, should be reversed, on the law, without costs, the judgment vacated, and the petition granted to the extent of annulling and vacating respondents' determinations as to the applicability of Administrative Code of the City of New York § 20-452 and § 20-453 to the sale of tickets to Skyride, and declaring that New York Skyline's ticket agents' sales of admission tickets to Skyride on the public sidewalks do not qualify them as "general vendor[s]," as defined by Administrative Code § 20-452(b), and that New York Skyline's ticket agents do not require a general vendor license to sell Skyride tickets under Administrative Code § 20-453. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: FEBRUARY 23, 2012

CLERK