SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 26, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6962 In re Charles Goodacre, Index 106093/10
Petitioner-Respondent,

-against-

Raymond Kelly, as the Police Commissioner of the City of New York, etc., et al.,
Respondents-Appellants.

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

Jeffrey L. Goldberg, Port Washington, for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered December 13, 2010, which granted the petition brought pursuant to CPLR article 78 seeking, among other things, to annul respondents' determination denying petitioner police officer accident disability retirement (ADR) benefits, found that petitioner is entitled to such benefits as a matter of law, and remanded the matter to respondents to grant petitioner the ADR benefits and for further processing, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

In this Heart Bill pension case, the court exceeded the scope of its review, which is determining whether "some credible evidence" supported the Medical Board's determination as to disability (*Borenstein v New York City Employees' Retirement Sys.,* 88 NY2d 756, 760 [1996]). The court concluded - contrary to findings of the Medical Board - that although there were conflicting submissions, as a matter of law, petitioner's hypertension may have led to left ventricular hypertrophy or other significant left ventricular dysfunction, which constituted a stress-related condition warranting ADR benefits.

It was the sole province of the Medical Board and the Board of Trustees, not the court, to resolve conflicts in the medical evidence (*Borenstein*, 88 NY2d at 761; *Higgins v Kelly*, 84 AD3d 520, 521 [2011], *lv denied* 18 NY3d 806 [2012]). Here, after making 11 reports over 6 years, having reviewed all of the medical reports and, in its most recent decision, recognizing the conflicting evidence, the Medical Board determined that although petitioner had hypertensive heart disease, he did not have a stress related disability because there was insufficient evidence of "significant left ventricular hypertrophy or other complications."

The Medical Board instead found petitioner disabled due to myocardial bridging, a congenital condition where a muscle band

of the heart lies over the left anterior descending coronary artery. The statutory presumption of General Municipal Law § 207-k (Heart Bill) was overcome by this credible evidence of petitioner's disabling congenital heart condition. The Board opined that bridging can, in certain circumstances, cause ischemia, or a heart attack, but it concluded that job related stress would not be a catalyst for either of these events, and awarded petitioner ordinary disability retirement benefits (*see Matter of Callahan v Bratton*, 253 AD2d 390 [1998] [petitioner not entitled to ADR benefits because job related activities did not predispose petitioner to, or precipitate attacks of, atrial fibrillation]).

Contrary to petitioner's contention, and the court's conclusion, it cannot be said as a matter of law that the cause of petitioner's disability is job related stress (*see Matter of Knorr v Kelly*, 35 AD3d 326 [2006]). The Medical Board's decision was supported by credible evidence and the Board sufficiently set

forth the reasons for its conclusions (*see Matter of Keiss v Kelly*, 75 AD3d 416 [2010]). Accordingly, we reverse the order appealed from, deny the Article 78 petition and dismiss the proceeding.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8012 The People of the State of New York, Respondent, Ind. 388/00

-against-

Ade Ngaii, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David E. A. Crowley of counsel), for respondent.

Order, Supreme Court, New York County (Patricia Nuñez, J.), entered on or about November 18, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of five years plus two years' postrelease supervision, and the matter remanded for further proceedings.

Substantial justice does not dictate denial of resentencing, and we exercise our discretion to specify an appropriate resentence (*see e.g. People v Milton*, 86 AD3d 478 [2011]). The court denied the motion primarily on the basis of defendant's history of failing to complete the residential drug treatment alternative programs to which he had been diverted in 2000 in

connection with the underlying offense, resulting in an escalation of enhanced sentences. However, despite defendant's relapses he managed to stay drug-free in the programs for extended periods of time. Moreover, defendant was only 16 years old at the time of the underlying arrest.

Defendant has made significant strides toward drug rehabilitation during his present imprisonment, and his disciplinary record is not particularly serious. He has taken vocational courses while in prison, and has strong family support, including a place to live upon release and help obtaining future employment. We further note that defendant has no history of violence either in or out of prison, and the remainder of his adult criminal history consists of convictions arising out of an additional street-level drug sale and bail jumping that occurred during his periods of relapse.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8013 Evangelina Alvarez, Index 24360/06
Plaintiff-Respondent,

-against-

Danny Reyes, et al.,
Defendants-Appellants.

Marks, O'Neill, O'Brien & Courtney, P.C. New York (James M. Skelly of counsel), for Danny Reyes and Nacirema Industries Incorporated, appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for New York Times Building, LLC, Amec Construction Management, Inc., Forest City Ratner Companies, LLC, NYT Real Estate Company, LLC and FC Lion, LLC, appellants.

Ronald Paul Hart, New York, for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered April 15, 2011, which, to the extent appealed from as limited by the briefs, upon granting the application of plaintiff's outgoing counsel for certain relief relating to an order rendered orally by the same court (Patricia Anne Williams, J.), on December 16, 2011, directed plaintiff to turn over seven specified pages of the transcript of a sealed ex parte proceeding to defendants, unanimously affirmed, without costs.

In this personal injury action arising from a pedestrian knockdown, plaintiff's prior counsel moved for a hearing on the amount of the charging lien, if any, that the firm was entitled

to. Opposing that motion, incoming counsel made allegations of misconduct, and argued that the alleged misconduct should result in prior counsel's loss of any lien. At the close of a sealed ex parte hearing, at which plaintiff testified, Justice Williams determined that incoming counsel's allegations were unfounded and directed that a hearing on the amount of prior counsel's lien would be held at the resolution of the case. In subsequent motion practice, wherein outgoing counsel sought an order reducing Justice Williams' oral directives to a signed order, defendants demanded a copy of the transcript, arguing that they were entitled to any information which may show that plaintiff's deposition testimony was inaccurate or incomplete.

Plaintiff did not waive her attorney-client privilege here by placing her communications "at issue" (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [2007]). Plaintiff's communications with prior counsel were raised only in the context of a fee dispute between attorneys, which had nothing to do with her suit against defendants. Further, there is no evidence that plaintiff consented to, or was even aware of, incoming counsel's ill-advised statements, made solely for the purpose of freeing the file of any charging lien, and not in furtherance of his client's claim or interests.

Similarly, plaintiff's attorney-client privilege was not

waived under the crime-fraud exception, since the motion court, following a hearing, determined that no such misconduct had occurred (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244 [2008]; *Matter of Grand Jury Subpoena*, 1 AD3d 172 [2003]). Any inquiry into whether the court improperly exercised its discretion in reaching that conclusion is precluded by the fact that this Court was not provided with a copy of the sealed transcript for review. It was defendants' obligation, as appellants, to assemble a proper record on appeal, including taking the initiative to make the sealed transcript available to this Court (*see* CPLR 5526; *Sebag v Narvaez*, 60 AD3d 485 [2009], *lv denied* 13 NY3d 711 [2009]). Similarly, a determination as to whether third parties may have been present, defeating plaintiff’s privilege, an argument defendants themselves admit is speculative, is impossible to reach absent a review of the transcript of the hearing.

Lastly, defendants’ argument that Justice Williams erred in directing plaintiff’s prior and incoming counsel to review the transcript to determine which portions should be disclosed to

defendants is academic. On the instant motion, Justice Aarons reviewed the hearing transcript herself and directed which pages were to be exchanged. Her order added several pages of testimony to the four pages previously selected by plaintiff's counsel.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8014 Ashok Goel, Index 106468/11
Plaintiff-Respondent

-against-

Tower Insurance Company of New York, et al.,
Defendants-Appellants.

Mound Cotton Wollan & Greengrass, New York (Kevin F. Buckley of counsel), for appellants.

Becker & D'Agostino, P.C., New York (Michael D'Agostino of counsel), for respondent.

Order, Supreme Court, New York County (Anil Singh, J.), entered February 21, 2012, which denied defendants' motion for summary judgment dismissing the complaint and directed plaintiff to appear for an examination under oath (EUO) within 90 days, unanimously affirmed, with costs.

Defendants did not establish that plaintiff's failure to comply with the coverage conditions by not sitting for an EUO and by not producing all of the documents sought by defendants, was willful noncompliance with the terms of the subject policy. The motion court properly considered the totality of the circumstances in concluding that plaintiff's conduct was not so willful as to require excusing defendants from liability (*see Erie Ins. Co. v JMM Props., LLC*, 66 AD3d 1282, 1285 [2009]),

particularly where, as here, there is evidence to suggest that defendants may have also breached the terms of the policy. Moreover, the record shows that defendants did not act diligently to obtain plaintiff's cooperation in a manner that was reasonably calculated to bring it about (*see Utica First Ins. Co. v Arken, Inc.*, 18 AD3d 644 [2005]).

There is no basis, at this stage of the proceedings, to dismiss defendant Tower Group, Inc. from the action.

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

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8015 Joseph Palker, Index 105781/10
Plaintiff-Respondent,

-against-

MacDougal Rest. Inc.,
doing business as Off the Wagon,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for appellant.

Sinel & Associates, PLLC, New York (Judith E. Crumpton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 12, 2011, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint solely to the extent of dismissing plaintiff's claim sounding in negligent hiring, retention and supervision, unanimously reversed, on the law, without costs, and the motion granted in its entirety. The Clerk is directed to enter judgment dismissing the complaint.

Supreme Court should have granted defendants' motion in its entirety. Defendant's employee allegedly pushed plaintiff down a flight of stairs. Contrary to plaintiff's contentions, under no fair construction of the complaint or interpretation of plaintiff's own account of the events could the conduct of

defendant's employee be deemed negligent. Plaintiff clearly based his action on an alleged offensive touching. Hence, defendant can be liable, if at all, only for assault and not for negligence (*see Cagliostro v Madison Sq. Garden, Inc.*, 73 AD3d 534 [2010]; *Mazzaferro v Albany Motel Enters.*, 127 AD2d 374 [1987]; *Smiley v North Gen. Hosp.*, 59 AD3d 179, 180 [2009]), regardless of the manner in which the complaint characterized the action (*see Trott v Merit Dept. Store*, 106 AD2d 158, 160 [1985]). As such, defendant cannot be held vicariously liable for its employee's conduct because the statute of limitations elapsed in August 2008 and plaintiff did not commence this action until April 2010 (*see* CPLR 215[3]; *Sola v Swan*, 18 AD3d 363 [2005]).

We reject plaintiff's attempt, for the first time on appeal, to argue that defendant is negligent for breaching its common law duty, as a landowner, to keep its premises safe. Not only does the complaint fail to allege as much, but plaintiff did not allege as much in opposition to defendant's motion. Rather, this is an attempt to circumvent the dismissal of plaintiff's claim for negligent hiring, retention, and supervision by couching that claim in different terms (*see Trott*, 106 AD2d at 160). Plaintiff's negligent hiring, retention, and supervision claim is

beyond the scope of this appeal because Supreme Court dismissed that claim and plaintiff never sought to appeal from that order.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8016 Sannon-Stamm Associates, Inc., Index 106510/08
Plaintiff-Appellant,

-against-

Keefe, Bruyette & Woods, Inc.,
Defendant-Respondent.

A. Bernard Frechtman, New York (Harvey L. Woll of counsel), for appellant.

Eiseman Levine Lehrhaupt & Kakoyiannis, P.C., New York (Eric Aschkenasy of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 12, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff Sannon-Stamm Associates, Inc.'s (SSAI) motion for partial summary judgment on its first cause of action for breach of contract, and granted that branch of defendant's motion for summary judgment as sought dismissal of the first cause of action, unanimously affirmed, without costs.

Contrary to SSAI's contention, its March 15, 2007 e-mail to defendant financial services firm, proposing fee-payment terms for its executive recruitment services, was not sufficiently definite in its material terms to be binding. Moreover, assent by defendant to such terms was not established in the record (*see generally Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). The March 15, 2007

e-mail expressly acknowledged that the material terms of the referral arrangement had not yet been discussed, and defendant's principal, on the same date, responded to the e-mail, "[L]ets discuss next week." The terms were not further discussed during the interview and hiring process of one of the prospective candidates. Defendant's conduct, viewed in the light of its principal's expressed wish to further discuss the referral fee terms, afforded no basis to conclude that its assent to the e-mail's proposed referral fee terms was obtained (*cf. John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In such scenario, SSAI, which aggressively initiated the referral process in the first place, knowingly undertook a risk to provide such services prior to obtaining a formal agreement between the two parties. Indeed, the lack of clarity regarding the method of calculating the alleged referral fee due was evident in that SSAI sought significantly disparate fees, from those sought here, in an earlier action commenced in Civil Court predicated upon the same transaction. Furthermore, the motion court properly found that

SSAI's attempt to rely upon a "prior dealings" theory to argue that defendant purportedly assented to the fee terms in the March 15, 2007 e-mail is unavailing, given the lack of proof of any prior dealings between the instant parties.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8018 In re Wilda C.,
Petitioner-Appellant,

-against-

Miguel R.,
Respondent-Respondent.

Andrew J. Baer, New York, for appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for respondent.

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

Order, Family Court, New York County (Jody Adams, J.), entered on or about October 5, 2011, which dismissed the petition seeking visitation with prejudice and enjoined petitioner from filing any additional custody and/or visitation petitions regarding the subject child without permission of the court, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for further proceedings consistent herewith.

The Family Court did not dismiss the petition on jurisdictional grounds, but on the merits, and thus, the issue of jurisdiction is not properly before this Court on appeal. While respondent urges that a prior order of the Family Court did rule on the issue and has collateral estoppel effect, the record

before this Court is insufficient to make such a determination and the issue should be addressed on remand (*see Matter of Richard W. v Maribel G.*, 78 AD3d 480 [2010]).

It is undisputed that full custody was awarded to respondent in March 2009 (*see* 74 AD3d 631 [2010]). The parties represent that an order of protection was issued the same day directing petitioner to "stay away from [the child] except for court ordered supervised visits after documentation of compliance with mental health treatment," and the child's attorney represents that the order of protection was for a period of one year. As there is no indication in the record before this Court that the order of protection was ever extended or that there is any other outstanding order addressing visitation, dismissal of the petition on the grounds that petitioner failed to allege a change in circumstances warranting modification cannot be affirmed.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8019 In re Carlos G.,

A Child Under Eighteen
Years of Age, etc.,

Bernadette M.,
Respondent-Appellant,

-against-

New York City Administration for
Children's Services,
Petitioner-Respondent.

Latham & Watkins LLP, New York (Daniel DeCederfelt Adams of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

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

Order (denominated a decision), Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about August 2, 2011, which denied respondent mother's motion for transfer of the permanency hearing concerning the subject child from the Referee to a judge or, in the alternative, modification of the order of reference to permit the Referee to hear and report, rather than to hear and determine, unanimously affirmed, without costs.

Although the court's ruling was denominated a "decision" and a decision is not an appealable order under CPLR 5512(a) (*see*

Rodriguez v Chapman-Perry, 63 AD3d 645 [2009]), the denial of the mother's application was appealable because the prior order of reference affected a substantial right, namely the mother's right to have the proceeding determined by a judge (*see General Elec. Co. v Rabin*, 177 AD2d 354, 356 [1991]). Moreover, the mother is an aggrieved party since she has a direct interest in the neglect proceeding, which will have a binding force on her parental rights to the child.

The record does not reflect that the mother ever provided written consent to the order of reference to the Referee to hear and determine, as required by CPLR 4317(a). However, the mother implicitly consented to the order of reference in that she actively participated in the proceedings before the Referee, including pursuing two appeals of the Referee's rulings before this Court, without ever challenging the Referee's jurisdiction (*see* 84 AD3d 629 [2011]; 74 AD3d 687 [2010]; *see also Meredith v City of New York*, 61 AD3d 522 [2009]; *Law Offs. of Sanford A. Rubenstein v Shapiro Baines & Saasto*, 269 AD2d 224 [2000], *lv denied* 95 NY2d 757 [2000]).

The child argues that the issue is moot because a permanency hearing has been scheduled before a Family Court Judge on the same day as the permanency hearing for the child's siblings. However, the issue is not moot because the issues giving rise to

the instant appeal are not resolved by the scheduling of the permanency hearing on the same day as the permanency hearing concerning the child's siblings. The cases have not been consolidated, and the determination that the mother was not entitled to visit the child was made by a Referee, not by a judge, without the mother's written consent.

The interests of justice and judicial economy do not favor revocation of the reference to permit one judge to resolve all issues concerning one family. The proceeding relating to this child is procedurally more advanced than the cases involving his siblings, and permanency for the child should not be delayed to accommodate later filed proceedings.

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

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8020 Mountain Creek Acquisition LLC, Index 650565/11
Plaintiff-Respondent,

-against-

Intrawest U.S. Holdings, Inc.,
Defendant-Appellant.

Satterlee Stephens Burke & Burke LLP, New York (Richard C. Schoenstein of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 14, 2011, which, inter alia, granted defendant's motion to dismiss the complaint solely to the extent of dismissing the third cause of action, unanimously modified, on the law, to dismiss the fifth cause of action for fraudulent inducement, and to strike the request for punitive damages, and otherwise affirmed, without costs.

The parties entered into a Stock Purchase Agreement (Agreement) for the purchase of Mountain Creek, Inc. (MCI), a New Jersey vacation resort, for the price of $15 million to be adjusted by, inter alia, the value of MCI's interim net revenue, to be calculated according to the Agreement. A dispute arose regarding the calculation of the interim net revenue, and plaintiff alleged that defendant refused to resolve the dispute

pursuant to the Agreement. Under the circumstances, plaintiff sufficiently pleaded a breach of the Agreement, which provided a specific method for resolving disputes concerning calculations of the interim net revenue (*see Furia v Furia*, 116 AD2d 694 [1986]).

Defendant represented in the Agreement that its financial statements had accurately presented MCI's results of operations for fiscal year 2009, and plaintiff allegedly later learned that this amount was materially different, especially as concerned MCI's obligations, due to the understatement of the company's liability for warranty reserves, and its insurance expenses. Defendant further represented in the Agreement that it had made no changes to its tax practices, when, according to the complaint, it had, thereby preventing plaintiff from prosecuting a tax appeal. Thus, plaintiff sufficiently pleaded a breach of these sections of the Agreement.

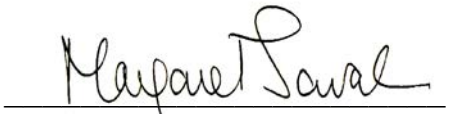
Plaintiff's claim alleging fraudulent inducement is barred by the specific disclaimer in the Agreement (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]), and by its failure to establish reasonable reliance on the alleged oral representations by the named employees (*see HSH Nordbank AG v UBS AG*, __AD3d__, 2012 NY Slip Op 02276 [2012]). Plaintiff, while suspecting that the reported insurance expense figure was "too low," failed to make use of the means of verification that were available to it,

such as examining any further documentation, reviewing the books of MCI, or traveling to MCI's offices to inspect its financials (*see UST Private Equity Invs. Fund v Salomon Smith Barney,* 288 AD2d 87, 88 [2001]; *Rodas v Manitaras*, 159 AD2d 341, 343 [1990]).

Plaintiff's request for punitive damages is stricken, since this was a private transaction, and plaintiff has not alleged any harm to the public nor has there been a showing of a high degree of moral turpitude (*see Steinhardt Group v Citicorp*, 272 AD2d 255, 257 [2000]).

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

ENTERED: JUNE 26, 2012



DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8021 Maria Leon, Index 310713/08
Plaintiff-Appellant,

-against-

Alcor Associates, L.P., et al.,
Defendants-Respondents.

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

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for respondents.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered April 4, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law and plaintiff's opposition failed to raise a triable issue of fact in this action for personal injuries allegedly sustained when plaintiff tripped and fell on the sidewalk in front of property owned and managed by defendants. Defendants demonstrated that the alleged defect in the sidewalk was trivial and nonactionable and did not possess the characteristics of a trap or nuisance (*see Fisher v JRMR Realty Corp.*, 63 AD3d 677, 678 [2009]). The photographs submitted on the motion, and authenticated by plaintiff, showed that the

alleged defect was a gradually sloping patch between two sidewalk flags. The defect was located on a level and dry sidewalk that was maintained in good condition. Moreover, while plaintiff described the sidewalk as "broken," the photographs show a uniformly patched and repaired sidewalk. Plaintiff's testimony also showed that the accident took place during the daylight hours with nothing obstructing her view (*see Losito v JP Morgan Chase & Co.*, 72 AD3d 1033 [2010]).

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8022-
8023 Index 116998/08

Parcside Equity, LLC,
Plaintiff-Respondent,

-against-

Leonard Freedman,
Defendant-Appellant.

- - - - -

Leonard Freedman,
Counterclaim Plaintiff-Appellant,

-against-

Parcside Equity, LLC,
Counterclaim Defendant-Respondent.

_____

Davidoff Malito & Hutcher LLP, New York (Michael Wexelbaum of counsel), for appellant.

Law Offices of Richard I. Wolff, P.C., New York (Richard I. Wolff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered September 8, 2011, in favor of plaintiff, and bringing up for review an order, same court and Justice, entered July 8, 2011, which, to the extent appealed from, denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment declaring that defendant's offer to sell his life insurance policies to plaintiff was irrevocable as a matter of law, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed

in the appeal from the judgment.

Key to this transaction to sell defendant's life insurance policies to plaintiff was paragraph 11 of the subject contract, which stated:

> "Performance. This Agreement has been executed first by the Seller as an offer to sell the Policy hereunder, which offer shall be open for acceptance by the Purchaser until 5:00 p.m. on October 17, 2008, at which time the offer shall be deemed to be withdrawn if this contract has not been returned to the Purchaser and in the Purchaser's sole discretion accepted by the Purchaser by that date or any other date selected by the Purchaser."

As the motion court properly found, this language -- in addition to the numerous documents incorporated with the contract, or executed contemporaneously with the contract on October 8, 2008, which were various "irrevocable" authorizations and consent forms related to the transfer of these policies -- clearly referenced the sale of defendant's life insurance policies to plaintiff, the mutual agreement of the parties, and an intent that such offer be irrevocable (*see PETRA CRE CDO 2007-1, Ltd. v Morgans Group LLC*, 84 AD3d 614, 615 [2011], *lv denied* 17 NY3d 711 [2011]; *American Cyanamid Co. v Elizabeth Arden Corp.*, 331 F Supp 597, 605 [SD NY 1971]).

Defendant nonetheless argues that, even if the offer was irrevocable, it was irrevocable only until October 17, 2008, the "time stated" for revocability, pursuant to General Obligations Law § 5-1109. This section provides:

> "[W]hen an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocablity. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time."

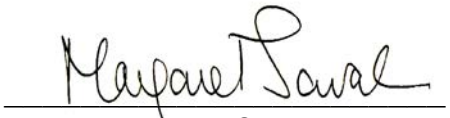
Under the plain language of the contract, plaintiff retained the express right to accept the "irrevocable offer" at its "sole discretion" on any "date selected." This provision is therefore subject only to the "reasonable time" criterion of General Obligations Law § 5-1109. Applying this standard, it would have been impossible for plaintiff to accept the "irrevocable offer" by October 17, 2008 as the contract was not received back from defendant until on or about October 23, 2008, and all required documentation and information was not provided until November 20, 2008. Under these facts and a plain reading of General Obligations Law § 5-1109, as well as paragraph 11 of the subject contract, the motion court properly found that plaintiff's acceptance by December 4, 2008 "was reasonable as a matter of law."

Because the motion court found the offer irrevocable, it properly declined to consider any of the extrinsic evidence.

Yet, even if it had, the undisputed facts establish that, while defendant's representatives attempted to negotiate a higher sale price for one of the life insurance policies, the offer was never actually revoked.

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

ENTERED: JUNE 26, 2012



DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8024 MSCI Inc., et al., Index 651451/11
Plaintiffs-Appellants,

-against-

Philip Jacob,
Defendant-Respondent,

Axioma Inc., et al.,
Defendants.

Pryor Cashman LLP, New York (Lisa M. Buckley of counsel), for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Lance J. Gotko of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 14, 2011, which granted defendant Philip Jacob's motion to dismiss plaintiffs' seventh cause of action alleging that he violated the Computer Fraud and Abuse Act (18 USC § 1030) (CFAA), unanimously affirmed, With costs.

The court properly determined that plaintiffs failed to state a cause of action under the CFAA. Even assuming the truth of the allegations in the complaint (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the CFAA does not encompass Jacob's misappropriation of information that he lawfully accessed while working for plaintiffs or misuse of work computers in

violation of their computer policies (*see United States v Nosal*, 676 F3d 854 [9th Cir 2012]; *see also University Sports Publs. Co. v Playmakers Media Co.*, 725 F Supp 2d 378, 385 [SD NY 2010]).

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

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8025 Aida Cuevas, Index 17673/07
Plaintiff-Appellant,

-against-

1738 Associates, LLC, et al.,
Defendants-Respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Michael P. Stieglitz of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered June 20, 2011, which denied plaintiff's motion for an order "striking defendants' answer and/or directing a verdict in favor of plaintiff and/or finding as a matter of law that defendants had notice of the dangerous condition sufficient to establish liability" due to spoliation of evidence, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion for spoliation sanctions. Plaintiff alleges that defendants destroyed or lost video surveillance tapes that supposedly recorded her slip and fall on a wet substance in the building vestibule. Given the lack of concrete evidence that the accident was even recorded in the first place and that plaintiff is still able to pursue her claim through the deposition

testimony of a non-party witness, the court had a reasonable basis for denying spoliation sanctions (*see Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517, 518 [2006]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]; *Christian v City of New York*, 269 AD2d 135 [2000]).

We have reviewed the remaining contentions and find them unavailing.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8026 Hernan Santa Jr., et al., Index 117927/09
Plaintiffs-Appellants-Respondents,

-against-

Capitol Specialty Insurance, Ltd, et al.,
Defendants-Respondents-Appellants.

Miller Eisenman & Kanuck, LLP, New York (Michael P. Eisenman of counsel), for appellants-respondents.

Havinks Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered January 30, 2012, which, to the extent appealed from, denied plaintiffs' motion for summary judgment declaring that defendant Capitol Specialty Insurance, Ltd. must make $1,000,000 in primary coverage available to plaintiffs, granted defendants' cross motion for summary judgment declaring that the maximum coverage available to plaintiffs through defendant Capitol was limited to $50,000, granted plaintiffs' motion for summary judgment declaring that defendant Redland Insurance Ltd. must make the entire limits of its excess policy in the amount of $4,000,000 available to plaintiffs, and denied defendants' cross motion for summary judgment declaring that no coverage was available under the Redland excess policy, unanimously affirmed, without costs.

In this declaratory judgment action, which arose out of an underlying personal injury action in which plaintiffs alleged that they were assaulted while patrons at a Manhattan nightclub, the $50,000 sublimit applicable to assault and battery coverage in the primary policy applied to all the coverage that was available under the policy, and plaintiffs were not entitled to a disclaimer of coverage pursuant to Insurance Law § 3420(d)(2) (*see Power Auth. of State of N.Y. v National Union Fire Ins. Co. of Pittsburgh*, 306 AD2d 139, 140 [2003]; *cf. Reliance Ins. Co. v Daly*, 67 Misc 2d 23 [1971], *mod on other grounds* 38 AD2d 715 [1972]).

Although the injured plaintiffs, strangers to the insurance policy, may only bring a direct action against the alleged tortfeasor's insurance company for a determination of coverage issues after a judgment had been secured against the tortfeasor (CPLR 3420[b][1]; *Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004]), the parties had the right to stipulate that plaintiffs could commence a declaratory judgment action for a determination of the scope of coverage (*see 1420 Concourse Corp. v Cruz*, 135 AD2d 371, 372 [1987], *appeal dismissed* 73 NY2d 868 [1989]). Although the stipulation explicitly referenced a declaratory judgment action only with respect to the primary policy, plaintiffs' complaint clearly referenced claims against both the

primary and excess policies, and defendants thus waived any objection to a determination of coverage rights under both policies (*see* CPLR 3211[a][3], 3211[e]; *Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 479 [2011], *appeal dismissed* 17 NY3d 922 [2011]). The record also establishes that plaintiffs were not aware of a dispute with respect to the excess policy at the time they entered into the stipulation.

Finally, while the primary policy afforded coverage for assault and battery and related negligence claims up to a sublimit of $50,000, the excess policy, which provided coverage in "like manner" to the primary policy, was silent as to this sublimit and therefore ambiguous. Defendants' representative testified that there was no endorsement applicable to the excess policy that excluded or limited the available coverage for bodily injury resulting from an assault and battery, and his subsequent contradictory affidavit was insufficient to resolve any ambiguity in favor of the insurer (*see Garber v Stevens*, 94 AD3d 426, 426 [2012]; *Kenavan v Empire Blue Cross & Blue Shield*, 248 AD2d 42, 47 [1998]).

Even if the excess policy was not ambiguous, plaintiffs have demonstrated "detrimental reliance, a necessary element of equitable estoppel" (*Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.*, 76 AD3d 468, 469 [2010]). Had plaintiffs learned that defendants

took a position of no coverage with respect to the excess policy on a timely basis, they would have had the option of trying to settle their claims within the $50,000 sublimit, instead of learning that the sublimit had substantially eroded by the time they appeared for trial.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8027 The People of the State of New York, Respondent, Ind. 952/07

-against-

Junal Jordan, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Wachtell, Lipton, Rosen & Katz, New York (C. Lee Wilson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered May 8, 2009, convicting defendant of two counts each of robbery in the first and second degrees, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The record supports the court's determination that, notwithstanding an identification procedure suppressed by the court, the victim had an independent source for his identification of defendant (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149 [1996], *lv denied* 88 NY2d 1072 [1996]). The victim's attention was drawn to defendant before the robbery, he observed defendant under good lighting conditions, at close range, for a significant period of

time, and he gave a detailed description of defendant that included a distinctive physical feature.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's reasons for not seeking to reopen the hearing (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find 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 was originally charged with two other robberies, and was identified by the complainants in those crimes in the same lineup employed in this case. Defendant argues that defense counsel was ineffective because he failed to move to reopen the *Wade* hearing after new evidence – DNA evidence in one instance and the statement of a participant in the crime in the other – led prosecutors to dismiss the charges in the other cases. Even assuming that it would have been sound strategy for counsel to afford the court the opportunity to revisit the issue, defendant has not established a reasonable probability that pursuing this course would have led to suppression of the identification.

Independent source analysis turns on the particular

circumstances under which a particular witness observed the perpetrator. Contrary to defendant's suggestion, the demonstration that defendant was misidentified by witnesses to other crimes in a lineup common to this case does not compel the conclusion that the identification here was the product of undue suggestiveness. Indeed, in one of the dismissed cases, the complaining witness identified defendant in a lineup even though – unlike the victim in this case – she was neither exposed to a suggestive showup nor told, after picking defendant's photograph, that she had picked out the suspect. This highlights that the identification in this case was not necessarily the product of unconstitutional suggestiveness.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8028N Grant Brown, etc., et al., Index 101487/06
Plaintiffs-Respondents,

-against-

Midtown Medical Care Center, et al.,
Defendants-Appellants,

Esther Sumitra-Albert, M.D.,
Defendant.

_____

Patrick F. Adams, P.C., Great River (Steven A. Levy of counsel), for appellants.

Laskin Law PC, Mineola (Michelle F. Laskin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about June 2, 2011, which, insofar as appealed from, in this action alleging medical malpractice, granted plaintiffs' motion to amend the caption and complaint to include a cause of action against Dr. John McKnight, unanimously affirmed, without costs.

Plaintiffs allege a failure to diagnose and properly treat the decedent's lung cancer while she was a patient at defendant Midtown Medical Care Center. For purposes of the statute of limitations, Dr. McKnight is united in interest with Midtown Medical Care Center, with whom he had an employment relationship giving rise to vicarious liability, and allowing the physician to be charged with notice of the action (*see* CPLR 203[c]; *Buran v*

Coupal, 87 NY2d 173, 178 [1995]; *Alamo v Citident, Inc.*, 72 AD3d 498 [2010]; *Cuello v Patel*, 257 AD2d 499, 500 [1999]). Dr. McKnight should have known that, but for plaintiffs' mistake in identifying the treating provider on the dates in questions, he would have been timely named in this action. Moreover, there is no showing of bad faith in plaintiffs' mistake or prejudice (*see Buran* at 178-181; *Austin v Interfaith Med. Ctr.*, 264 AD2d 702, 704 [1999]).

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4207 Eyal Ovadia, et al., Petitioners,

-against-

Office of the Industrial Board of Appeals, et al., Respondents.

Index 101890/10

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for petitioners.

Andrew M. Cuomo, Attorney General, New York (C. Michael Higgins of counsel), for respondents.

Upon remittitur from the Court of Appeals (__ NY3d __, 2012 NY Slip Op 03358 [2012]), determination of respondent Industrial Board of Appeals, dated December 14, 2009, affirming an order of respondent Commissioner of the Department of Labor directing petitioners to pay the claimants unpaid wages, unanimously annulled, on the law, without costs, and the matter remanded for further proceedings.

The Court of Appeals remitted the matter to this Court with directions to remand to the Industrial Board of Appeals for further proceedings in accordance with Court of Appeals' opinion, including "a determination of whether Ovadia made an enforceable promise to pay the workers for their continued work following

Bruten's disappearance and whether the workers relied on his promise by continuing to work at the construction site for the following six days" (*id.* at *6).

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

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

5843 Jose Santiago, Index 303974/07
Plaintiff-Appellant,

-against-

JP Morgan Chase and Company,
Defendant-Respondent.

_____

Elefterakis & Elefterakis, P.C., New York (Nicholas Elefterakis of counsel), for appellant.

Maloof, Lebowitz, Connahan & Oleske, PC, New York (Charles J. Gayner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered July 13, 2010, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Plaintiff seeks damages for personal injuries he sustained when he allegedly slipped and fell on the wet tile floor of defendant's ATM vestibule. In support of its motion for summary judgment, defendant relied primarily upon plaintiff's deposition testimony. Plaintiff testified that his accident occurred on February 25, 2005, at around 11:00 or 11:30 A.M., when he entered the ATM lobby at defendant's bank. At the time, he was wearing rubber boots. It was not raining or snowing, although it had snowed the night before, and it was "icy and slushy" that morning. There was some form of precipitation on the sidewalk in

front of the doorway to the bank, which plaintiff described as "[m]elted ice." The sidewalks in the immediate area were intermittently covered with slush or melted ice and salt.

Plaintiff's accident occurred after he had entered the bank lobby and taken four or five steps inside, past the threshold area. As he walked into the lobby, he wiped his feet on a mat or rug before stepping onto the tiled portion of the floor. He fell as he walked towards the ATMs. Both of plaintiff's feet slipped, causing him to fall backwards. His back and head hit the ground first, causing him to feel weak and dizzy, although he did not lose consciousness.

Plaintiff did not notice the slippery condition of the floor until he fell. There were no signs warning of a wet floor and the lighting conditions were "clear." When the ambulance arrived at the bank, plaintiff realized that his clothes, particularly, the back of his pants, were wet.

Defendant also relied upon the deposition testimony of its facilities manager, Paul Deri, as to its floor covering procedures. Deri testified that the carpet or runner in the ATM vestibule is set into the floor and is not removable and that it is there for customers to wipe their feet on before they enter the main branch. The mat stretches from the entry door, through the ATM vestibule, and up to the interior door leading to the

main lobby. It does not run from the entrance to the ATMs. Deri explained that additional mats would "perhaps" be placed in the ATM vestibule "if weather required it and if [they] were available." He said that the usual and customary procedure for dealing with inclement weather is "to have [our] mats out to keep people's feet dry and clean and things [safe]." Branches could request additional cleaning services "[i]f things got significantly bad." These procedures were not part of any written rule or policy, however, and were typically left to the branch manager's discretion. On the day of the accident, there were no mats in the ATM vestibule.

In opposition to defendant's motion, plaintiff relied upon his deposition, as well as that of nonparty witness Patrick Carroll, a former employee of defendant. Carroll testified that in February 2005, he was a vice president, assigned to manage the branch where plaintiff's accident occurred and was present on the day of the accident, although he did not see the accident happen. Carroll testified further that the branch's customary procedure for inclement weather was to place a yellow tent sign in the main lobby cautioning customers as to the wet floors. During the day, if there was a lot of water in the ATM area, someone would be told to mop it up, but no particular person had the responsibility to maintain the cleanliness of the vestibule.

Carroll specifically stated that when it was wet outside, the tiled area between the embedded mat and the ATM machines would "absolutely" became wet. He said that on the day of the accident, no yellow tent sign was placed in the ATM lobby.

When he reached the ATM lobby, Carroll did not notice any water or ice near the man on the floor. His assumption was that he had slipped on ice or snow that he had carried in from outside on the bottom of his shoes. He explained, "If you are not standing on the rug and you are on the tiles, it will be slippery."

Supreme Court erred in granting summary judgment to defendant, because there are triable issues of fact as to whether an unremedied recurring dangerous condition caused plaintiff's injury (*see e.g. Colbourn v ISS Intl. Serv. Sys*., 304 AD2d 369, 370 [2003]). The record shows that while the previous night's snowstorm had ended well before plaintiff's fall, there was still ice and slush outside, and that when it was wet outside, the tile floor near the ATMs where plaintiff fell became wet. Additionally, there were no mats or yellow tent signs in the ATM vestibule on the day of plaintiff's accident. Contrary to the dissent's allegations, plaintiff does not contend that the tile floor was generally slippery, which is insufficient to establish liability (*see Piacquadio v Recine Realty Corp*., 84 NY2d 967

[1994]). He argues that a slippery condition occurred every time there was inclement weather, in the precise area where he fell and that defendant routinely left it unaddressed (*see David v New York City Hous. Auth.*, 284 AD2d 169, 171 [2001]).

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

FRIEDMAN, J. (dissenting)

Plaintiff seeks to recover damages for injuries he incurred when he slipped and fell in the defendant bank's ATM lobby, which he had just entered from outside. Although it was no longer snowing when the incident occurred, the record establishes — as the majority concedes — that "there was still ice and slush outside" at that time, making it inevitable that people entering the lobby would continuously track moisture onto the floor. There was a permanently inset mat in the floor of the ATM lobby leading from the exterior doorway to the entrance to the main bank lobby, but the tiled floor of the ATM lobby was otherwise uncovered. In opposing defendant's summary judgment motion, plaintiff took the position that the floor on which he slipped was wet before he stepped onto it, although it is not entirely clear from his deposition that he noticed any water on the floor before his mishap. Plaintiff offered no evidence to show how long any wet condition of the floor had existed before the accident, nor did he present evidence that the floor itself was defective in any way.[1] On this record — under principles

[1]The majority suggests, with no basis whatsoever, that I make "allegations" to the effect that plaintiff "contend[s] that the tile floor was generally slippery." I attribute no such contentions to plaintiff; I merely point out that the case presents no issue as to whether the floor was inherently defective.

established by years of case law that the majority simply ignores — defendant is entitled to summary judgment dismissing the complaint. Accordingly, I respectfully dissent.

The majority approaches the uncomplicated and undisputed facts evidenced in the record as if this case were one of first impression. Nothing could be further from the truth. Over the years, New York courts have decided numerous cases presenting the very same fact pattern we see here — a slip and fall on the floor at the entrance to a public building, when the floor was rendered slippery by water or slush tracked in by pedestrians during a period of inclement weather. In such cases, contrary to the majority's holding in this matter, the courts of this state have repeatedly held that a property owner's general awareness that an area becomes wet as a result of inclement weather does *not* constitute constructive notice of the specific condition that gave rise to an accident (*see e.g. Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005], *affg* 21 AD3d 735 [2005]; *Asante v JP Morgan Chase & Co.*, 93 AD3d 429 [2012]; *Rouse v Lex Real Assoc.*, 16 AD3d 273, 274 [2005] ["that rainwater was being tracked into the lobby does not constitute notice of a dangerous condition"]). Further — and, again, directly contradicting the majority's present holding — the courts of this state have also repeatedly held that, at a time of inclement weather, a property

owner has *no duty* either to continuously mop up moisture tracked onto its floors by people entering from outside or to cover its entire floor with mats (*see e.g. Miller v Gimbel Bros.*, 262 NY 107 [1933]; *Thomas v Boston Props.*, 76 AD3d 460, 461 [2010] ["the law imposes no obligation to take continuous remedial action to remove moisture accumulating as a result of pedestrian traffic"]; *Gonzalez-Jarrin v New York City Dept. of Educ.*, 50 AD3d 334, 335 [2008] [property owners "were under no obligation 'to cover the entire floor with mats and to continuously mop up all tracked-in water'"], quoting *Garcia v Delgado Travel Agency*, 4 AD3d 204, 204 [2004]; *Meza v Consolidated Edison Co. of N.Y.*, 50 AD3d 452 [2008]; *Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [2005] [property owner "did not have an obligation to provide a constant remedy to the problem of water being tracked into a building in rainy weather"]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [2000]; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-147 [1999]; *Negron v St. Patrick's Nursing Home*, 248 AD2d 687 [1998]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1995]).

Blithely ignoring the holdings of all of the foregoing cases, the majority in effect holds that defendant could only avoid liability by stationing a worker in the lobby with a mop, continuously mopping up after each person as he or she walked in,

or by covering the entire floor with mats. This is simply not the law. In its determination to reach this result, the majority seemingly pretends that it is writing on a clean slate, addressing a fact pattern never before seen. In fact, New York courts have been deciding cases on similar facts for decades, and have established principles to govern such cases. The majority essentially ignores this body of precedent. Tellingly, the majority does not cite a single case in which the plaintiff allegedly slipped on water that people tracked into a building (as opposed to water that leaked into a building through structural cracks).

Finally, to the extent the majority bases its result on defendant's failure to place a warning sign in the ATM lobby, it cites no precedent authorizing the imposition of liability on a property owner for failing to warn persons entering its building during a period of "ice and slush" that a tiled or stone floor may be slippery due to tracked-in moisture — a risk that is open and obvious to any reasonable person (*see Tagle v Jakob*, 97 NY2d 165, 169 [2001] ["a landowner has no duty to warn of an open and

obvious danger"]). In any event, plaintiff does not argue that defendant may be held liable based on the absence of a warning sign.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6031-
6032 Oxbow Calcining USA Inc., et al., Index 650972/10
Plaintiffs-Respondents-Appellants,

-against-

American Industrial Partners, et al.,
Defendants-Appellants-Respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Maura Barry Grinalds of counsel), for appellants-respondents.

Troutman Sanders LLP, New York (Charles Greenman and Kevin Wallace of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 3, 2011, which denied defendants' motion to the extent that it sought to compel arbitration and dismiss the fraud and fraudulent concealment causes of action or, in the alternative, to stay the action pending a simultaneously commenced Texas arbitration, and which granted the motion to dismiss with respect to the breach of fiduciary duty causes of action, unanimously modified, on the law, to the extent of reinstating plaintiffs' causes of action for breach of fiduciary duty, dismissing the fraud and fraudulent concealment causes of action, and granting the motion to stay the action, and otherwise affirmed, without costs.

The facts gleaned from the first amended complaint (the complaint) are as follows. Plaintiff Oxbow Carbon LLC (Oxbow Carbon) is the immediate parent and sole owner of plaintiff Oxbow Calcining USA Inc. (Oxbow USA), formerly known as Great Lakes Carbon USA Inc. (GLC USA). Oxbow USA, through its subsidiary, nonparty Oxbow Calcining LLC (Oxbow LLC), the arbitration claimant, formerly known as Great Lakes Carbon LLC (GLC LLC), owns and operates a calcining plant in Port Arthur, Texas.

Defendants Rogers and Bingham are former directors of GLC USA and principals of defendant American Industrial Partners (AIP). Defendants American Industrial Partners Capital Fund II, L.P. (AIP Fund II) and American Industrial Partners Capital Fund III, L.P. (AIP Fund III) are affiliates of AIP. In or about 1998, AIP, through AIP Fund II, acquired all of the stock of GLC USA and its subsidiaries, which the complaint refers to collectively as GLC.

The calcining process emits large amounts of waste heat, which can be converted to steam. Adjacent to the calcining plant is a steam plant that Dynergy Power Corp. (Dynergy) owned and operated until sometime in 2000. Pursuant to an agreement between GLC and Dynergy, waste heat was transferred from the calcining plant’s kilns to the steam plant and used to heat generators that produced steam and electricity for sale to end

users. The release of flue gas from both the calcining plant's kiln stacks and the steam plant's boiler stack was conducted pursuant to regulatory permits issued to GLC.

In 2000, GLC purchased the steam plant from Dynergy. Before operations could resume, the plant required refurbishment, including the installation of a new pollution control system, which GLC could not fund.

In 2003, AIP sold a portion of its interest in GLC to the Great Lakes Carbon Income Fund (GLC Income Fund), but continued to hold a controlling interest. In 2004, two competing offers for the purchase of the steam plant and the transfer of waste heat from the calcining plant were submitted to GLC. One was from Cinergy and the other from AIP, which, along with another entity, formed nonparty Port Arthur Steam Energy LP (PASE), the arbitration respondent, for that purpose. Because GLC's AIP directors were conflicted, GLC appointed an independent committee of non-AIP directors to review the competing proposals.

In November 2004, to obtain the committee's approval, AIP, with the knowledge of the individual defendants, represented, as had Cinergy, that it would install electrostatic precipitators in its new pollution control system. Based on defendants' knowledge of GLC, and defendants' representations that AIP would fully protect the interests of GLC and its shareholders, the committee

agreed to accept AIP's proposal. However, AIP soon advised GLC that it would probably be worth installing a magnesium hydroxide injection and multicone pollution control system, which was less expensive and would enable operations to commence sooner. To induce GLC to agree, AIP represented that it would install an effective system at AIP's expense if the injection system failed, and that GLC would never have any monetary liability for the requirement to supply waste heat to PASE. Relying on these representations, GLC sold the steam plant to PASE for $1 and, effective February 25, 2005, entered into a Heat Exchange Agreement (HEA) with PASE whereby PASE agreed to process all waste heat and flue gas from the calcining plant.

In 2005, AIP sold another portion of its interest in GLC to the GLC Income Fund. In 2006, it sold its remaining interest to Rain Commodities (USA) Inc., an unaffiliated third party. In or about May 2007, Oxbow Carbon, LLC purchased the stock of GLC.

Plaintiffs allege that AIP's inadequate injection system, and installation of unlined carbon steel boiler stacks, resulted in excessive and rapid corrosion, causing the stacks to fail. After AIP/PASE refused to fix the problems, Oxbow USA had to fix them, at a cost estimated to be between $6 million and $9 million. Towards this end, Oxbow USA installed a "cooler baghouse" (an added pollution control system), replaced corroded

boiler stacks, and retained experts to conduct testing.

On July 16, 2010, Oxbow LLC demanded arbitration in Texas of claims against PASE for breach of the HEA and related duties. Simultaneously, plaintiffs commenced this action alleging that defendants, as former directors and controlling shareholders of GLC, engaged in fraud before and during the sale of the steam plant to PASE and breached their fiduciary duty to GLC and its shareholders. Plaintiffs also alleged that defendants concealed the material risks created by the inferior pollution control system, causing Oxbow Carbon to overpay for GLC. Shortly after the complaint was filed, defendants moved, inter alia, to compel arbitration.

The Federal Arbitration Act reflects a strong public policy favoring arbitration, a policy New York courts have also promoted (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 48 [1997]; *Matter of Miller*, 40 AD3d 861, 861 [2007]). Nevertheless, “the obligation to arbitrate . . . remains a creature of contract" (*Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc*., 252 F3d 218, 224 [2d Cir 2001], *cert denied* 534 US 1020 [2001]), and parties may structure arbitration agreements to limit both the issues they choose to arbitrate and "*with whom* they choose to arbitrate their disputes"

(*Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.*, __ US __, 130 S Ct 1758, 1774 [2010]). Where, as here, "the parties dispute not the scope of an arbitration clause but whether an obligation to arbitrate exists," the general presumption in favor of arbitration does not apply (*Applied Energetics, Inc. v NewOak Capital Mkts., LLC*, 645 F3d 522, 526 [2d Cir 2011]; *see also Matter Miller*, 40 AD3d at 862).

Guided by these principles, we find that Supreme Court correctly denied defendants' motion to compel arbitration. Neither plaintiffs nor defendants are signatories to the agreement to arbitrate. While the arbitration provision in the HEA is broad, covering "[e]very dispute of any kind or nature between the Parties arising out of or in connection with this Agreement," the HEA defines the term “Parties” as GLC LLC, now Oxbow Calcining USA Inc, and PASE, the arbitration claimant and respondent.

Nor are plaintiffs subsidiaries of or the successors in interest to GLC LLC. Although they are the grandparent and parent companies to Oxbow LLC, which is the successor to GLC LLC, "[i]nterrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration" (*World Bus. Ctr. v Euro-American Lodging Corp*, 309 AD2d 166 [2003] *citing TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 340 [1998]). A parent corporation's complete

ownership of a subsidiary's stock is also insufficient, by itself, to pierce the corporate veil (*see De Jesus v Sears, Roebuck & Co., Inc.*, 87 F3d 65, 69 [2d Cir 1996], *cert denied* 519 US 1007 [1996]; *Thomson-CSF, S.A. v American Arbitration Assn*, 64 F3d 773, 780 [2d Cir 1995] ["Anything short of requiring *a full* showing of some accepted theory under agency or contract law imperils a vast number of parent corporations"]).

Defendants contend that the nonsignatory plaintiffs must arbitrate under an estoppel theory. However, there is little authority for enforcing an arbitration provision between two nonsignatories (*see Invista S.A.R.L. v Rhodia, S.A.*, 625 F3d 75 [3d Cir 2010]; *American Personality Photos, LLC v Mason*, 589 F Supp 2d 1325, 1331 [SD Fla 2008]; *Amstar Mtge. Corp. v Indian Gold, LLC*, 517 F Supp 2d 889, 900 [SD Miss. 2007]). Even if estoppel may be raised in this situation, a nonsignatory may be estopped from avoiding arbitration where it “knowingly accepted the benefits of an agreement with an arbitration clause” (*MAG Portfolio Consultant, GMBH v Merlin Biomed Group LLC*, 268 F3d 58, 61 [2d Cir 2001] [internal quotation marks and citation omitted]). The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the

arbitration provision in pursuing its claim (*see Matter of SSL Intl., PLC v Zook*, 44 AD3d 429 [2007]; *American Bureau of Shipping v Tencara Shipyard S.P.A.*, 170 F3d 349, 353 [2d Cir 1999]). Here, plaintiffs did not assume performance of the HEA and did not derive a direct benefit therefrom. Rather, plaintiffs are suing defendants in their capacity as former fiduciaries of GLC who allegedly fraudulently misrepresented facts and engaged in self-dealing. Accordingly, plaintiffs are not equitably estopped from avoiding the agreement's obligation to arbitrate.

Arbitration of the claims against the individual defendants is not required, since the alleged misconduct does not relate to their behavior as officers, directors, or agents of PASE, the other signatory to the agreement, but, rather, to their behavior as former directors of GLC USA (*see Hirschfeld Prods. v Mirvish*, 88 NY2d 1054 [1996]).

The fraud claim should have been dismissed since it merely alleges an intent not to perform future contractual obligations (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478 [2010]; *Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [2010]).

The fraudulent concealment claim should also have been

dismissed. To state a claim for fraudulent concealment, a plaintiff must allege: (1) that the defendant had a duty to disclose certain material information but failed to do so; (2) that the defendant then made a material misrepresentation of fact; (3) that said misrepresentation was made intentionally in order to defraud or mislead; (4) that the plaintiff reasonably relied on said misrepresentation; and (5) that the plaintiff suffered damage as a result (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586 [2009]). Plaintiffs failed to allege that, at the time of the subject transactions, they were known parties that could be expected to rely on defendants' representations or omissions (*see e.g. Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370 [2010]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1996]). They alleged conclusorily that defendants intended to cause them harm, based on a possibility that the injection system might fail some day. However, former directors of a company do not owe a duty to disclose information to future, unknown purchasers.

Supreme Court erred in dismissing plaintiffs' breach of fiduciary duty claims as time-barred under CPLR 202 at this procedural stage. Where a nonresident brings a cause of action that accrued outside of New York, CPLR 202 applies, and the action must be timely in both New York and the other jurisdiction

(*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*id.* at 529). In the case of a corporate plaintiff, that may be the state of incorporation or its principal place of business (*id. at* 529-30; *see also Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580, 580-581 [2010]; *Brinckerhoff v JAC Holding Corp.*, 263 AD2d 352, 353 [1999]). Plaintiffs allege that Oxbow USA is a Delaware corporation formerly known as GLC USA, doing business in New York and Texas and "formerly having its principal place of business at 551 Fifth Avenue . . .," with its current principal place of business in Florida; that the causes of action set forth arose in New York; and that from August 2003 until 2005, AIP and GLC's [GLC USA and its subsidiaries] offices were located in New York. Read together, these allegations, if proven, would establish that plaintiffs' principal office was in New York when the cause of action accrued. Defendants did not submit documentary evidence that would conclusively disprove these allegations (*see e.g. Romanelli v Disilvio*, 76 AD3d 553, 554 [2010]). Any ruling on whether the borrowing statute applies would require a factual determination as to the principal residency of GLC USA and its

subsidiaries, which is inappropriate on motion to dismiss (*see e.g. United Bhd. of Carpenters & Joiners of Am. v Nyack Waterfront Assoc.*, 212 AD2d 778 [1995]).

Verizon Directories Corp. v Continuum Health Partners, Inc. (74 AD3d 416 [2010], *lv denied* 15 NY3d 716 [2010]) is inapposite. In *Verizon*, we rejected the plaintiff's contention that it was a resident of New York, or that its cause of action accrued in this State, by virtue of its authorization to do business and asserted extensive presence here. Verizon did not claim that its principal office was in New York.

Accordingly, the motion to dismiss the breach of fiduciary duty cause of action as time-barred under the borrowing statute is premature and is denied without prejudice to renewal after further discovery. Should it be determined on renewal that the borrowing statute does not apply, the claims on behalf of Oxbow USA against the individual defendants in their capacities as directors of GLC will be governed by the six-year statute of limitations of CPLR 213(7), which applies to actions for breach of fiduciary duty by or on behalf of a corporation against a present or former corporate director or officer (*see Sardanis v Sumitomo Corp*. 279 AD2d 225, 230 [2001]; *see also Matter of Skorr v Skorr Steel Co., Inc.*, 29 AD3d 594 [2006]; *Toscano v Toscano*, 285 AD2d 590 [2001]). "CPLR 213(7) applies to all

'action[s],' with no differentiation between legal and equitable claims" (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 649 [2011]).

As to the AIP defendants, "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Here, the essence of plaintiffs' claim is that AIP, as the holder of a controlling interest in GLC, breached its fiduciary duty to ensure that any self-dealing transaction between GLC and PASE would be entirely fair to GLC and its shareholders, by employing bait-and-switch tactics and making numerous misrepresentations to GLC's independent committee and management in order to fraudulently induce GLC to enter into the HEA (*see Carbon Capital Mgt., LLC v American Express Co.*, 88 AD3d 933 [2011]; *Monaghan v Ford Motor Co.*, 71 AD3d 848 [2010]).

Defendants' motion to stay this action pending the outcome of the arbitration should be granted. CPLR 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." This Court has stayed litigation that included nonsignatories to the subject arbitration agreement where the non-signing party was closely

related to the signatories and was alleged to have engaged in substantially the same improper conduct (*see Pacer/Cats/CCS v MovieFone, Inc.*, 226 AD2d 127 [1996]). Here, although there is not a complete identity of parties, the arbitration statement of claims and the complaint contain overlapping factual allegations, and both seek the same damages, including all costs and expenses related to the replacement, repair, inspection, and maintenance of the boiler stacks, and lost steam revenue. Thus, the determination of the pending arbitration proceeding may well dispose of or limit the issues to be determined in this action (*see Belopolsky v Renew Data Corp.*, 41 AD3d 322 [2007]).

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

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6834 Mark DeRosa, Index 307731/08
Plaintiff-Respondent,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Appellants-Respondents,

Greco Bros. Ready Mix Concrete Co., Inc.,
Defendant-Respondent-Appellant,

Our Rental Corp., et al.,
Defendants.

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Malapero & Prisco LLP, New York (Frank J. Lombardo of counsel), for appellants-respondents.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about June 3, 2011, which, to the extent appealed from as limited by the briefs, denied the cross motion of defendants-appellants for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and granted plaintiff's motion for partial summary judgment on the issue of liability on his section 240(1) cause of action, reversed, on the law, without costs, plaintiff's motion denied and appellants' cross motion granted.

Plaintiff, the driver of a cement-mixing truck, was directed by the property owner's contractors and construction manager, to position his cement truck side-by-side with another cement truck

so that the two trucks could simultaneously pour their cement into a hopper. The space plaintiff was directed to occupy afforded him a foot or less of leeway on either side of his truck in which to operate. The spacing was significant since plaintiff needed at least two feet on the truck's rear to unfold a two-foot extension attached to a metal ladder that was affixed to the truck. The ladder enabled the driver to climb up to the top of the truck in order to evaluate the consistency of the cement in the truck's mixing barrel prior to pouring the cement mix.

After plaintiff parked his truck, he went to the rear of his truck and activated switches that put the truck's mixer at full speed. He then mounted the right side of the truck's rear fender, which was approximately three feet off the ground, and knelt down to reach around to the rear side of the truck to activate a water-mixing valve. As plaintiff began to stand and lift his leg around to the right in an effort to ascend the truck's unextended ladder, the back of his shirt became caught in the mixer's rotating hatch handle, causing him to be propelled upward and over to the other side of the truck.

Dismissal of plaintiff's Labor Law § 240(1) cause of action is warranted. Contrary to the dissent's assertion, we are fully cognizant that § 240(1) is to be liberally construed (*see Harris v City of New York*, 83 AD3d 104, 108 [2011]). However, such

liberality "should be construed with a commonsense approach to the realities of the workplace at issue" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). The protections of the statute "are not implicated simply because the injury is caused by the effects of gravity upon an object" (*Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]). Rather, the question is "whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). Stated differently, the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603).

Here, the record demonstrates that plaintiff was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force (*see Toefer v Long Is. R.R.,* 4 NY3d 399, 408 [2005]; *Medina v City of New York*, 87 AD3d 907, 909 [2011]). Rather, plaintiff's accident arose from activities and circumstances that arise on a construction site and are not covered by § 240(1)'s elevation-differential protections (*see Toefer,* 4 NY3d at 407).

Plaintiff failed to establish that the circumstances, at the time of his injury, warranted the protection of the type of

safety equipment enumerated in § 240(1) (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *compare D'Alto v 22-24 129th St., LLC*, 76 AD3d 503, 506 [2010]). Side-by-side pouring of concrete, although apparently not a routine method of delivery, was not unknown to either plaintiff or defendants. Plaintiff testified that he made such deliveries on a "handful" of other occasions and made no complaints about such practice prior to his injury, despite the fact that he never received any training on how to make such deliveries. Under these circumstances, the "realities of the workplace at issue" do not implicate the protections of the statute (*Salazar,* 18 NY3d at 140).

Nor do the holdings in *Runner v New York Stock Exch., Inc.*, (13 NY3d 599 [2009], *supra*) and *Wilinsky v 334 E. 92nd Hous. Dev. Corp.* (18 NY3d 1 [2011]), as cited by the dissent, compel a different result. In *Runner*, the plaintiff was injured while using a makeshift system of lowering a heavy reel of steel wire down four stairs (13 NY3d at 602). In *Wilinsky*, the plaintiff was injured when unsecured pipes that extended above his work location fell on him during demolition of a wall enclosing those pipes (18 NY3d at 5). In each case, the plaintiff's injury was the direct result of the failure to provide safety devices of the type enumerated in the statute.

Simply put, "the protections of Labor Law § 240(1) do not

apply to every worker who falls and is injured at a construction site" (*Berg*, 10 NY3d at 904). Indeed, as the dissent acknowledges, plaintiff testified that his delivery work did not require that he be provided with any safety equipment from the owner or general contractor. The dissent's position is therefore an unwarranted extension of the statute.

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

RENWICK, J. (dissenting)

In this personal injury action, plaintiff's Labor Law § 240(1) claim arises out of an accident that took place when he was attempting to make a concrete delivery to a work site, which defendant owner was converting into cooperative apartments. Plaintiff was climbing the cement truck, to visually assess whether the consistency of the mix was appropriate for the specifications of the job, when a lever from the rotating barrel of the cement truck caught plaintiff and literally threw him, like a cannonball, over the top of the truck and into the side of the street that had been left open for vehicular traffic.

Based upon these remarkable but undisputed facts, Supreme Court granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. The majority of this Court, however, now reverses and grants defendants summary judgment dismissing the Labor Law § 240(1) claim on the grounds "that plaintiff was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force." I disagree with the majority's astonishing conclusion and, instead, find that plaintiff's injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a

physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). I must therefore dissent.

Background

The facts of this case are essentially undisputed. Plaintiff's accident occurred on April 11, 2006, at a construction site located on the corner of 81st Street and Fifth Avenue in Manhattan and owned by defendant 995 Fifth Avenue LLC. The owner hired defendant Bovis Lend Lease LMB, Inc. as construction manager. The project consisted of the transformation of the former Stanhope Hotel into cooperative apartments. Defendant RCC Concrete Corp. (RCC) was the concrete contractor for the project. Defendant Greco Bros. Ready Mix Concrete Co., Inc. and nonparty Elite Ready Mix Corp. (Elite) were related corporations that principally produced and delivered concrete.

Plaintiff was trained as a cement truck driver and had three years of experience driving the cement truck at issue for Elite. Plaintiff's job as the driver/operator of a cement truck entailed on-the-site mixing of the cement. He was required to open a valve located near the rear of the driver's side of the truck in order to release the desired amount of water into the concrete. The water and concrete would then typically take approximately

eight to ten minutes to mix. During the period in which the concrete and water mixed, he was supposed to climb up to "the top of the truck," lean into the "load chute," and "[l]isten and look" at the mix. He was trained to tell the consistency of the concrete both by sight and by "the sound of mixed concrete in the barrel." The truck itself was 11½-to-12-feet high. Plaintiff had been provided a "fold down ladder" in order to observe the load chute. The ladder was affixed near the rear of the driver's side of the truck.

Prior to his accident, he had made two deliveries to the site, once on the morning of the accident and once during the prior week. On neither of the prior deliveries was the area set up for side-by-side cement deliveries. On each of the prior deliveries, plaintiff had backed the truck to the hopper when directed to do so by the RCC Concrete flag person, dumped the cement, washed the truck out, and then returned to his employer's plant, all without incident.

On the day of the accident, plaintiff's first delivery of cement to the construction site was uneventful. On his second trip to the construction site, plaintiff had to wait in line to deliver his cement because two other cement trucks were ahead of his truck, and they were positioned "side-by-side" to allow them to simultaneously dispense their cement into a "hopper." From

the hopper, the cement was pumped towards the building and used to pour the building's first and second cement floors.

In order for the two cement trucks to simultaneously pour their cement without interfering with the flow of traffic on 81st Street (which was a westbound street having only three lanes), each truck occupied one traffic lane, side-by-side, in the two lanes located nearest the building (i.e., on the south side of 81st Street). The third lane, which was furthest from the building (on the north side of the street), was left open for traffic. The two southerly lanes on 81st Street were cordoned off by movable metal barriers. The hopper was positioned near the corner of 81st Street and 5th Avenue (in front of the renovated building), and the cement trucks would park just east of the hopper on 81st Street, with the rear of the trucks facing west, towards the hopper and 5th Avenue.

Once one of the two cement trucks finished dumping its cement, an RCC flag person motioned for plaintiff to back his cement truck into the spot formerly occupied by the departing cement truck. That spot was the middle traffic lane on 81st Street. The truck that remained, and was still delivering cement, occupied the southerly lane of 81st Street (abutting the curb). Once plaintiff backed into the middle lane and parked, he noted that he had eight inches of space between his truck and the

truck parked to his right. On the left side of his truck, plaintiff noted there was approximately one foot of space between his truck and the barrier fence that separated the work space on 81st Street from the open traffic lane on the north side of 81st Street.

Plaintiff exited the driver's side of his truck (i.e., the truck cab's right side, which is the opposite of an automobile). Plaintiff then walked around the front of his truck, towards the passenger side, and then towards the rear of his truck, via the one-foot space that existed between his vehicle and the barrier fencing. Plaintiff had no problem getting to the back of his truck along the barrier fence. Once at the back of the truck, plaintiff pressed switches that activated the cement mixer to operate at full speed. Plaintiff then climbed onto a 20-inch-high bumper to access the truck's 36-inch-high back fender. Plaintiff mounted the back fender to reach a water-mixing valve located on the right side of his truck (i.e., the driver's side).

Once on the fender, plaintiff knelt down to reach the water valve located near the truck's right side. Plaintiff activated the water valve and proceeded to stand back up while still on the rear fender. His intent was to then move to his left in order to mount a ladder which was affixed to the truck's right side, towards the rear. The rear ladder and the water valve were

located right next to each other. The ladder would have allowed him to ascend to the top of the truck so that he could evaluate the consistency of the cement mixture. However, as plaintiff stood from his kneeling position on the back fender, and started to move his feet towards the ladder, the lever of the rotating hatch caught onto his shirt and propelled him upward and over the top of the cement truck, into the open lane of traffic. Plaintiff landed about five feet from his truck. He never set foot on the side ladder before he was catapulted over the top of the truck.

Plaintiff was unable to drop the extension piece of the truck's rear ladder down to the street level — to enable him to climb from the ground to the top of the 12-foot high truck to check the cement's consistency — due to the limited 8-inch space between the two trucks. Plaintiff explained that the ladder's extension piece was 24 inches long, and had to be unfolded, outwardly, away from the truck, and then down to the ground. As for safety equipment, plaintiff noted that his delivery work did not require that he be provided with any safety equipment from the owner or general contractor. He did not receive instructions from anyone at the project on how to make his delivery, apart from the RCC flag person who directed him to back into the middle traffic lane and to dispense his cement side-by-side with another

truck. Plaintiff had only made “side-by-side” deliveries of cement on a “handful” of occasions in the past. He never received any training on how to do side-by-side pours.

Elite’s principal, Joseph Greco, testified at his deposition that in his six or seven years (“on and off”) of making concrete deliveries, he had never heard of, or witnessed, side-by-side deliveries of concrete. Greco opined that side-by-side deliveries would tend to block traffic and limit the operating space of the truck driver, potentially preventing the driver from accessing portions of the truck.

Bovis’s Senior Superintendent at the project, John McGillicuddy, testified at his deposition that he had seen side-by-side deliveries of concrete, but could not recall the frequency that such practice was utilized. RCC Concrete Superintendent Darren Jonoski testified that he made the decision as to side-by-side deliveries, and that such delivery practice was a “common” one.

In September 2008, plaintiff commenced this personal injury action and asserted two causes of action — namely, common law negligence and violations of the Labor Law (§§ 200, 240(1) and 241(6)). Plaintiff moved for partial summary judgment as to liability on his labor Law § 240(1) claim. The owner and general contractor opposed the motion and cross moved for summary

judgment dismissing the claims against them. While denying defendants' cross motion, the court granted plaintiff's motion to the extent of finding that plaintiff presented evidence to show he was engaged in work covered by Labor Law § 240(1), inasmuch as his cement delivery work was in furtherance of the building's renovation, and that he "f[e]ll and sustain[ed] serious personal injuries" while performing his duties.[2] This appeal followed.

Analysis

Contrary to the majority's determination, I find that the motion court properly granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim. That section, more commonly referred to as the Scaffold Law, provides that

> "[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

To establish liability under Labor Law § 240(1), a plaintiff must demonstrate both that the statute was violated and that the

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[2] The court, having granted plaintiff summary judgment on his Labor Law § 240(1) claim, "decline[d] to consider" defendants' argument that they are entitled to summary judgment dismissing plaintiff's claims, inasmuch as the "damages" sought on each of the claims were "the same regardless of the theory of liability," and the court's decision rendered such other claims "academic." Defendant did not appeal from this determination.

violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]).

The majority's argument that plaintiff's accident is outside the scope of § 240(1) because it resulted from a usual and ordinary danger of a construction site is unpersuasive. The majority argues that the reality of the work place "d[id] not implicate the protections of the statute" because "[s]ide-by-side pouring of concrete, although apparently not a routine method of delivery, was not unknown to either plaintiff or defendants." However, whether plaintiff was aware that side-by-side pouring was going to take place is of no moment. Rather, as the recent Court of Appeals holdings in *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 603 [2009]) and *Wilinsky v 334 E. 92nd Hous. Dev. Corp*. (18 NY3d 1 [2011]) made abundantly clear, the proper question is whether a safety device of the kind enumerated in section 240(1) was necessary to guard plaintiff from the risk of a physically significant elevation differential.

A brief review of the facts of *Runner* and *Wilinsky* is necessary to dispel the notion the majority has that the "dissent's position is . . . an unwarranted extension of the statute." In *Runner*, the plaintiff and several coworkers had been directed to move an 800-pound reel of wire down a set of

four stairs. To prevent the reel from rolling down the stairway, they had been instructed to tie one end of a 10-foot length of rope to the reel, and then to wrap the rope around a metal bar that was placed horizontally across a door jamb at the top of the stairway. The plaintiff and two coworkers held the rope to anchor the reel, while two other workers began to push the reel down the stairs. As they moved the reel, the plaintiff, who was "essentially acting as [a] counterweight []" to the reel, was pulled toward the bar. He was ultimately pulled into the bar, and struck his hands against it. It was alleged that a pulley should have been used, instead of the makeshift rope system (13 NY2d at 602).

The Court was asked to determine whether liability could be imposed under Labor Law § 240(1), even though the worker had not fallen and was not struck by a falling object. The Court held that the applicability of the statute was not dependent on whether the injury resulted from a fall, either of the worker or an object upon the worker. Rather, the decisive issue was whether the plaintiff's injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603).

Likewise, more recently, in *Wilinsky* (18 NY3d 1 [2011], *supra*) the Court of Appeals, consistent with *Runner*, rejected any bright-line rule on whether the injury resulted from a fall, either of the worker or an object upon the worker. In *Wilinski*, the plaintiff was demolishing brick walls at a vacant warehouse. Previous demolition of the ceiling and floor above had left two metal, vertical plumbing pipes unsecured. The pipes were approximately 10 feet high and rose out of the floor on which the plaintiff was working. No measures had been taken to secure the pipes. While the plaintiff was working, the pipes were struck by debris and toppled over, injuring plaintiff. The plaintiff moved for summary judgment under Labor Law § 240(1). (*Wilinsky, 18 NY3d at* 5-6.)

The specific issue before the Court of Appeals was whether plaintiff had a claim under § 240(1) even though he and the pipes were at the same level at the time that the pipes collapsed. The Court found that this factor was not dispositive. Instead, the correct analysis should be whether a device of the type enumerated in Labor Law § 240(1) should have been used to protect against elevation-related risk during the performance of a task covered by the statute. The Court observed that the plaintiff had demonstrated not that the kinds of protective devices enumerated in the statute, such as ropes or blocks, could have

been used to secure the pipes and prevent the accident. The Court ultimately held that there was a question of fact as to whether the plaintiff's injury resulted from the lack of a safety device of the type enumerated in the statute (*Wilinsky,* 18 NY3d at 9-11).

As in *Runner* and *Wilinski*, this case contains the necessary conditions for the applicability of section 240(1), i.e., an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against. Plaintiff's job required him to complete the mixing of the concrete at the site itself. He performed this task by operating a water valve switch that was located on the rear of the driver's side of his truck. Plaintiff was also required to climb to the top of the truck so that he could visually assess whether the consistency of the mix was appropriate for the specifications of the job. The truck was equipped with a ladder, located on the rear of the driver's side of the truck, for this task.

Under the circumstances, it cannot be seriously disputed that a device of the type enumerated in Labor Law § 240(1) should have been used, during the performance of a task covered by the statute, where plaintiff was required to perform a job-related task from a physically significant elevation differential. Indeed, a device precisely of the sort enumerated by the statute

was provided for use during the performance of the task covered by the statute. Specifically, the truck was equipped with a ladder, located on the rear of its driver's side, which was intended to be used as the barrel mixed concrete and for that obvious reason was "placed" so as to swing out and away from the barrel. Thus, the ladder – which would normally be used to access a different elevation, was "indisputably" the type of device triggering the statute (*Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163, 164 [2003]; *see also McGarry v CVP 1 LLC*, 55 AD3d 441, 441 [2008]; *Bush v Goodyear Tire & Rubber Co.* (9 AD3d 252 [2004]);; *Oliveira v Dormitory Auth. of State of N. Y.*, 292 AD2d 224 [2002]).

Nor can it be seriously disputed that the accident was caused by the elevation risk that the ladder was intended to guard against. All defendants had to do was to provide adequate space for plaintiff to use the safety device his employer had provided. However, they, not he, decided that they wanted the concrete delivered by the "faster" side-by-side method. Although the majority ignores the risk posed by such method, the majority cannot dispute the fact that by physically preventing plaintiff from "placing" the ladder in the manner it was supposed to be "placed," defendants exposed plaintiff to distinct "elevation-related" hazards. One risk was that plaintiff might fall while

contorting himself in trying to access the valve or the ladder. It was also very likely that plaintiff would strike one of the trucks as he fell to the ground, since they were only eight inches apart. The barrel of the adjacent truck presented a risk since it was rotating during the process of delivering cement. The other risk was that which actually occurred — namely, that plaintiff could accidently come in contact with the hatch of the rotating cement barrel. Thus, plaintiff has shown that defendants failed to provide him with an adequate safety device to shield him from harm, and defendants point to no evidence in opposition that would create an issue of fact.

That the accident happened under remarkable circumstances — a lever from the rotating barrel of plaintiff's cement truck catches him and literally catapults him, like a cannonball, over the top of his truck — is of no moment. Indeed, the Court of Appeals has held that in order to make out a valid claim under Labor Law § 240(1), "[a] plaintiff need not demonstrate the precise manner in which the accident happened" *(Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). Rather, the key is whether plaintiff was injured when an elevation-related device failed to perform its function to support and secure him from injury (*see Morin v Machnick Bldrs*, 4 AD3d 668, 670 [2004]). Thus, since plaintiff was required to use the truck's fender as an ersatz

ladder, and his injury was caused when he fell off the makeshift device, this claim was one of the gravity-related hazards or perils that the ladder was intended to guard against.

To hold that this accident does not invoke the Scaffold Law ignores clear precedent from this Court. We have consistently held, under analogous circumstances, that a temporary staircase serving as the functional equivalent of a ladder to access different levels of the work site, is the type of elevation-related risk the statute was intended to cover *(see e.g. Megna v Tishman Constr. Corp. of Manhattan,* 306 AD2d 163 [2003], *supra* [a worker was injured when a temporary two-step staircase leading to a temporary wooden landing collapsed, causing him to fall to the floor]; *McGarry v CVP 1 LLC*, 55 AD3d 441, 441 [2008], *supra* ["makeshift staircase (unsecured cinder blocks) was being used as access to different levels of the work site"]; *see also Bush v Goodyear Tire & Rubber Co.,* 9 AD3d 252 [2004] [while plaintiff was atop the dumpster, attempting to level the debris inside, his arm hit a wire and he fell to the ground], *lv dismissed* 3 NY3d 737 [2004]).

Defendants' arguments attempting to circumvent the plain meaning of, and the strict liability imposed by, the statute do not survive close scrutiny. For instance, there is no merit to defendants' contention that this case does not give rise to

liability under Labor Law § 240(1) because, essentially, it does not present the type of elevation risk envisioned in the statute. Defendants' and the majority's reliance on *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]), in support of this contention, is misplaced. In *Toefer*, the Court held that "[a] four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240(1)'s coverage" (*id*. at 408).

Toefer is readily distinguishable from this case. The working position of plaintiff here is clearly a discernible difference because standing on a fender to access yet another level is not such an ordinary practice as stepping down from a flatbed truck. Instead, plaintiff should have been on the ladder that his employer had provided.

Indeed, in *Ortiz v Varsity Holdings, LLC* (18 NY3d 335 [2011]), the Court of Appeals recently relied upon this factual distinction in making *Toefer* and its progeny inapplicable to the case. In *Ortiz*, the plaintiff was injured when he was taking debris from a building under demolition and placing it in a dumpster outside. The dumpster was about six feet high, eight feet wide, and fourteen feet long. The ledge at the top of the dumpster was about eight inches in width. Plaintiff climbed up, using footholds built into the side, and began to rearrange the

debris inside to make more room. It started to rain, making the surface of the dumpster slippery. Ortiz was injured when, while holding a wooden beam and standing at the top of the dumpster, with at least one foot on the narrow ledge, he lost his balance and fell to the ground (18 NY3d at 338).

In distinguishing *Ortiz* from *Toefer* and its progeny, the Court of Appeals held that the working position of Ortiz was distinguishable from that of the worker in *Toefer*. In *Toefer*, the Court explained, the plaintiff was simply stepping down from a flatbed truck. He, therefore, encountered "the usual and ordinary dangers of a construction site," from which he, "may reasonably be expected to protect himself by exercising due care" (18 NY3d at 399 [internal quotation marks omitted]). By contrast, in *Ortiz*, the worker was required to climb a dumpster, and the defendant failed to demonstrate that the worker's position on the ledge was unnecessary or that no safety device of the kind enumerated in section 240(1) would have prevented the plaintiff's fall. Similarly, here, defendants have failed to show that standing on the truck's fender was unnecessary -- plaintiff had no other choice because the ladder was blocked.

Finally, there is no plausible view of the evidence that plaintiff's own acts or omissions were the sole proximate cause

of the accident (*cf. Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]; see also *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 [2005]). Contrary to defendants' allegations, "[t]his is not a situation where a plaintiff, on his own initiative, took a foolhardy risk which resulted in injury" (*Harris v City of New York,* 83 AD3d 104, 110 [2011]; *cf*. *Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]). Indeed, while defendants argue that plaintiff, as driver, had full authority over his truck, including how to park it, and that he could have angled the truck in the middle lane so as to allow him to fully extend the truck's rear ladder, those assertions are not supported by the evidence. The record undisputably reflects that the RCC flag person directed plaintiff into the middle lane, side-by-side with another cement truck, and that there was less than a combined two feet of space on the sides of the truck in which to maneuver. Plaintiff was left to attempt to access the truck's raised rear ladder from the back fender. Hence, as a matter of fact and law, plaintiff cannot be the sole proximate cause of his injuries (*see Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879 [2006] [the plaintiff was not the sole proximate cause of his injury where the evidence showed that at the time of injury, he was acting pursuant to the directions of his supervisor]).

For the reasons discussed above, I would affirm the grant of plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

7648
M-1880 Harvey 1390 LLC, et al., Index 570356/10
Petitioners-Respondents,

-against-

Matthew Bodenheim,
Respondent,

John Cassarino,
Respondent-Appellant.

_____

David E. Frazer, New York, for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Alexa Englander of counsel), for respondents.

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Order of the Appellate Term of the Supreme Court, First Department, entered September 17, 2010, which, in a summary nonpayment proceeding, reversed an order of the Civil Court, New York County (Arlene H. Hahn, J.), entered on or about March 9, 2010, granting respondent-appellant tenant's motion to vacate the judgment to the extent of staying execution of a warrant of eviction for 15 days, unanimously reversed, on the law, without costs, and the Civil Court order reinstated to the extent of staying execution of the warrant of eviction for 15 days from service upon petitioners-respondents of a copy of this order, to permit payment of any outstanding arrears.

Although enforcement of stipulations of settlement is favored (*Chelsea 19 Assocs. v James*, 67 AD3d 601, 602 [2009]), a

court always retains the power to vacate a warrant of eviction prior to its execution for "good cause shown" (RPAPL 749[3]; *see Matter of Brusco v Braun*, 84 NY2d 674, 682 [1994]; *102-116 Eighth Ave. Assoc. v Oyola*, 299 AD2d 296 [2002]; *Parkchester Apts. Co. v Scott*, 271 AD2d 273, 273-274 [2000]). In fact, the court is permitted, in appropriate circumstances, to vacate a warrant of eviction and return a tenant to possession even after the warrant has been executed (*Matter of Brusco*, 84 NY2d at 682). A determination as to whether good cause exists is entrusted to the sound discretion of the court upon review of the particular facts and circumstances presented (*see 102-116 Eighth Ave. Assoc.*, 299 AD2d at 296).

We find that Civil Court did not abuse its discretion in finding good cause to stay the execution of the warrant for a short period to allow this longtime rent-stabilized tenant to pay his remaining arrears. The tenant demonstrated that he approached charities and agencies to obtain assistance, tendered almost all of the payment due, and showed that he would soon

receive enough charitable assistance to satisfy the arrears (*see Parkchester Apts.*, 271 AD2d at 273-274 [court properly exercised its discretion to vacate a warrant of eviction where, inter alia, the tenant had made appreciable payments and included with his motion payment exceeding the arrears due]).

Contrary to petitioners' view, our decision in *Chelsea 19* (67 AD3d 601) does not require a different result. In that case, we declined to vacate a default judgment and warrant of eviction for a tenant who had a history of "extensive and unexplained rent defaults" (21 Misc 3d 129[A], 2008 NY Slip Op 52013[U] [App Term 2008], *affd* 67 AD3d 601 [2009]), and failed to appear in opposition to the landlord's motion for issuance of a warrant of eviction. When the tenant subsequently sought to vacate the judgment, he provided no "excuse whatsoever" (*id.*), let alone a reasonable excuse, for his default. Moreover, he failed to pay the amounts due under the stipulation of settlement, as well as subsequently accruing rent arrears, for more than six months, at which time he made full payment. Under those circumstances, the *Chelsea 19* tenant's "claimed difficulty in obtaining funds," standing alone, did not provide good cause to vacate the warrant (67 AD3d at 602).

Here, the tenant did not sit idly by or fail to appear, resulting in entry of judgment by default. Instead, he made

partial payments, engaged in good faith efforts to secure emergency rental assistance to cover the arrears and, at the time Civil Court stayed execution of the warrant, owed less than a month's rent, which was forthcoming from a charity (*see Bushwick Props., LLC v Wright*, 34 Misc 3d 135[A], 2011 NY Slip Op 52389[U], *1-2 [App Term 2011] [warrant stayed where the tenant diligently applied to organizations for the arrears and belatedly received a commitment letter for the full amount of the arrears]).

We note that nothing in *Chelsea 19* abrogates a court's authority, in the exercise of its discretion, to vacate a warrant of eviction based on a showing of good cause. Nor does the case stand for the proposition that a court may never consider a tenant's difficulty in obtaining funds when determining, under all the circumstances, whether good cause exists to stay an eviction warrant. These cases involve fact-sensitive inquiries, and must be decided after review of all the circumstances, including the extent of the delay, the length and nature of the tenancy, the amount of the default and the particular tenant's

history, as well as a balancing of the equities of the parties (*see Parkchester Apts. Co. v Heim*, 158 Misc 2d 982, 983-984 [App Term 1993]).

M-1880 - Harvey 1390 LLC, et al., v Bodenheim,

Leave to file amicus curiae brief denied.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7727 In re Helen G.,
Petitioner-Appellant,

-against-

James K. T.,
Respondent,

Laverne W.,
Respondent-Respondent.

Lisa Lewis, Brooklyn, for appellant.

Karen Freedman, Lawyers for Children, New York (Doneth Gayle of counsel), attorney for the child.

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about October 13, 2010, which, after a hearing, denied the petition for grandparent visitation, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a determination of whether it is in the subject child's best interest to recommence visitation and contact with petitioner.

The Family Court erred in finding that petitioner, the child's paternal grandmother, who lives in the State of Georgia, does not have standing based on equitable circumstances to seek visitation (*see* Domestic Relations Law § 72(1); *Emanuel S. v Joseph E.*, 78 NY2d 178, 180 [1991]). The record establishes that although petitioner's relationship with the subject child became

sporadic after he turned two years old, when the relationship between the child's parents deteriorated, petitioner traveled to New York on several occasions over the course of the following seven years and attempted to see the child, but was usually prevented from doing so by respondent mother.

Petitioner eventually filed the instant petition and the parties agreed in court in March 2010 to allow telephone calls and visits in New York. Some telephone contact ensued but when petitioner arrived in New York for a pre-arranged visit in July, respondent mother refused to allow the visit and cut off communication, alleging that petitioner was consorting with her son, the child's father, who is also a named respondent, but who does not oppose the instant petition.

The acrimonious nature of the relationship between petitioner and respondent is an insufficient basis upon which to determine that visitation is not in the child's best interest

(*see e.g. E.S. v P.D.*, 8 NY3d 150, 157 [2007]; *Matter of Weis v Rivera*, 29 AD3d 812, 813 [2006]). Since more than a year has passed since contact was cut off by respondent, a new hearing must be held to determine whether it is in the child's best interest to recommence visitation and/or contact with petitioner.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

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

6253 In re Darryl C.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about April 1, 2010, reversed, on the law, without costs, and the delinquency petition dismissed.

Opinion by Tom, J.P. All concur except Richter and Abdus-Salaam, JJ. who dissent in an Opinion by Richter, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Karla Moskowitz
Roslyn H. Richter
Sheila Abdus-Salaam
Nelson S. Román, JJ.

6253

_____x

In re Darryl C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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Darryl C. appeals from the order of disposition of the Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about April 1, 2010, which adjudicated him a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on probation.

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

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

TOM, J.P.

The law imposes a strict standard for a stop and frisk, requiring an officer to have a reasonable suspicion of an individual's involvement in criminal activity (CPL 140.50[1]; *People v De Bour*, 40 NY2d 210, 223 [1976]) and then "knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety" (CPL 140.50[3]; *People v Batista*, 88 NY2d 650, 654 [1996]). The motion court erred in holding that a police officer exercising the common-law right to inquire without a reasonable suspicion of criminal activity may subject the individual he is questioning to a frisk under the guise that the officer claimed to perceive some threat to his personal safety. Such ruling broadly expands the power of the police to search an individual during street encounters and can too easily lead to the diminishment of one of the most cherished rights, the right of individuals to be secure in their persons against illegal searches and seizures (NY Const art I, § 12; US Const 4th Amend). The gradual erosion of this basic liberty can only tatter the constitutional fabric upon which this nation was built. The ramifications go beyond this single case. Widespread, aggressive police tactics in street encounters have recently raised concerns in other judicial

forums. In *People v Holland* (18 NY3d 840 [2011, Lippman, Ch.J., dissenting]), the Chief Judge took issue with his own Court's dismissal of the appeal as "not only unsound jurisdictionally, but erosive of this Court's role in articulating the law governing police-civilian encounters" (*id.* at 845). He stated:

> "When courts with the factual jurisdiction to make attenuation findings employ facile analytic shortcuts operating to shield from judicial scrutiny illegal and possibly highly provocative police conduct, an issue of law is presented that is, I believe, this Court's proper function to resolve . . . This is not an exaggerated or purely academic concern in a jurisdiction where, as is now a matter of public record, hundreds of thousands of pedestrian stops are performed annually by the police, only a very small percentage of which actually result in the discovery of evidence of crime" (*id.*).

In a footnote, Chief Judge Lippman made reference to *Floyd v City of New York* (8 F Supp 2d 417 [SD NY 2011]), in which the United States District Court noted, "[T]he policing policies that the City has implemented over the past decade and a half have led to a dramatic increase in the number of pedestrian stops, to the point of now reaching almost 600,000 a year" (*id.* at 422 [internal quotation marks omitted]). The District Court has now granted class action status to the plaintiffs in that case to challenge the constitutionality of the New York Police

Department's stop-and-frisk program (*Floyd v City of New York*, 2012 WL 1868637, 2012 US Dist LEXIS 68676, [SD NY, May 16, 2012, No. 08-Civ-1034 (SAS)]).

While the dissent's opening paragraph frames the issue in somewhat dramatic terms, the actual testimony in this case presents a picture that is more pedestrian in all senses of the word. Appellant, a 14-year-old boy standing alone on the street, was stopped in broad daylight, by a police officer who believed appellant to be a truant, not a gang member, holding an object that the officer could not identify. The subsequent search was conducted without any evidence that the appellant was engaged in criminality or that he represented any threat to the safety of the officer. The motion court's ruling would, in effect, give the police the authority to stop and frisk a pedestrian who is not a suspect of a crime.

The facts herein, even crediting the officer, prohibit the search undertaken in this case. At a combined *Wade*/*Dunaway* hearing, the testimony of Police Officer Orlando Colon, the arresting officer, established that on February 18, 2010, at about 11:30 a.m. he was on uniform patrol with three other officers in an unmarked van in the vicinity of 40 West Tremont Avenue, Bronx County. As a result of tensions between two rival youth gangs, multiple shootings had occurred in the area, the two

most recent within four blocks of the officer's location. The context of gang violence explained the officer's presence at that location. From the van, at a distance of about 10 feet, Colon observed the 14-year-old appellant standing alone on the sidewalk "examining an object with his right hand and in his left hand he had a cell phone." Appellant was not a suspect, nor was he associated with any gang activity. Although it was broad daylight, the officer could not describe or identify the object appellant was looking at, except to state that it was black and held in appellant's right palm near his waist. Then, Colon testified, appellant "looks up, he sees the van. I'm assuming he saw it was a police van." Colon continued, "He stared at the van. He stopped, put the object in his right pocket and continued to walk and . . . handle the cell phone." At this point, this unexceptional activity was the extent of the officer's observations. Colon then left the vehicle, approached appellant and engaged him in conversation. Colon learned that appellant had come from Queens to visit his stepbrother who, the officer surmised, lived in a building where one of the rival youth gangs was concentrated. Colon then asked appellant what he had in his right hand, and appellant responded that it was his wallet. Colon testified that "[d]uring the course of the conversation he was stuttering a little bit. A little bit

nervous." I will depart from a strict reading of the evidence to this limited extent: a 14-year-old boy confronted by a police officer might be "a little bit nervous" without that fact raising a red flag. Colon continued that "[m]y suspicion didn't heighten until I asked him what he had in his right hand and he told me it was his wallet that he had in the back of his pants packet. The answer was a little deceiving to me." Colon testified that, having observed appellant put the object into his right coat pocket, not his back pocket, "I told him I'm not interested what he had in his back pocket. I'm interested what he put in his coat pocket."

When appellant "attempted to go into the back pocket" to retrieve his wallet, Colon told him, "[D]o me a favor. Don't put your hands in your pocket," with which appellant complied. Colon continued, "At this point I tapped his right jacket pocket. I felt it was a hard object," although there was no indication that the object was any kind of weapon. Colon added, "At this point I repositioned myself to get an advantage. I go behind him. As I go behind him I put my right hand behind him. I tapped the pocket one more time and then I put my hand in the pocket." Colon's "hand went right into the pistol grip of the firearm."

Family Court denied appellant's motion to suppress the

firearm, stating that "Officer Colon reasonably believed [appellant] to be armed and had a legitimate concern for his own safety. As such, he was justified in patting down the jacket pocket into which he saw [appellant] place a black object." The court concluded, "[O]nce he *felt the grip* of a gun, Officer Colon *then* had a reasonable suspicion that [appellant] was involved in a crime, which authorized the officer to detain him."

The Family court's conclusion that the discovery of the weapon affords reasonable suspicion of involvement in a crime reverses the necessary order of the analysis (*De Bour*, 40 NY2d at 215-216). As noted in *People v Rivera* (14 NY2d 441, 447 [1964], *cert denied* 379 US 978 [1965]), "[t]he question is not what was ultimately found, but whether there was a right to find anything" (*see also Wong Sun v United States*, 371 US 471, 484 [1963] ["that a search unlawful at its inception may be validated by what it turns up" is a proposition that has been consistently rejected]).

Family Court did not conduct the rigorous analysis required by *People v De Bour* (40 NY 2d 210, 223 [1976], *supra*) to justify each escalation in interference with appellant's freedom of movement. In *De Bour*, the Court of Appeals provides four levels of permissible official interference with an individual's liberty. The minimal intrusion of approaching a person to request information requires only "some objective credible

reason" to approach the individual that does not necessarily implicate criminal conduct (40 NY2d at 223). The second level of interference is the common-law right to inquire, triggered by a "founded suspicion" that criminal activity is afoot, which permits interference with an individual "to the extent necessary to gain explanatory information, but short of a forcible seizure" (*id.*). The third level is a forcible stop and detention, activated by a reasonable suspicion that a specific individual "has committed, is committing or is about to commit a felony or misdemeanor" (*id.*). Under the third level of interference, an officer making a forcible stop has authority to conduct a protective frisk of the individual if there is a reasonable threat of physical injury or reasonable suspicion that the person who can now be classified as a suspect is armed (CPL 140.50 [3]). The fourth level permits an officer to arrest an individual when there is probable cause to believe that individual has committed a crime or offense in his or her presence (*De Bour*, 40 NY2d at 223; CPL 140.10).

The permissible stop and frisk under *De Bour* tracks CPL 140.50(1) and (3) which provide in relevant part:

> "[W]hen he [a police officer] reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor . . . [and] a police officer . . . reasonably suspects that

> he is in danger of physical injury, he may search such person for a deadly weapon . . . ."

The issue before us is whether the arresting officer had a reasonable suspicion of appellant's participation in a crime, combined with a reasonable fear for his personal safety, so as to justify the stop and frisk. Absent reasonable suspicion of involvement in a crime, there was no basis to stop and detain appellant and, thus, no basis for even considering conducting a frisk (*De Bour,* 40 NY2d at 223).

By giving seemingly evasive answers to Officer Colon's questions, appellant arguably allowed for the possibility that he might have some form of contraband, warranting further questioning under the common-law right to inquire. But the officer never undertook any further inquiry, and nothing appellant said or did gave any indication that he had committed, was committing or was about to commit a crime — the necessary predicate for the forcible detention while appellant's jacket pocket was searched (*id.*).

The frisk in this case elevated the encounter from mere inquiry to a forcible intrusion. Even if Officer Colon's approach arguably was justified by a legitimate public interest in controlling gang violence and by his observation of appellant's apparent reaction to seeing other uniformed police

officers inside the unmarked van, the arresting officer's own testimony clearly established that he did not have any reasonable suspicion that appellant was involved in a crime before he searched appellant. During cross-examination of Colon the following answers were elicited:

> "Q So let's go back, officer, again. At some point you asked him what did he put in his pocket?
>
> "A Yes, ma'am.
>
> "Q And he responded that he put a wallet in a pocket?
>
> "A Yes, ma'am.
>
> "Q It's your testimony that this was friendly conversation. At this time you were talking to him and it was a friendly conversation, you were inquiring, correct?
>
> "A That's correct.
>
> "Q And he had not become a suspect in any crime at that point, correct?
>
> "A No, ma'am.
>
> "Q And he had not been known to you as a gang member at that point?
>
> "A No, ma'am.
>
> "Q There was no indication that he was involved in any gang that you were investigating at that time, correct?
>
> "A No.
>
> "Q Yet you chose to pat him down for your safety?

"A Yes, ma'am."

Here, the record affords no grounds for the forcible stop and detention, and in the absence of any basis for detaining appellant, the subsequent search lacks a lawful foundation. Moreover, notwithstanding the officer's unelaborated subjective claim that his safety was threatened, that assertion is not grounded in any objective evidence that would convert the unsubstantiated claim into a reasonable fear. Colon could not identify the object appellant was holding and conceded that youths may hold any number of nondescript black objects, including video games, "Gameboys," small school notebooks, or wallets. Further, Colon believed that the 14-year-old was a truant and not a gang member. As stated by Colon, his inquiry of appellant was a friendly conversation. There was no evidence to show appellant posed a threat to Colon's safety.

As noted above, Colon testified that at the time appellant responded that he put a wallet in his pocket, "he had not become a suspect in any crime." Based on this testimony, Colon could not have suspected appellant of carrying a weapon. Thus, the dissent's finding that Officer Colon had "reasonable suspicion that appellant committed a crime, namely that he was armed with a weapon," is without support in the record and inconsistent with Colon's testimony. This is pure conjecture on the part of the

dissent without any evidentiary support.

Furthermore, as just noted, Officer Colon's claim of "[r]easonable fear for [his] safety" also lacks support in the record. Officer Colon could not describe the object held by appellant or discern its nature, even after he had twice patted down the pocket of appellant's jacket. In fact, after tapping the object twice, Officer Colon stated that "[i]t didn't strike me right away as being a weapon, a knife or anything like that but it's hard." The dissent asserts that Colon did not say in his own words that the object "did not seem like a weapon." However, that was the obvious implication of his testimony that after tapping on the object in appellant's coat pocket on two separate occasions, the object "didn't strike me right away as being a weapon." It is beyond comprehension how the dissent concludes that Colon had a reasonable suspicion that appellant was armed with a weapon so as to justify a search, in light of Colon's testimony that the object in appellant's coat pocket did not seem like a weapon. It is clear from the officer's testimony that until his hand reached into appellant's coat pocket and encountered the pistol grip, he had no idea what was in appellant's jacket pocket. This was a mere hunch at best, not a reasonable suspicion, that defendant might be armed, which is not the objective indicia of either criminality or a threat to the

officer's safety that is necessary to justify a search (*Terry v Ohio*, 392 US 1, 22 [1968]; *People v Cantor*, 36 NY2d 106, 113 [1975]).

The dissent's ruling would permit a police officer to search an individual by the mere assertion that the person may be armed absent any articulated facts to support the officer's claim of suspicion of criminality or of a reasonable threat of physical injury.

Colon's bare assertion of a "[r]easonable fear for [his] safety" is inconsistent with his own testimony that is noted above. Likewise, vague concerns about age and gender, presence in a bad neighborhood and nervousness upon being confronted, all fall short of a reasonable suspicion that appellant personally presented "an actual and specific danger to the officer's safety" (*People v Carvey*, 89 NY2d 707, 711 [1997] [internal quotation marks omitted]).

In explaining why he engaged in a more aggressive inquiry the officer testified that he had observed appellant's wallet in his back pants pocket, when appellant had shoved the unidentified object into his right jacket pocket. While the officer's testimony may contradict appellant's explanation that he had been looking at his wallet when he inserted an object into his jacket, they also contradict the officer's unelaborated assertion that he

became concerned for his safety when he saw appellant reach for his back pocket, especially in view of the officer's expressed disinterest in appellant's back pocket presumably because he knew it contained a wallet. In any event, Officer Colon's request, "[D]o me a favor. Don't put your hands in your pocket," is hardly an expression of fear for personal safety; rather, it is standard protocol.

It cannot be gainsaid that policing is hazardous by nature — here involving work in an area of gang activity, drug dealing and violent crime — but a pretext to excuse intrusive action may be found in nearly any encounter with a person who arouses enough suspicion to support the common-law right to inquire. While aggressive police tactics may well result in more arrests, neither respect for the law nor cooperation with law enforcement authorities is fostered by subjecting individuals to the exercise of arbitrary police power.

As noted in *People v Cantor* (36 NY2d at 106, 112 [1975], *supra*), the Fourth Amendment is not designed to protect those intent on criminality but "to prevent random, unjustified interference with private citizens." The Court's remarks in that case bear repeating:

> "Street encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be

> accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law-abiding citizen to the police officer's whim or caprice –– and this we must not do" (*id.*).

To condone Officer Colon's search of appellant would, in essence, subject an individual, without any suspicion of his or her involvement in a crime, to a frisk merely by reason of the person's possibly innocuous behavior and, in this case, a teenager's evasive response to the police officer, and the officer's bare and unfounded claim of fear for his or her safety. If, as the dissent holds, the mere expression of apprehension by a police officer, without suspicion of criminal activity, is enough to justify a search, there will be few instances in which such an "intrusion on the security and privacy of the individual" could be successfully challenged even when the intrusion is "undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity" (*De Bour*, 40 NY2d at 217). This would constitute an illegal affront to the individual's fundamental right to be secure from unreasonable searches and seizures (*id.*, 40 NY3d at 216; NY Const, art I, § 12; US Const 4th Amend).

The cases cited by the dissent in support of its proposition that a frisk is justified by a police officer's mere suspicion that an individual is armed are distinguishable. They generally

demonstrate that reasonable suspicion of criminality justifying a limited detention of a suspect is necessary to conduct a frisk, and they involve compelling indicia that the person searched was involved in the commission of some crime other than the possession of a weapon. In *People v Davenport* (92 AD3d 689 [2012]), police received a radio call of a shooting at a specific location. Arriving in under a minute, the officers encountered the nervous defendant, his hand on his waistband, making a slow retreat after making eye contact with an officer (*id.* at 689-690). That combination of factors — the information and the observation — is absent from this case. In *People v Thanh Do* (85 AD3d 436 [2011], *lv denied* 17 NY3d 905 [2011]), confidential information was received that a home invasion would take place at a specific location, where police encountered three men fitting the description of the robbers and searched the defendant after observing an L-shaped bulge in his waistband. Again, the information coupled with the observation justified the police action. In *People v Johnson* (22 AD3d 371 [2005], *lv denied* 6 NY3d 754 [2005]), the defendant's "clothing and physical characteristics fit an armed robber's description that was sufficiently specific, given the temporal and spatial factors" (*id.* at 372). In *People v Greenidge* (241 AD2d 395 [1997], *affd* 91 NY2d 967 [1998]), police received a radio transmission of an

armed robbery and, only three blocks from the location of the crime, observed a man matching the general description they had received and the defendant, who was clutching a jacket under his arm as if concealing something. In *People v Brown* (277 AD2d 107 [2000], *lv denied* 96 NY2d 756 [2001]), defendant and another man were seen hurrying away from an unlocked car, which was in disarray and which they had just parked in an area known to have a high incidence of stolen vehicles. It was not registered to either man, each of whom reached for his waistband upon becoming aware of the presence of plainclothes officers (*id.* at 108). In *People v Davenport* (9 AD3d 316 [2004], *lv denied* 3 NY3d 705 [2004]), the defendant conceded that the police had a right to frisk her, preserving only the contention that they had no right to remove an item from her pocket. All these cases are clearly distinguishable from the facts of this case. *People v Batista* (88 NY2d 650 [1996], *supra*), cited by the dissent, likewise does not support the dissent's position. That case is distinguishable by the officer's belief, based on personal experience, that the defendant was wearing a bulletproof vest (which, while not illegal, permitted the inference that the wearer was also armed). The officer testified that the outline of the vest was visible, that he wore one every day and that he was therefore familiar with "'what a vest looks like when it's sitting up on somebody's

chest'" (*id.* at 652).

Here there was no reasonable suspicion of criminal activity on the part of appellant, and the situation did not present the officer with "good cause for such fear," especially in light of his testimony that the inquiry was a friendly conversation and that appellant was not a suspect in a crime or gang activity. In the absence of either of the requisite elements for conducting a stop and frisk, the weapon recovered from appellant's person must be suppressed.

Accordingly, the order of disposition of the Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about April 1, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on probation for a period of 18 months, should be reversed, on the law, without costs, and the delinquency petition dismissed.

All concur except Richter and Abdus-Salaam, JJ. who dissent in an Opinion by Richter, J.

RICHTER, J. (dissenting)

In this appeal, we are presented with the question of whether a police officer was justified in conducting a limited safety frisk when he reasonably suspected that the individual whom he was questioning was armed with a weapon that could harm the officer. In light of recent gang shootings in the area, furtive behavior by the individual in shoving a black object into his pocket upon seeing the police, nervousness while being questioned, deceptive answers to the police officer's inquiry, and the individual's hand movement toward his pocket, we conclude that the officer had a reasonable suspicion that the individual was armed with a weapon, thus justifying the frisk.

We reject the majority's attempt to paint this case as merely involving a police officer's unsupported hunch. In fact, the record contains the requisite "specific and articulable facts" (*People v Chestnut*, 51 NY2d 14, 22 [1980], *cert denied* 449 US 1018 [1980]) upon which the officer reasonably acted. Nor do we accept the majority's inflammatory accusation that upholding this frisk would "broadly expand[] the power of the police" in a way that would open the door to random stops of juveniles on the streets. In finding the stop and frisk here justified, we faithfully adhere to the principles enunciated by the Court of Appeals in *People v De Bour* (40 NY2d 210 [1976]) and *People v*

Batista (88 NY2d 650 [1996]).[1]

Appellant was charged in a juvenile delinquency petition with acts which, if committed by an adult, would constitute, inter alia, the crime of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). In a supporting deposition, Police Officer Orlando Colon stated that on February 18, 2010, at approximately 11:30 a.m., near 40 West Tremont Avenue in the Bronx, he observed appellant, a then 14-year-old teenager, in possession of a Colt .25 caliber semiautomatic firearm, which was loaded with one round of ammunition in the chamber and four rounds of ammunition in the magazine.

Appellant moved to suppress the weapon seized from him, and the court conducted a hearing on the motion. In denying the motion, the hearing court credited the testimony of Officer Colon, the presentment agency's sole witness, and concluded that the police actions that culminated in recovery of the weapon were entirely reasonable and lawful.[2]

The unrebutted evidence at the suppression hearing

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[1] The majority, by citing to the federal litigation over the City's stop and frisk policy, inappropriately seeks to turn this family court appeal, in which we disagree over whether the officer's observations were sufficient to support a reasonable concern for his safety, into a referendum on the NYPD's policing tactics. It is nothing of the sort.

[2] Appellant did not testify or call any witnesses at the hearing.

established that on the morning of February 18, 2010, Officer Colon was on uniformed patrol in the Bronx in an unmarked van with three other officers. Their assignment that day was to visit areas targeted by the precinct commander due to recent multiple shootings between members of two rival teenage gangs: the Burnside Money Getters and the River Park Tower Boys. Approximately six shootings had taken place in the recent weeks, including two that occurred two days earlier; the ages of those involved in the shootings were early teens to early 20s. Because the rivalry between the two gangs was ongoing, the police had set up a mobile command and designated three days to visit the targeted areas.

At approximately 11:30 a.m., Officer Colon and his fellow officers were riding near 40 West Tremont Avenue, an area within the territory of the Burnside Money Getters, and just four blocks from the scene of the two most recent shootings. From about 10 feet away, Officer Colon observed appellant on the corner holding a black object in his right palm, near his waist, and examining it; a cell phone was in appellant's other hand. Appellant looked up, stared at the van, immediately shoved the black object into his right coat pocket, and began playing with his cell phone.

As appellant continued walking and playing with his phone, Officer Colon exited the van, approached appellant in a

nonaggressive manner, and began a conversation; the other officers remained in the vehicle. At the hearing, Officer Colon explained that he approached appellant due to the recent shootings in the area, and because appellant, by shoving the black object into his pocket upon seeing the police van, appeared to be trying to conceal something that he did not want the public to see. In addition, the officer believed that appellant, who appeared to be a teenager, should have been in school at that time.[3] Officer Colon asked appellant where he was coming from and what he was doing. Appellant responded that he was traveling from Queens and was going to visit his stepbrother at the end of West Tremont Avenue. The officer described appellant's demeanor during the conversation as "nervous."

Based on appellant's responses, Officer Colon believed that he was heading toward the vicinity of River Park Towers, which was in the territory of the River Park Tower Boys gang. Officer Colon asked appellant what he had been holding in his right hand. Appellant did not answer the question, and instead told the officer that he had a wallet in his back pants pocket. Officer Colon's suspicions were heightened because he observed appellant put the black object into his right coat pocket, not his back pants pocket. The officer told appellant he was not interested

[3] Although it turned out that school was not in session that day, Officer Colon testified that he was not aware of that fact.

in what he had in his back pocket, but was interested in what he had put into his coat pocket. Appellant still did not explain what he had in his right coat pocket. Rather, he reached toward his right back pants pocket, and Officer Colon instructed him not to put his hands in his pocket. At the hearing, the officer explained that he was afraid for his safety, and in particular feared that appellant had a weapon, especially in light of the recent gang violence in the area among teenagers. Based on those concerns, Officer Colon tapped appellant's right coat pocket, where he had seen him hide the black object, and felt a hard object.

Although Officer Colon was not certain what was in the pocket, he thought it could be a knife or other weapon. Because of that concern, the officer repositioned himself behind appellant for safety reasons in the event a struggle were to ensue, and tapped the pocket one more time. Officer Colon then reached into appellant's pocket, and the officer's hand "went right into the pistol grip of the firearm." Officer Colon called out a code word to indicate to his fellow officers the presence of a firearm. One of those officers exited the van and held appellant while Officer Colon removed the firearm from appellant's pocket. Appellant was then placed under arrest.

It is well settled that any inquiry into the propriety of

police conduct must weigh the degree of intrusion entailed against the precipitating and attending circumstances out of which the encounter arose (*see People v Salaman*, 71 NY2d 869, 870 [1988]), and determine whether the intrusion was reasonably related in scope to the circumstances leading to the encounter (*De Bour*, 40 NY2d at 215). Furthermore,

> "in this difficult area of street encounters between private citizens and law enforcement officers, [courts must not] attempt to dissect each individual act by the policemen; rather, the events must be viewed and considered as a whole, remembering that reasonableness is the key principle when undertaking the task of balancing the competing interests presented"

(*Chestnut*, 51 NY2d at 23; *see People v Celaj*, 306 AD2d 71, 71-72 [2003], *affd* 1 NY3d 588 [2004]).

We conclude that the measured actions taken by Officer Colon were reasonable under all of the circumstances presented. In an area where a series of teenage gang shootings had recently occurred, Officer Colon saw appellant stare at the police van and suddenly shove a black object he had been holding in his palm into his coat pocket. From the circumstances, it reasonably appeared to the officer that appellant was not simply placing the object in his pocket, but rather was hiding it from view. In addition, Officer Colon believed, albeit mistakenly, that school was in session that day, which raised a concern that appellant

might be a truant (*see Matter of Kennedy T.*, 39 AD3d 408 [2007]). Based on this combination of factors, the officer had, at least, an objective credible reason to approach appellant and ask for information (*see De Bour*, 40 NY2d at 223; *People v Flynn*, 15 AD3d 177, 178 [2005], *lv denied* 4 NY3d 853 [2005]; *People v Steinbergin*, 4 AD3d 192, 192 [2004], *lv denied* 3 NY3d 648 [2004], *cert denied* 543 US 1159 [2005]).

When Officer Colon asked basic nonaccusatory questions, appellant stuttered and appeared nervous, and when appellant gave his destination, the officer recognized it as a location connected with gang activity. This behavior, in conjunction with appellant's furtive actions in hiding the black object, led the officer to have a founded suspicion that criminal activity was afoot, allowing him to engage in a common-law right of inquiry (*see People v Hollman*, 79 NY2d 181, 184-185 [1992]; *Matter of Jamaal C.*, 19 AD3d 144, 145 [2005] [the appellant's attempts to conceal a heavy object underneath his jacket suggested the presence of a weapon and justified, at least, a common-law inquiry]). Thus, contrary to appellant's argument, he was not indiscriminately stopped merely because he was a teenager in a high crime area. Nor is it relevant that the initial tone of the conversation was "friendly." Indeed, had Officer Colon acted in a more aggressive manner, that would have been inappropriate at

this early stage.

Next, Officer Colon's limited pat-down frisk of appellant's coat pocket was reasonable under the circumstances. As the Court of Appeals reinforced in *Batista* (88 NY2d at 650):

> "'If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger'"

(*id*. at 654, *quoting People v Rivera*, 14 NY2d 441, 446 [1964], *cert denied* 379 US 978 [1965]). Thus, the Court concluded that in order to justify a frisk, "the officer must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety" (*Batista*, 88 NY2d at 654; *see also Salaman*, 71 NY2d at 870 ["where the officer is justified in believing that the suspect is armed, a frisk for weapons is permissible"]).

At a suppression hearing, an officer does not even have to "articulate any feeling of fear for his own [or others'] safety" as long as the situation presents "good cause for such fear" (*Batista*, 88 NY2d at 654 [internal quotation marks omitted). Here, the testimony went beyond that required by *Batista* because Officer Colon specifically testified that he feared for his

safety. And the facts presented at the hearing show that Officer Colon's fear was reasonable under the circumstances. First, the officer was not on routine patrol, but was assigned to a specific detail tasked with investigating a number of recent teenage gang shootings in the area. Next, Officer Colon observed appellant — a teenager who, in the officer's view, should have been in school that morning — holding a black object in the palm of his hand near his waist (*see People v Rivera*, 286 AD2d 235 [2001] [grasp at the waist is a telltale sign of a weapon], *lv denied* 97 NY2d 760 [2002]). As the hearing court aptly noted, black is a common color for weapons, and weapons are commonly held in one's palm.

Officer Colon then saw appellant stare at the police van and immediately shove the black object into his coat pocket. Appellant's eye contact with police, followed by his rapid concealment of the object, provided additional reason for the officer to suspect it was a weapon (*see People v Omowale*, 83 AD3d 614, 617 [2011] [eye contact may be weighed with other factors to determine if police officers reasonably fear for their safety], *affd* 18 NY3d 825 [2011]). The officer's concerns that appellant possessed a weapon were further heightened by appellant's stuttering and nervous behavior, and the fact that appellant was heading toward an area connected with the gang activity.

When asked what he had in his hand, appellant deflected the

question, and told Officer Colon that he had placed a wallet in his back pants pocket. The officer knew this was false, because he had just seen appellant put the object in his front coat pocket. Appellant's deceptive answer to Officer Colon's question, together with all of the previous information, provided the officer with a reasonable suspicion that appellant was armed. And when appellant moved his hand toward his pocket, it was reasonable for Officer Colon, who at that moment was alone with appellant on the street, to take the minimally intrusive, self-protective measure of patting down appellant's coat pocket (*see Batista*, 88 NY2d at 654; *People v Correa*, 77 AD3d 555 [2010], *lv denied* 16 NY3d 742 [2011]; *People v Jackson*, 52 AD3d 400 [2008], *lv denied* 11 NY3d 833 [2008]; *People v Mims*, 32 AD3d 800 [2006]).

The majority mistakenly claims that we are justifying the frisk of appellant in the absence of a reasonable suspicion that he committed a crime. The same evidence that leads us to conclude that Officer Colon had a reasonable fear for his safety also supports a finding of a reasonable suspicion that appellant committed a crime, namely that he was armed with a weapon that could cause the officer harm. Thus, we need not address whether, in this case, the officer's pat down would have been justified even at a level-two inquiry (*see e.g. Correa*, 77 AD3d at 555; *People v Robinson*, 278 AD2d 808, 808 [2000], *lv denied* 96 NY2d

787 [2001]; *People v Chin*, 192 AD2d 413, 413 [1993], *lv denied* 81 NY2d 1071 [1993]), because here there were sufficient grounds to support a level-three frisk.

Finally, Officer Colon acted lawfully in reaching into appellant's coat pocket and removing the weapon after the pat down. Although the officer could not know for certain what the "black," "hard" object was when he tapped the outside of appellant's coat pocket, he testified that he was concerned it could have been a weapon. Officer Colon did not say, as the majority contends, that the object "did not seem like a weapon." In light of all of the preceding events, Officer Colon was justified in reaching into appellant's pocket to rule out the possibility that the object was a weapon. The majority's view that the officer had to be sure that the object was a weapon before taking steps to ensure his safety is contrary to existing precedent and would place the officer at undue risk (*see People v Thanh Do*, 85 AD3d 436 [2011] [after protective frisk failed to rule out possibility that object was a weapon, officer was justified in removing object from the defendant's person], *lv denied* 17 NY3d 905 [2011]; *People v Allen*, 42 AD3d 331, 332 [2007] [officer's reasonable suspicion that defendant "might be concealing a weapon" justified frisk], *affd* 9 NY3d 1013 [2008]; *People v Mims*, 32 AD3d at 800 [officer who touched bulge and felt

a hard object that he reasonably believed could be a gun was entitled to reach into the area and remove the object]; *People v Johnson*, 22 AD3d 371, 372 [2005] [officer justified in removing object from pocket where he "was concerned that it might have been a weapon"], *lv denied* 6 NY3d 754 [2005]; *People v Greenidge*, 241 AD2d 395, 395 [1997] [upon feeling weighty object inside pouch "that felt like it might be a gun," the police properly opened the pouch], *affd* 91 NY2d 967 [1998]). It is undisputed that "[r]easonable suspicion, not absolute certainty, is the applicable standard" (*Chestnut*, 51 NY2d at 22). And when the officer felt the pistol grip of a gun, he properly removed the weapon (*see People v Davenport*, 9 AD3d 316 [2004], *lv denied* 3 NY3d 705 [2004]; *People v Brown*, 277 AD2d 107, 108 [2000], *lv denied* 96 NY2d 756 [2001]).

Ignoring the court's determination that Officer Colon was a credible witness, the majority asserts that there was no reasonable threat to his safety, and that the hearing court's findings otherwise were based on a "bare assertion" by Officer Colon. In so doing, the majority gives short shrift to the well-settled principle that "[t]he credibility findings of a hearing court are accorded great deference and will not be disturbed unless a police officer's testimony is manifestly untrue, physically impossible, contrary to experience, or self-

contradictory" (*People v Moore*, 93 AD3d 519 [2012] [internal quotation marks omitted], *lv denied* ___ NY3d ___ [2012]).

In concluding that the search here was justified, we fully recognize that there are situations in which the police abuse their authority to stop and frisk young people, but here, Officer Colon acted appropriately consistent with the steps required by the law. Although the majority portrays this case as a police officer detaining a teenager on the street based only on "vague concerns about age and gender" and "presence in a bad neighborhood," the evidence at the suppression hearing showed nothing of the sort. The majority either ignores or minimizes the wealth of facts supporting the officer's safety concerns, including his testimony about the gang activity, appellant's concealing the object upon seeing the police, appellant's nervous behavior and deceptive answers when questioned, and appellant's reaching for his pocket. Thus, Officer Colon's testimony that he patted down appellant's coat pocket because he feared that appellant had a weapon was neither a "bare assertion" nor an "unsubstantiated claim," as the majority posits, but was well supported by the evidence in this developing street encounter.

In rejecting Officer Colon's statement that he reasonably feared for his safety, the majority makes a number of unwarranted assertions. First, the majority argues that the officer could

not have been concerned for his safety because he "presumably . . . knew [the back pocket] contained a wallet." This is merely speculation because the officer never gave any such testimony. Next, the majority makes the puzzling claim that Officer Colon's instructing appellant not to put his hands in his pocket was not an expression of fear for personal safety. In fact, just the opposite is true — the officer told appellant not to reach for his pocket precisely because he was concerned there was a weapon. That concern was further elucidated by Officer Colon's repositioning of himself behind appellant for safety reasons after he felt the hard object.

Finally, the majority places undue emphasis on the fact that Officer Colon did not frisk the back pocket where appellant was reaching, but instead tapped the front coat pocket. Officer Colon's action made perfect sense because he had observed appellant place the black object in his front pocket. What reasonably caused Officer Colon to fear for his safety was the movement of appellant's hand on the same side of the body as the suspected weapon. Because the determination of the hearing court, which saw and heard Officer Colon testify, was not "plainly unjustified or clearly erroneous," it is improper for the majority to substitute its own fact findings (*People v Greene*, 84 AD3d 540, 541 [2011] [internal quotation marks

omitted]).

The majority attempts to distinguish *Batista* on its facts, but cannot dispute its core holding — that a frisk is justified if the police have knowledge of facts or circumstances supporting a reasonable suspicion that the suspect is armed or poses a threat to safety. We, along with the other Departments, have repeatedly applied *Batista* in upholding frisks based on concerns about officers' safety (*see e.g. People v Davenport*, 92 AD3d 689 [2012]; *People v Butler*, 81 AD3d 484 [2011], *lv denied* 16 NY3d 893 [2011]; *People v Caicedo*, 69 AD3d 954 [2010], *lv denied* 14 NY3d 886 [2010]; *People v Martinez*, 39 AD3d 1159 [2007], *lv denied* 9 NY3d 867 [2007]; *People v Douglas*, 309 AD2d 517 [2003], *lv denied* 1 NY3d 596 [2004]; *People v Crespo*, 292 AD2d 177 [2002], *lv denied* 98 NY2d 709 [2002]; *People v Siler*, 288 AD2d 625 [2001], *lv denied* 97 NY2d 709 [2002]; *People v Robinson*, 278 AD2d 808 [2000], *lv denied* 96 NY2d 787 [2001]).

As noted earlier, in assessing the propriety of the police conduct here, we must consider whether the intrusion was reasonably related in scope to the circumstances leading to the encounter (*De Bour*, 40 NY2d at 215). Here, Officer Colon's actions were minimally intrusive and a measured response to the situation he faced. At no point did he draw his weapon, place appellant in handcuffs, or otherwise restrain appellant's

movement. When appellant became evasive in the face of the officer's question and began moving his hand, the officer did not immediately enter the coat pocket. Instead, he tapped on the pocket, and then tapped again, in an attempt to ascertain the nature of what appellant hid in his pocket. Only after he felt a hard object did he make the reasonable decision to enter the pocket. Even then, he did not immediately pull the object out, but removed it only when he felt the pistol grip of a weapon.

The majority believes that Officer Colon should not have frisked appellant, even after appellant began to move his hand. But had the officer refrained from conducting a limited pat down, appellant would have had the opportunity to actually reach into the front pocket where the weapon was located, which was the officer's safety concern. Under these circumstances, it would be unrealistic to require Officer Colon to assume the risk that appellant's conduct was "innocuous or innocent" (*People v Benjamin*, 51 NY2d 267, 271 [1980]). As the Court of Appeals has observed: "[W]here . . . police officers find themselves in a rapidly developing and dangerous situation presenting an imminent threat to their well-being, they must be permitted to take reasonable measures to assure their safety and they should not be

expected to await the glint of steel before doing so" (*People v Allen*, 73 NY2d 378, 380 [1989] [internal quotation marks omitted]; *see Davenport*, 92 AD3d at 691; *People v Bracy*, 91 AD3d 1296, 1298 [2012]; *Brown*, 277 AD2d at 108).

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK

Saxe, J.P., Sweeny, Freedman, Manzanet-Daniels, JJ.

7052-
7053-
7054-
7055 The Plaza PH2001 LLC, Index 602673/08
Plaintiff-Appellant, 600732/10

-against-

Plaza Residential Owner LP, et al.,
Defendants-Respondents.

- - - - -

The Plaza PH2001 LLC,
Plaintiff-Appellant,

-against-

Plaza Residential Owner LP, et al.,
Defendants-Respondents.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey W. Davis of counsel), for respondents.

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Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered November 30, 2010 and March 16, 2011, affirmed, without costs. Order, same court and Justice, entered May 4, 2011, modified, on the law, to deny the motion as to the first, second, and third causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered August 22, 2011, modified, on the law, in accordance with the foregoing, so as to vacate the dismissal of the first action, and otherwise affirmed.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

7052-7053-7054-7055
Index 602673/08
600732/10

_____x

The Plaza PH2001 LLC,
Plaintiff-Appellant,

-against-

Plaza Residential Owner LP, et al.,
Defendants-Respondents.

- - - - -

The Plaza PH2001 LLC,
Plaintiff-Appellant,

-against-

Plaza Residential Owner LP, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered November 30, 2010, which, among other things, granted the motion to dismiss the complaint filed under index No. 600732/10 (second action) and award attorneys' fees, the order, same court and Justice, entered March 16, 2011, which denied plaintiff's motion to, among other things, vacate the order entered November 30, 2010 and consolidate the second action with an earlier action filed by plaintiff under index No. 602673/08 (first action), order, same court and Justice,

entered May 4, 2011, which, to the extent appealed from as limited by the briefs, granted the motion to dismiss the amended complaint in the first action, and the order, same court and Justice, entered August 22, 2011, which, sua sponte, vacated an order entered on or about June 30, 2011 reinstating the original complaint in the first action, and dismissed the first action with prejudice.

Morrison Cohen LLP, New York (Y. David Scharf, Jerome Tarnoff, and Joaquin Ezcurra of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey W. Davis and Samantha V. Ettari of counsel), for respondents.

SAXE, J.

This litigation arose because plaintiff's expectations for the penthouse apartment that it had agreed, pre-construction, to purchase were not met by the apartment as built. The question is whether plaintiff is left with any legal recourse, in view of the provisions of the purchase agreements, offering plan, and construction plans that defendants rely on in their current dismissal motion.

On a previous appeal, this Court modified the dismissal of plaintiff's original complaint, reinstating a cause of action for breach of contract (*see* 79 AD3d 587 [2010]). We are now asked to address the propriety of the motion court's subsequent dismissal of both a new complaint served by plaintiff against the same defendants in a second action and an amended complaint plaintiff served in the first action in the wake of our reinstatement of a portion of the first complaint.

FACTUAL AND PROCEDURAL HISTORY

The First Action

Defendant CPS 1 Realty LP was the original sponsor of a condominium offering plan, dated December 7, 2005, for the sale of luxury residential condominium units at the Plaza Hotel in Manhattan, and defendant Plaza Residential Owner LP took over as sponsor in April 2006; both defendants are allegedly wholly owned

by defendant El-Ad Properties NY LLC (those three defendants will be referred to collectively as Sponsor). Defendant Stribling Marketing Associates LLC was the selling agent under the condominium offering plan.

In August 2007, plaintiff, The Plaza PH2001 LLC, entered into two purchase agreements: one for a planned penthouse unit, at a price of $31 million, and the other for a smaller unit, apartment 1602, to be used for the household help employed in the penthouse residence.

When plaintiff's representative was permitted to see the nearly completed penthouse in May 2008, the penthouse was different from the unit plaintiff had expected. Instead of a large, light and airy expanse of open living space with floor-to-ceiling 11-foot-high windows providing expansive views of Central Park, plaintiff found a living area broken up by several large columns that also blocked the view, with small, three-foot-tall windows beginning three feet from the floor and ending at the six-foot line where the sloped skylights in the ceiling began, and a cramped feel to the room due to the low height at which the ceiling and skylights met the wall and windows. Instead of an open, light kitchen space with four large windows and a moderate-sized kitchen island surrounded by sufficient floor space, plaintiff found the kitchen floor space largely taken up by an

excessively large island, and an obtrusive, steeply pitched ceiling ending at a height of six feet, which, as in the living room, gave a cramped feel to the breakfast area; in addition, the kitchen had only two small windows instead of four large ones, drastically diminishing the expected view.

Plaintiff also alleged that while the plans had showed the exterior wall of the penthouse as continuous with that of the lower floors, the exterior wall as constructed was set back approximately three feet, and a drainage grate not shown in any plans had been situated directly outside the exterior wall, below the living room and kitchen windows, inside a three-foot ledge.

Based on these alleged changes to the penthouse as constructed, plaintiff first sought rescission of the contracts, then commenced this action.

The original complaint, the subject of the previous appeal, had asserted causes of action for breach of the purchase agreements and fraud, and sought rescission, return of the down payments and legal fees. The allegations included the failure to construct the penthouse in accordance with the plans, model or representations relating to such aspects of the units as room size, ceiling height, number and size of windows, layout, and other design details. Plaintiff also alleged that defendants deliberately failed to provide notice of the changes made, in an

effort to deprive plaintiff of its right and ability to rescind the purchase agreements. The cause of action asserted against Stribling Marketing Associates LLC claimed fraudulent inducement based on the assertion that these defendants made representations, through the use of the model apartment relating to the penthouse's layout and design, that they knew to be untrue.

Defendants' motion to dismiss the original complaint in its entirety was based primarily on the "No Representations" provision contained in both purchase agreements, in which plaintiff acknowledged that it had not relied on "any architect's plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or otherwise," except as represented in the purchase agreement or in the plan. The full clause reads as follows:

> "No Representations. Purchaser acknowledges that *Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or otherwise*, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions of the Unit or the rooms therein contained or any other physical characteristics thereof . . . *except as herein or in the Plan*

> *specifically represented*; Purchaser has relied solely on his or her own judgment and investigation in deciding to enter into this Agreement and purchase the Unit. No person has been authorized to make any representations on behalf of Sponsor. No oral representations or statements shall be considered a part of this Agreement. Purchaser agrees (a) to purchase the Unit, without offset or any claim against, or liability of, Sponsor, *whether or not any layout or dimension of the Unit or any part thereof, or of the Common Elements, as shown on the Floor Plans on file in Sponsor's office and [to be] filed in th[e] City Register's Office, is accurate or correct*, and (b) that Purchaser shall not be relieved of any of Purchaser's obligations hereunder by reason of any immaterial or insubstantial inaccuracy or error. The provisions of this Article 20 shall survive the closing of title or the termination of this Agreement" (emphasis added).

The motion court dismissed the complaint, holding that this "No Representations" clause established a complete defense to plaintiff's claims as a matter of law. In addition, the court considered, and rejected, plaintiff's reliance on the provision of the condominium offering plan – which was incorporated by reference into the purchase agreements - providing for a right of rescission in the event the sponsor found it necessary to make material alterations in the plans. That provision reads:

> "Any such changes, if material (for example, variations in square footage in excess of 5%) shall be disclosed by Sponsor in a duly filed amendment to the Plan .... No such change will be made if the same would materially adversely affect any Purchaser under an Agreement ... unless ... (iii) the same is dictated by construction conditions at the Property (such as coordination of Building systems, conflicts with structural members or elements, conforming with Legal Requirements, unforeseen events, etc. and, in all

> cases, in good faith, reasonably necessary due to factors not within Sponsor's reasonable control, and where no practicable alternative (in the exercise of sound construction management practices) exists), and in such event, Sponsor will, in the amendment disclosing such material adverse change, offer the affected Purchaser(s) the right, for at least 15 days, to rescind their Agreement(s) and receive a refund of their Deposit(s) . . . However, as long as the layout and dimensions of a Residential Unit conform substantially to the Plans and Specifications, a Purchaser will not be excused from purchasing a Residential Unit by reason of a minor, non-material deviation or change and will not have any claim against Sponsor as a result thereof."

The court held that the complaint "fail[ed] to describe any changes which, under these definitions, would be considered 'material.'"

This Court disagreed in part with the motion court's reasoning, reinstating a cause of action for breach of contract. In our view, while the allegations of the original complaint relied in part on the alleged breach of "extracontractual representations," which reliance was precluded by the "No Representations" clause, it did not rely *solely* on the breach of the alleged extracontractual representations. Rather, the original complaint also asserted that the penthouse unit was constructed in a manner materially different from that set forth in the filed plans and specifications, contrary to the requirements of the offering plan, which required that the work be performed substantially in accordance with those filed plans

and specifications and that material alterations be the subject of an amendment to the plan. This Court therefore held that:

> "Plaintiff stated a cause of action for breach of contract by alleging that certain aspects of the finished penthouse apartment did not conform to the specifications of the condominium offering plan incorporated by reference into the purchase agreements, and defendants' submissions failed to establish grounds to dismiss the contract claim pursuant to CPLR 3211(a)(1)" (79 AD3d at 587).

We upheld the dismissal of plaintiff's fraudulent inducement cause of action, however, agreeing with the motion court that, because of the "No Representations" provision in the purchase agreements, plaintiff could not have relied on the alleged extracontractual representations.

The Second Action

On March 22, 2010, before this Court ruled on plaintiff's appeal from the dismissal of its first complaint, plaintiff commenced a second action, based on essentially the same claims. Plaintiff offers two explanations: first, that when the IAS court declined to sign an order to show cause by which plaintiff sought to amend the original complaint, it directed the commencement of a new action, and, second, that the new action was authorized by CPLR 205(a), which permits commencement of a new action within six months of dismissal of a lawsuit when that dismissal is *not* on the merits. This second complaint contained claims for breach of contract, fraud and negligent misrepresentation, breach of the

covenant of good faith and fair dealing, and deceptive trade practices under General Business Law § 349, and a claim under 15 USC § 1703(a), known as the Interstate Land Sales Act.

Defendants moved to dismiss the complaint in the second action. By order entered November 30, 2010, the motion court granted the motion on the ground that the action was barred by the res judicata effect of the order dismissing the first action, since "[p]laintiff's previous complaint and the current complaint[] stem from the same transaction and seek the same damages." This is the first of the four orders that we consider on the present appeal.

Following this Court's order entered December 21, 2010 reinstating the breach of contract claim in the first action, plaintiff took two separate steps. On January 21, 2011, plaintiff moved to vacate the November 30, 2010 order dismissing the complaint in the second action. It contended that the res judicata reasoning of the motion court was no longer valid in view of the reinstatement. Plaintiff also sought consolidation of the two actions. By order entered March 16, 2011, the court denied the motion to vacate its dismissal of the second action and to consolidate. This is the second order we consider on this appeal.

Further Activity in the Reinstated First Action

In addition to its January 21 motion seeking to revive its second action, on January 28, 2011 plaintiff served an amended complaint in the reinstated first action, "as of right," pursuant to CPLR 3025(a). The amended complaint contained five causes of action: for declaratory relief, specific performance, breach of contract, breach of the covenant of good faith and fair dealing, and violation of General Business Law § 349 based on alleged deceptive trade practices. On March 4, 2011, defendants moved to dismiss the amended complaint in the first action, and, by order entered May 4, 2011, the court granted the motion, holding that the amended complaint:

> "seeks to re-assert claims that were dismissed, and later affirmed as properly dismissed by the Appellate Division, First Department. Such amendment is prejudicial and would amount to plaintiff seeking a second bite at the apple on matters already dismissed on the merits."

Defendants had also moved for release of the down payments and for attorneys' fees as the "prevailing party" under paragraph 35 of the purchase agreements. The order denied that branch of the motion, holding that defendants failed to "set forth any entitlement to same at this juncture." This May 4, 2011 order is the third one we consider on this appeal.

Defendants moved for reargument of their motion for attorneys' fees and the release of the down payments, which the motion court denied by order entered June 30, 2011; the order

stated that the "original summons and complaint [in the first action] was reinstated upon this Court's dismissal of the amended summons and complaint," and scheduled a preliminary conference. It appears from this order that in the motion court's view, when it dismissed the amended complaint on May 4, 2011, the reinstated original complaint remained extant.

However, after the preliminary conference, apparently upon an oral request by counsel without any written notice of motion, the court issued an order, entered August 22, 2011, vacating its June 30, 2011 order "and its reinstatement of the original complaint" and dismissing the first action with prejudice. This is the fourth order considered on this appeal; although an appeal may not lie as of right from this order under CPLR 5701, we address the order on the merits pursuant to a grant of leave.

DISCUSSION

The main issue to be addressed here is whether the documents submitted by defendants on the motion to dismiss the amended complaint succeeded, where the first dismissal motion failed, in conclusively establishing that plaintiff cannot prevail on its claims.

But first we address the preliminary issues. Initially, the first order on appeal correctly dismissed the second action based on the doctrine of res judicata. At that point, the only extant

ruling was Supreme Court's ruling dismissing the first complaint. We reject plaintiff's argument that res judicata did not apply because the phrase "with prejudice" was deleted from the form of the dismissal order. Even where an order does not explicitly so state, a dismissal is on the merits for res judicata purposes if the order addressed the merits and was not issued purely on account of technical pleading deficiencies (*see Jericho Group Ltd. v Midtown Dev. L.P.*, 67 AD3d 431 [2009], *lv denied* 14 NY3d 712 [2010]; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558 [1989]). By its terms, the order addressed the merits of the complaint. Further, the pending appeal did not alter the applicability of the doctrine of res judicata at that time (*see Petrella v Siegel*, 843 F2d 87, 90 [2d Cir 1988]).

We also affirm the second order on appeal. The second action was improperly commenced, and this Court's reinstatement of a portion of the first complaint did not retroactively render commencement of the second action proper.

However, the motion court erred when, in its third order, entered May 4, 2011, it dismissed in its entirety the amended complaint in the first action. The short form order stated only that "[t]he amended summons and complaint seeks to re-assert claims that were dismissed, and later affirmed as properly dismissed," and that "[s]uch amendment is prejudicial and would

amount to plaintiff seeking a second bite at the apple on matters already dismissed on the merits," and also observed that the amended complaint was filed without leave of the court.

The May 4, 2011 order seems to imply that while the reinstated portion of the complaint in the first action remained extant, plaintiff's attempt at its amendment was procedurally and substantively improper. Notably, however, plaintiff was entitled to amend its reinstated complaint under CPLR 3025(a), which allows a party to amend its pleading once without leave "within twenty days after service of a pleading responding to it." The permitted amendments range from minor corrections, to the addition of substantive elements, to the addition of new causes of action (*see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:1, C3025:3).

Once plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint "became the only complaint in the action" (*Hummingbird Assoc. v Dix Auto Serv.*, 273 AD2d 58 [2000], *lv denied* 95 NY2d 764 [2000]). The action was then required to proceed "as though the original pleading had never been served" *(Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841, 841 [1975]).

The amended complaint must therefore be analyzed must any complaint on a CPLR 3211 motion; we construe the complaint

liberally, accepting as true the facts alleged, and according plaintiff the benefit of every possible inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). Of course, this Court's ruling regarding the sufficiency of a portion of the original complaint's breach of contract claim constitutes the law of the case and remains controlling to the extent the issues raised in the original complaint and addressed by our decision are presented in the amended complaint (*see Fusco v Kraumlap Realty Corp.*, 1 AD3d 189 [2003]). But our previous finding that defendants "failed to establish grounds to dismiss the contract claim pursuant to CPLR 3211(a)(1)" does not preclude re-examination of the amended complaint's restated contract claim pursuant to CPLR 3211(a)(1), based on evidence *not* submitted on the first dismissal motion. That is, by amending the complaint, plaintiff gave defendants a renewed opportunity to offer documentary evidence conclusively disproving the amended complaint's material allegations. Defendants took advantage of this opportunity by submitting the condominium offering plan and amendments to it, along with the purchase agreements, in support of their argument that the documentary evidence conclusively disproves plaintiff's claims.

The first through third causes of action in the amended complaint are founded on the breach of contract claim. The first

seeks a judgment declaring that the sponsor was required to proffer an amendment to the condominium offering plan detailing the changes to the plans, and that plaintiff is entitled to a right of rescission and the return of its deposits, in view of the alleged material adverse changes made to the original plans for the penthouse unit. The second seeks specific performance, demanding a judgment directing the sponsor to amend the offering plan and set out the changes to the plans for the unit. The third seeks monetary damages, in the amount of plaintiff's down payments, for the alleged breach of contract.

A breach of contract claim should, of course, be dismissed under CPLR 3211(a)(1) if the contract itself precludes the claim (*see 150 Broadway N.Y. Assoc. L.P. v Bodner*, 14 AD3d 1, 5 [2004]). Defendant continues to rely on the "No Representations" clause of the purchase agreements as conclusively precluding plaintiff from relying on alleged precontractual or extracontractual promises. However, as we previously held, plaintiff may have a viable claim under the contract to the extent the amended complaint pleads a breach of the terms of the purchase agreements, the offering plan, or the filed plans and specifications (*see* 79 AD3d 587).

Review of the amended complaint discloses that many of plaintiff's allegations are still grounded in extracontractual

statements and promises, and are therefore precluded by the "No Representations" clause. For example, the introductory factual allegations cite to "the marketing materials, the model apartments, the website and the physical mock-ups of the duplex [p]enthouse shown to plaintiff's representatives," as well as the sales agent's oral representations promising such characteristics as "opulent grandeur." However, elsewhere in the amended complaint, plaintiff alleges a breach of the Sponsor's contractual obligations based on the alleged failure to build the penthouse in accordance with the plans and specifications, and the making of material alterations to those plans and specifications without notice to plaintiff.

Among the alleged material alterations to the plans are the steeply sloped ceiling that drops to a height of only six feet where it meets the wall and banks of windows; the reduction in the number of kitchen windows from four to two; the presence of multiple large columns blocking what the plans had displayed as a large airy open living space containing one small column; and the addition of the drainage grate outside the exterior wall, which necessitated other changes, such as setting the unit's exterior wall back several feet and reducing the size of the windows along that wall.

These allegations are not barred by the "No Representations"

provision, nor are they precluded by any other, general provisions of the purchase agreements. Defendants point to the contract provision entitled "Construction," which provides that "[t]he issuance of a temporary or new permanent Certificate of Occupancy for all or any portion of the Building shall be deemed presumptive evidence that renovation of the Building or of such portion of the Building and its appurtenances and the Residential Units therein has been substantially completed in accordance with th[e] [Offering] Plan and the Plans and Specifications." However, this clause cannot invalidate or negate the requirement of the offering plan, incorporated into the purchase agreements, that if the sponsor intends to implement material changes to the filed plans and specifications, it must amend the plans and notify the purchasers and allow for a right of rescission.

Defendants also rely on provisions of the offering plan as grounds to dismiss under CPLR 3211(a)(1). To challenge plaintiff's claim regarding the addition of large columns in the living room, defendants rely on the ninth amendment to the offering plan, in which the sponsor reported "the relocation of vertical shafts and the movements of walls in order to complete the coordination of the HVAC systems and infrastructure," and appended new penthouse floor plans, referenced as Exhibit C. If this Court were prepared to assume that it is capable of

correctly understanding the notations on the floor plan without the assistance of a witness's explanation, those floor plans could, upon examination, arguably support the conclusion that the presence of columns between the penthouse's living room and the foyer area, as well as one small column in the room, were reflected in the submitted floor plan. However, it seems ill advised for this Court to presume that level of expertise in this context.

Even if this Court were capable of interpreting the submitted floor plan as a matter of law, and upon doing so were to preclude plaintiff's claim regarding additional columns, nevertheless, plaintiff claims other alterations to the plans that are not conclusively disproved by the submitted documents.

For example, defendants' submissions fail to conclusively disprove plaintiff's claim with regard to ceiling heights. The offering plan originally specified that the height of residential units "will generally be nine feet to eleven feet, varying from floor to floor," and that with ceiling heights in the kitchens, powder rooms, bathrooms and foyers would be approximately nine feet, with the proviso that they "may vary." As defendants point out, the ninth amendment provided for reductions in ceiling heights in the kitchens, powder rooms, bathrooms and foyers from 9 feet to 8½ feet. Of course, the very fact that defendants

perceived the need to include in an amendment to the offering plan this six-inch reduction in ceiling height tends to indicate that such a change in the plan may be a material alteration requiring a formal amendment to the plan -- notwithstanding the provision's conclusion that the six-inch reduction in ceiling heights "reflect changed specifications which are immaterially different from those initially described in the Plan." In any event, a sloped ceiling that comes down to a height of 6 feet would seem a far more substantial material alteration than a reduction to 8½ feet. Moreover, the provision of the ninth amendment that reports reductions in height for the kitchens, powder rooms, bathrooms and foyers specifically excludes "the ceiling heights in the principal living spaces of the Residential Units."

As to plaintiff's claim that the windows are substantially smaller and fewer than called for in the plans and specifications, it should be noted that defendants have not actually submitted copies of the filed plans and specifications, so as to contradict that claim. Rather, defendants essentially call into question whether plaintiff can establish that anything in the plans and specifications was materially altered by the windows as constructed, asserting that there is nothing in the documents they submitted that provides for floor-to-ceiling

windows. This amounts to a challenge, impermissible on this motion, to plaintiff's ability to prove that the filed plans and specifications provided for floor-to-ceiling windows; it does not constitute a submission of documents conclusively disproving the claim. But it is worth observing that the plans submitted by defendants actually indicate a bank of four windows in the kitchen; a reduction to two windows may well constitute a substantial, material change, especially in combination with other alterations to the plans.

Similarly, plaintiff's claim that the inclusion of the drainage grate outside the exterior, below the living room and kitchen windows, constituted or created a material alteration to the filed plans and specifications is not disproved by the submitted documents. The documents also fail to disprove the other alleged design changes that were apparently required to accommodate the drainage grate, namely, the setting back of the unit's exterior wall and the reduction in the size of the windows along that wall.

Defendants emphasize that the sponsor has broad discretion and flexibility to modify the units during construction. They point to the floor plans' warning that "[a]ll dimensions are approximate and subject to normal construction variances and tolerances," and that "[s]quare footage exceeds the usable floor

area." These provisions, too, fail to constitute sufficient grounds for dismissal of the complaint under CPLR 3211(a)(1). They cannot negate the provision of the offering plan, incorporated in the purchase agreements, that imposed on the sponsor an affirmative duty to file an amendment to the plan for any material changes that would materially adversely affect the purchaser, "for example, variations in square footage in excess of 5%." We cannot properly determine as a matter of law at this juncture whether the effect of the alleged changes, in the windows and ceiling heights and the placement of the exterior wall and drainage grate, constituted sufficiently material changes that they should have been the subject of an amendment to the offering plan. Since plaintiff's reliance on these alleged alterations to the plans and specifications is not precluded by any of the documents submitted on defendants' motion, defendants have failed to establish a right to dismissal.

The allegation that a breach of contract was also established by a lack of promised services and facilities may seem difficult to press, in the face of the offering plan provision warning that at first some of the services and facilities described in the plan may not be available; however, that provision does not absolutely preclude the possibility that a failure of services or facilities may constitute a breach of

contract. It would be more appropriate to address this claim on the merits than on the pleadings alone.

In sum, the first through third causes of action include claims that the construction of the penthouse created material alterations to the filed plans, without the notice and right of rescission required by the purchase agreements. These allegations are sufficient to state a cause of action, because they are not entirely precluded by the "No Representations" clause or any other submitted documents.

The fourth cause of action asserts a breach by the sponsor of the implied covenant of good faith and fair dealing, focusing primarily on the sponsor's alleged promises in the course of marketing the unit that the planned penthouse would have "spectacular" and "magnificent" views and high ceilings, and the expectations created by the model, but also including reference to the failure to disclose material alterations to the filed plans. To the extent this cause of action is not precluded by the "No Representations" clause, we view it as duplicative (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010], *lv denied* 15 NY3d 704 [2010]).

Plaintiff's fifth cause of action, alleging deceptive trade practices on the part of both the sponsor and the selling agent, pursuant to General Business Law § 349, fails as a matter of law

because the claimed violations do not have "a broad impact on consumers at large" (*see Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [2000]). We need not address defendants' challenge to a purported Martin Act claim, since the complaint contains no such claim.

Finally, we reject defendants' contention that in any event, as a matter of law, the complaint fails to state a breach of the purchase agreement for unit 1602. The lack of an explicit contingency provision linking the two units is not dispositive; the allegations of the complaint are sufficient for these purposes.

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered November 30, 2010, which, among other things, granted the motion to dismiss the complaint filed under index No. 600732/10 (second action) and award attorneys' fees, should be affirmed, without costs. The order, same court and Justice, entered March 16, 2011, which denied plaintiff's motion to, among other things, vacate the order entered November 30, 2010 and consolidate the second action with an earlier action filed by plaintiff under index No. 602673/08 (first action), should be affirmed, without costs. The order, same court and Justice, entered May 4, 2011, which, to the extent appealed from as limited by the briefs, granted the motion to dismiss the

amended complaint in the first action, should be modified, the motion denied as to the first, second, and third causes of action, and otherwise affirmed, without costs. The order, same court and Justice, entered August 22, 2011, which sua sponte vacated an order entered on or about June 30, 2011 reinstating the original complaint in the first action, and dismissed the first action with prejudice, should be modified in accordance with the foregoing, so as to vacate the dismissal of the first action, and otherwise affirmed, without costs.

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

ENTERED: JUNE 26, 2012

DEPUTY CLERK